

THE PRESS AND THE PUBLIC'S FIRST AMENDMENT RIGHT OF
ACCESS TO TERRORISM ON TRIAL: A POSITION PAPER

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I. Introduction

After the Bush Administration's declaration of war on terrorism, following the September 11, 2001 attacks on the World Trade Center and Pentagon, the President issued a military order on November 13, 2001 regarding "Detention, Treatment, and Trial of Certain Non-Citizens." The order called for the creation of military tribunals, which would try non-citizens who allegedly violated the "laws of war" without the same protections afforded defendants in Article III courts and U.S. Military courts-martial. Following the President's military order, newspaper articles and television talk shows were filled with debate and criticism about the propriety of using military tribunals rather than federal courts established under Article III of the Constitution to try non-citizen terrorists.¹ For a while the Bush Administration pressed ahead with its plan. The Department of Defense created draft regulations implementing the military order and unofficially released their contents to the press to measure the public's reaction.² Now, two months later, the regulations themselves have not been issued nor has the Bush Administration commented on whether regulations might be issued. Instead, to date all indictments against suspected terrorists and enemies of war have been brought in Article III courts.

Whether or not non-citizen terrorists are tried in military tribunals, the question of whether such tribunals must be open under the First Amendment right of access is crucial. Put precisely, if tribunals are held, will the public -- and the press -- be able to observe the tribunal proceedings just as they can in Article III courts and courts-martial?

Military tribunals have been used periodically throughout United States history, and the Supreme Court has been asked to consider their constitutionality and jurisdiction on a number of occasions. But no court has considered whether the press and public have a First Amendment right of access to proceedings in military tribunals, as they have for proceedings in Article III courts and U.S. Military courts-martial. That may be because the last military tribunal convened in this country was in 1946, long before the United States Supreme Court recognized the right of access to criminal proceedings. Or, it may be because military tribunals have traditionally been used in the most heated and uneasy times of war when there was little time to consider the First Amendment rights of the press and public. With very little fan-fare and without any delay, military tribunals swiftly dealt with violators of the laws of war.

Whether terrorists are tried in military tribunals or Article III courts, thus far secrecy seems to be an important goal in the Administration's legal strategy. Since the September 11th attacks, judges have closed their courtrooms and sealed evidence during grand jury proceedings, subpoena applications and other pre-indictment proceedings when the Government has raised "national security" concerns.³ Even determining whether a matter has been opened involving

¹ See George Lardner Jr. & Peter Slevin, *Military May Try Terrorism Cases; Bush Cites 'Emergency'*, WASH. POST, Nov. 14, 2001, at A1; Elizabeth Bumiller and David Johnston, *Bush Sets Option of Military Trials in Terrorist Cases*, N.Y. TIMES, Nov. 14, 2001, at A1; Naftali Bendavid, *Bush Oks Terror Tribunals*, CHI. TRIB., Nov. 14, 2001, at 1; Harriet Chiang, *Bush Wants Terrorist Trials In Special Military Courts*, SAN. FRAN. CHRON., Nov. 14, 2001 at A1; Josh Meyer, David G. Savage, and Eric Lichtblau, *Bush to Allow Terror Trials by Military*, L.A. TIMES, Nov. 14, 2001, at A1.

² See Katharine Q. Seelye, *Just Who Would Want to Defend Suspects Before a Tribunal? Probably Plenty*, N.Y. TIMES, Dec. 28, 2001, at B6; Neil A. Lewis, *The Military Tribunals; Rules on Tribunal Require Unanimity on Death Penalty*, CHIC. TRIB., Dec. 28, 2001, at N3; John Hendren, *Lawyers in Tribunals to Face Daunting Task*, L.A. TIMES, Dec. 29, 2001, at A1.

³ See Peter Slevin & Mary Beth Sheridan, *Suspects Entered U.S. on Legal Visas; Men Blended In; Officials Say 49 Have Been Detained on Immigration Violations*, WASH. POST, Sept. 18, 2001, at A6; Dan Malone, *800*

an alleged terrorist has become near impossible for the press and public. Without public announcement, for example, on September 21, 2001, the country's chief immigration judge, Michael J. Creppy, issued a memorandum ordering that hearings designated by the Justice Department be kept secret with court officials forbidden even to confirm that cases exist.⁴

It is axiomatic that discussion of public affairs must be "uninhibited, robust and wide-open."⁵ But that is not enough. Since the founding of the Republic, it has been considered essential that the public be informed as well. The importance of a right of access to information is believed to have been first outlined by James Madison: "a popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."⁶ Later, Professor Meiklejohn concurred: "The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life."⁷ In our modern society, information is power.

Under these circumstances, the presumption today must be of openness. The President has a vital responsibility to the people of the United States, all of whom were affected by the September 11 attacks. There is a deep-seated desire to see justice be done to those who were behind the terrorism. "The courthouse is a 'theatre of justice,' wherein a vital social drama is staged; if its doors are locked, the public can only wonder whether the solemn ritual of communal condemnation has been properly performed."⁸ Chief Justice Burger's 1980 decision in *Richmond Newspapers v. Virginia*, the case definitively establishing the First Amendment right of access to criminal trials, hits precisely upon our current national need to take part in and be informed about the prosecution of terrorism:

When a shocking crime occurs, a community reaction of outrage and public protest often occurs. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness

Detainees Shrouded in Blanket of Secrecy; FBI, INS Aren't Talking; Immigration Courts Ban Families from Hearings, DALLAS MORNING NEWS, Oct. 21, 2001, at 18A; Phillip O-Connor, *Middle Eastern Men Arrested Here Remain In Jail In Inquiries; Critics Say Court Rights Are Being Curtailed*, ST. LOUIS POST-DISPATCH, Oct. 22, 2001, at A1; Cindy Gonzalez, *Midlands FBI Agents Following Up on Attacks; Although Reports Have Tapered Off, There Are Still Leads to Check Out*, OMAHA WORLD-HERALD, Oct. 7, 2001, at 7B; Darrel Giles, *Crowd Applauds as FBI Agents Arrest Witnesses - Act of War: The Hunt*, DAILY TELEGRAPH (SYDNEY), Sept. 27, 2001, at W4.

⁴ William Glaberson, *Closed Immigration Hearings Criticized as Prejudicial*, N.Y. TIMES, Dec. 7, 2001, at B7. This article does not address the right of access to immigration proceedings.

⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁶ Letter From James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON, 103 (Galliard Hunt ed.) (1910). At times, the Bush Administration has become confused over whether to release information, such as tapes of Osama Bin Laden celebrating the September 11th attack, because of a belief that the American people may be unable to handle the information. See Editorial, *The Bin Laden Tapes*, N.Y. TIMES, Dec. 11, 2001, at A26.

⁷ ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 75 (Oxford University Press) (1948).

⁸ LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 958 (Foundation Press, 2d ed.) (1988), quoting JEREMY BENTHAM, THE RATIONALE OF JUDICIAL EVIDENCE 597 *et passim* (J. Stuart Mill ed.) (1827).

that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help"....

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done – or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process satisfy the appearance of justice. And the appearance of justice can best be provided by allowing people to observe it.⁹

Many fear that press access will compromise national security concerns.¹⁰ The qualified right of access recognized by the Supreme Court clearly permits courts to excise sensitive information as long as this is done in a narrowly tailored way to satisfy a compelling governmental interest. Concerns about a media circus surrounding terrorist trials and predictions that members of the al Qaeda terrorist network may be glorified or made into martyrs if they are on public trial must all be addressed on a case-by-case basis; not by blanket closure orders.¹¹

This position paper explores in depth the trial of terrorists and unlawful combatants throughout the history of the United States. Indeed, we begin with the Boston Massacre of 1770 and review how the colonialists dealt with the press and the public's desire to report on and attend that trial. We then look at the use of military tribunals in the Civil War and in World War II from the point of view of the press's right to attend and report on the proceedings. The Civil War was a period when all civil rights were largely suspended and the press' ability to cover the myriad military tribunals was stymied by an insecure and vulnerable Republic. In 1942, President Roosevelt permitted a secret military tribunal to try and convict eight Nazi saboteurs. This paper looks closely at why the Nazis were tried in secret and whether secrecy was needed to arrive at the proper outcome. In 1946, President Truman tried Tomoyuki Yamashita, a Japanese general, for war crimes in a special military tribunal. We look at the role of the press there in delivering the whole account of what the general was charged with and whether he should have been convicted. We also discuss the role of public access at Nuremberg.

⁹ *Richmond Newspapers, Inc. v. Virginia*, 488 U.S. 555, 571-72 (1980).

¹⁰ See Bill Keller, *Trials and Tribulations*, N.Y. TIMES, Dec. 15, 2001, at A31; Benjamin Weiser, *Ex-Prosecutor Wants Tribunals to Retain Liberties*, N.Y. TIMES, Jan. 8, 2002, at A13; Gail Gibson, *Both Sides Soften Stance on Military Tribunals*, THE BALTIMORE SUN, Dec. 5, 2001, at A1.

¹¹ See Elisabeth Bumiller and David Johnston, *Bush Sets Option of Military Trials in Terrorist Cases*, N.Y. TIMES, Nov. 14, 2001, at A1; Vicki Haddock, *Terror Trial: Now You See it, Now You Don't*, SAN. FRAN. CHRON., Jan. 13, 2002, at D3; Harriet Chiang, *Camera-shy Federal Judges Aren't About to Change the Rules*, SAN. FRAN. CHRON., Jan 19, 2002, at A9.

In 1964, the United States Supreme Court first articulated that the First Amendment protects the press and public from governmental censure. The First Amendment right of access to criminal proceedings was then recognized in 1980 in *Richmond Newspapers*. This paper looks at the development of the right of access both in Article III courts and in courts-martial. We review many cases where terrorists and foreign criminals were tried and convicted in open court. We discuss in detail numerous hijacking trials, the Noriega and McVeigh trials, the 1992 World Trade Center bombing cases, and the trial of al Qaeda members in 2001.

Given that the First Amendment right of access applies in cases involving terrorists and unlawful combatants tried in Article III courts and in courts-martial, can the President of the United States use his Article II powers to abrogate that right if he creates a military tribunal or if he conducts trials overseas? We do not think he can.

Finally, since we conclude that the First Amendment right of access must apply to all criminal proceedings no matter the forum, we address the special procedures that a court should apply in cases involving classified or national security information. The government's undoubtedly compelling interest in protecting national security information always must be taken into account. Blanket closure orders need not – indeed must not – be permitted because the Classified Information Procedure Act (“CIPA”) already permits limited closure to protect truly sensitive information.

II. In Times of War Throughout American History, Open Trials Have Had a Salutary Effect On Justice and Closure Has Bred Corruption and Contempt

A. The Boston Massacre of 1770

Chief Justice Burger, writing for the majority in *Press Enterprise I*, cited the Boston Massacre of 1770 as an excellent example of how the American colonialists inherited a strong tradition of open criminal proceedings, including jury selection. The Court noted:

The presumptive openness of the jury selection process in England, not surprisingly, carried over into proceedings in colonial America. For example, several accounts noted the need for talesmen at the trials of Thomas Preston and William Wemms, two of the British soldiers who were charged with murder after the so-called Boston Massacre in 1770.¹²

The Boston Massacre is particularly instructive since it occurred at an extremely uneasy time for the colonialists and, in effect, involved the attack by enemy soldiers on townspeople.

By March of 1770, the city of Boston was in political turmoil. While war had not yet been declared, the city had been effectively “occupied” since 1768 by British soldiers who were quartered among the civilian populace.¹³ As might have been expected, conflicts almost

¹² *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 508 (1984) (finding that the First Amendment right of access applies to jury selection).

¹³ BOSTON GAZETTE AND COUNTRY JOURNAL, Mar. 12, 1770.

inevitably arose between the soldiers and their Colonial “hosts.”¹⁴ On February 22, a loyalist was harassed by a crowd outside his home; when he fired a gun at the crowd, he inadvertently killed Christopher Seider, an eleven-year-old boy.¹⁵ The Seider boy’s funeral became a major propaganda tool for the colonists, and a subsequent fist-fight between a group of soldiers and employees of “John Gray’s Ropewalk” on March 2 only exacerbated the tensions.¹⁶

The riot of March 5, 1770, to which Samuel Adams first affixed the title “the Boston Massacre,” was the climactic episode in that season of “partisanship, violence, and general testing of the legal process” in the colonial era.

In the evening of March 5, the sentry standing in front of the Custom House on King Street in Boston got into a dispute with a group of townspeople. He called for help, and six British soldiers, a corporal, and Captain Thomas Preston marched down to the Custom House from the Main Guard. The tumult continued; the soldiers fired, their bullets striking a number of persons, three of who died instantly, one shortly thereafter and a fifth in a few days.¹⁷

Around two in the morning of March 6, a warrant was issued for the soldiers’ arrest, and they were taken into custody. Later that day, thousands of Bostonians appeared at Faneuil Hall demanding that the British troops be expelled from Boston.¹⁸ Captain Preston immediately surrendered himself to the sheriff.

As a result of the impassioned feelings in Boston, the cause of the soldiers firing ended up very much in dispute. On March 12, 1770, Captain Preston testified in his deposition that the soldiers were just innocent victims of the Bostonians’ conspiracy and criminal intent to steal the king’s money:

In a few minutes after I reached the guard, about 100 people passed it and went towards the custom house where the king's money is lodged. They immediately surrounded the sentry posted there, and with clubs and other weapons threatened to execute their vengeance on him. I was soon informed by a townsman their intention was to carry off the soldier from his post and probably murder him. On which I desired him to return for further intelligence, and he soon came back and assured me he heard the mob declare they would murder him. This I feared might be a prelude to their plundering the king's chest. . . . [A] general attack was made on the men by a great number of heavy clubs and snowballs being thrown at them, by which all our lives were in

¹⁴ JOHN ADAMS, THE LEGAL PAPERS OF JOHN ADAMS 1 (Kinvn L. Wroth & Hiller B. Zobel, eds.) (1965). (“British troops had been garrisoned in Boston since 1768; thereafter friction between inhabitants and soldiers had increased steadily; this friction generated heat and even occasional sparks of violence.”)

¹⁵ This is referred to as “the so-called martyrdom of the little Seider boy.” *Id.* at 3. Later in the year, Richardson, the loyalist who fired the shot that killed Seider, was convicted of murder. After a second trial, he was pardoned by the King.

¹⁶ What passed at Mr. Gray’s rope-walk has already been given the public and may be said to have led the way to the late catastrophe.” BOSTON GAZETTE AND COUNTRY JOURNAL, Mar. 12, 1770.

¹⁷ See ADAMS, *supra* note 14, at 1.

¹⁸ HILLER B. ZOBEL, THE BOSTON MASSACRE 206 (Norton & Co.) (1970).

imminent danger, some persons at the same time from behind calling out, damn your bloods-why don't you fire. Instantly three or four of the soldiers fired, one after another, and directly after three more in the same confusion and hurry. . . . On my asking the soldiers why they fired without orders, they said they heard the word fire and supposed it came from me. This might be the case as many of the mob called out fire, fire, but I assured the men that I gave no such order; that my words were, don't fire, stop your firing. In short, it was scarcely possible for the soldiers to know who said fire, or don't fire, or stop your firing.¹⁹

On the same day Preston gave his deposition testimony, the decidedly partisan weekly, the *Boston Gazette and Country Journal* (“*Boston Gazette*”), reported quite a different story from the one Preston had given in his deposition. The *Boston Gazette* reported that on the night of March 5, the soldiers “were seen parading the streets with their drawn cutlasses and bayonets, abusing and wounding numbers of the inhabitants.” A few minutes after nine o’clock “four youths . . . were passing the narrow alley . . . in which was a soldier brandishing a broad sword of an uncommon size against the walls, out of which he struck fire plentifully.” The reports went on: “The noise brought people together; . . . and more lads gathering, drove [the soldiers] back to the barrack where the boys stood some time as it were to keep them in.” A short time later:

Thirty or forty persons, mostly lads, being by this means gathered in King Street, Capt. Preston with a party of men with charged bayonets, crying make way! They took place by the custom house and, continuing to push to drive the people off pricked some in several places, on which they were clamorous and, it is said, threw snow balls. On this, the Captain commanded them to fire; and more snowballs coming, he again said damn you, fire, be the consequence what it will! One soldier then fired . . . the soldiers continued the fire successively till seven or eight or, as some say, eleven guns were discharged.²⁰

Since the soldiers had fired without a prior reading of the “Riot Act,” they were thus subject to civil charges of murder or manslaughter.²¹ They were indicted on March 13, 1770, but the trials were delayed for several months because of the perception that the soldiers would not be able to get a fair trial:²² “the popular feeling was one not of self-criticism, but of

¹⁹ See Deposition of Captain Thomas Preston, Mar. 12, 1770.

²⁰ BOSTON GAZETTE AND COUNTRY JOURNAL, Mar. 12, 1770.

²¹ PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 140 (HarperCollins) (1998).

²² *BOSTON GAZETTE* suggested that limiting the freedom of the press might have led to the events that precipitated the Massacre: “[t]he Boston Journal of Occurrences, as printed in Mr. Holt’s *New York Gazette*, from time to time, afforded many striking instances of the distresses brought upon the inhabitants by [the quartering of the British soldiers]; and since those Journals have been discontinued, our troubles from that quarter have been growing upon us.” BOSTON GAZETTE AND COUNTRY JOURNAL, Mar. 12, 1770. (emphasis added). Apparently the colonists had come to rely upon the existence of a (relatively) free press and viewed it as a safeguard of their other liberties.

bloodthirstiness and revenge.”²³ Preston and his men could not hope for a fair trial until the town’s passions had cooled.²⁴

The press played an important role before the trial began in airing all sides of the controversy. The journalist Samuel Adams used his political clout in an effort to compel the soldiers to trial more quickly than the authorities wished.²⁵ Captain Preston himself also utilized the media to his own advantage when he had a “card” [advertisement] published in the *Boston Gazette* expressing his “Thanks . . . to the Inhabitants in general of the town – who throwing aside all Party and Prejudice, have with the utmost Humanity and Freedom swept forth advocates for truth, in defense of my injured Innocence.”²⁶

Preston apparently thought that his own publicity campaign was effective, since by September, he felt that the temperature of the town had cooled enough for him to petition the court to expedite his trial: “the alteration in men’s minds towards him is extremely visible, a degree of coolness has succeeded to the late warmth, and there are many reasons to hope an impartiality on trial of which lately there was not a ray of expectation.”²⁷

While a guilty verdict was still considered the most desirable from the colonists’ point of view, they nonetheless wanted to be able to show the world that the soldiers had received a fair trial. “Supremely confident that neither public opinion nor local jurors would return any verdict but condemnation, they were expansively willing to let the military have the best lawyers available; that way, no one could later taint the proceedings with unfairness.”²⁸ They obtained good quality counsel for the defense, including (future president) John Adams, who stated:

“[T]his would be as important a Cause as ever was tryed in any Court or Country of the World; and that every Lawyer must hold himself responsible not only to his Country, but to the highest and most infallible of all Trybunals for the Part he should Act.”²⁹

Some restraints on the press, which were the result of following the British system during the colonial period, were imposed during the trial. The *Boston Gazette’s* publication of Preston’s deposition testimony just after his arrest had led to the fear that a mob planned to lynch the soldiers.³⁰ Thus, when printers made a motion at the town meeting that they be permitted to sell a printed narrative “of the horrid massacre,” it was voted down “lest it might

²³ See ADAMS, *supra* note 14, at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See ZOBEL, *supra* note 18, at 221. In Preston’s letter to London, however, the defenders of his “injured innocence” became “Malcontents industriously using every Method to fish out Evidence to prove [the March 5 shooting] was a concerted Scheme to murder the Inhabitants.” *Id.* at 235.

²⁷ See ADAMS, *supra* note 14, at 14.

²⁸ See ZOBEL, *supra* note 18, at 221.

²⁹ See ADAMS, *supra* note 14, at 6.

³⁰ See ADAMS, *supra* note 14, at 12.

unduly prejudice those whose Lot it might be, to be Jurors to try these Causes: This restraint they continued at their Meeting in May, and *untill the Trials should be over.* – A Caution, which all good Men will applaud.”³¹

Nonetheless, despite – or perhaps due to the political sensitivities of the proceedings -- the trials of Preston and his men themselves were open to the public:³²

There is something pleasing and solemn when one enters into a court of law – Pleasing, as there we expect to see the scale held with an equal hand – to find matters deliberately and calmly weigh’d and decided, and justice administered without any respect to persons or parties, and from no other motive but a sacred regard to truth. . .³³

Despite the tenor of the times, and much to the surprise of Samuel Adams and his cronies, Captain Preston and most of the soldiers were acquitted. Two of the soldiers were found guilty, but they pleaded “benefit of clergy” and were branded on their thumbs instead of executed.³⁴ Samuel Adams seemed to believe the men were all guilty, but he was nevertheless satisfied having watched the trial that the judicial process had taken place fairly:

The trial of Capt. Preston and the Soldiers who were indicted for the murder of Messrs. Gray, Maverick, Caldwell, Carr and Attucks, on the fatal fifth of March last, occasions much speculation in this Town: And whatever may be the sentiments of men of the coolest minds abroad, concerning the issue of this trial, we are not to doubt, but the Court, the Jury, the Witnesses, and the Council on both sides have conscientiously acquitted themselves.³⁵

The press may have lost its first access motion when it was not permitted to print articles during the trial of Captain Preston and his men. But the legacy of the case is that the pretrial publicity and the public’s attendance at the trial were instrumental in obtaining a fair result for the British soldiers.

³¹ Article Signed “Vindex” (Boston Gazette, Dec. 31, 1770), THE WRITINGS OF SAMUEL ADAMS 110 (1904-08).

³² See ZOBEL, *supra* note 18, at 248.

³³ Article Signed “Vindex” (Boston Gazette, Dec. 17, 1770), THE WRITINGS OF SAMUEL ADAMS 110 (1904-08).

³⁴ See ADAMS, *supra* note 14, at 24-25.

³⁵ Article Signed “Vindex” (Boston Gazette, Dec. 10, 1770), THE WRITINGS OF SAMUEL ADAMS 110 (1904-08) (emphasis added). Since Adams clearly disagreed with the court’s holding, this statement may be somewhat ironic.

B. Civil War Military Tribunals

During the Civil War, military tribunals, as opposed to civilian courts, were used by the federal government to try confederate spies and soldiers.³⁶ More troubling, as part of a broader campaign by the Lincoln administration to quash public dissent in the North, military tribunals were also used to swiftly try and punish civilians who criticized the federal government or the war.

Judged by today's legal standards, the government's wide-scale suppression of speech and civil liberties during the Civil War constituted extreme violations of the First Amendment and other constitutional rights. At the outbreak of war, when the Union army's embarrassing defeat at Bull Run prompted calls by several northern papers to "let the South go," the government's response was to promptly shut them down for "sedition."³⁷ In August 1861, Postmaster General Montgomery Blair ordered the postmaster in New York to exclude from the mails five New York newspapers deemed not sufficiently supportive of the Northern war effort - - effectively putting them out of business.³⁸ Government agents also arrested

³⁶ See *Ex Parte Quirin*, 317 U.S. 1, 31 (1942) (listing representative cases), WILLIAM WINTHROP, *MILITARY LAWS AND PRECEDENTS* 1310-11 (2d ed. 1896). Perhaps the most intriguing case of a rebel spy tried by military commission is that of Captain John Beall. A one-time law student who came from a prominent Virginia family and was reportedly the heir apparent to a British nobleman, Beall was commissioned as an acting master in the confederate navy and traveled to Canada to organize clandestine operations against the Union. In September 1864, Beall led a small group of men who seized and scuttled two passenger steamers on Lake Erie - apparently as part of an unsuccessful attempt to free confederate prisoners of war interned nearby. He was subsequently captured after making three unsuccessful attempts to derail passenger trains near Buffalo, New York and, while incarcerated at Police Headquarters in New York City, reportedly attempted to bribe a turnkey with \$3,000 in gold - again unsuccessfully. Charged with being a spy, pirate, and "guerrillero," Beall was tried and convicted by a six member commission of Union military officers - apparently in closed proceedings - and sentenced to "be hanged by the neck till he is dead."

Several unsuccessful pleas for commutation of his death sentence were subsequently made to President Lincoln by prominent northerners - including a petition signed by 85 members of the House of Representatives and six senators, as well as personal appeals by the Governor of Massachusetts, the Librarian of Congress and the President of the Baltimore and Ohio Railroad. After Beall's execution, a "weird and lurid story" began appearing in numerous newspapers that, among other supplicants, John Wilkes Booth had supposedly had a midnight interview with Lincoln, that Lincoln, moved to tears, promised to pardon Beall and that, when Lincoln broke his promise, Booth hatched his plot to assassinate Lincoln in revenge.

This story was branded by one contemporary writer as "utter fabrication," "generated in the brain of Mark M. Pomeroy, the notorious editor of 'Pomeroy's Democrat,' a sensational weekly published shortly after the war." Booth's diary entry supposedly written after the assassination states "I knew no private wrong. I struck for my country and that alone." There the Committee leaves the story of John Beall. See ISSAC MARKENS, *PRESIDENT LINCOLN AND THE CASE OF THE JOHN Y. BEALL* (1911), *MILITARY COMMISSION, TRIAL OF JOHN Y. BEALL, AS A SPY AND GUERRILLA* (Appleton and Co.) (1865).

³⁷ Among others, the *Missouri State Journal*, the *St. Louis Ear Bulletin* and *The Missourian* were closed down in July and August 1861. On August 18, a company of federal troops took possession of the *Savannah (Missouri) Northwest Democrat* and, on August 22, U.S. Marshals seized the type and paper the *Philadelphia Christian Observer*. See BRAYTON HARRIS, *BLUE & GRAY IN BLACK & WHITE: NEWSPAPERS IN THE CIVIL WAR* 97 (Brassey's) (1999).

³⁸ See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 46-47 (Knopf) (1998). In an effort to circumvent the ban, *New York News* owner Benjamin Wood (who was also the brother of New York's Mayor) began delivering his paper west and south by private delivery. The response by U.S. Marshals was to seize all copies of the *News* and even to arrest a Connecticut newsboy found hawking the paper. *Id.*

newspaper editors deemed disloyal to the administration, and the State Department kept a dossier entitled “Arrests for Disloyalty.”³⁹ This policy of seizing and banning papers and arresting news editors was to continue throughout the war.⁴⁰

Even Reverend J.R. Stewart was arrested in the pulpit of his church in occupied Alexandria, Virginia for omitting a prayer for the President of the United States.⁴¹ And, on a less humorous note, when civilian William B. Mumford, in occupied New Orleans, tore down an American flag from the Customs House, he was ordered tried for treason by Major General Benjamin Butler and hanged from a temporary gallows erected at the scene of his “crime.”⁴²

All told, approximately 13,000 civilians were arrested by federal authorities during the Civil War.⁴³ Lincoln also suspended the writ of habeas corpus, thereby denying prisoners judicial review of the legality of their incarceration.⁴⁴ And, with no judicial recourse, some northern civilians were tried and convicted by secret military tribunals for having engaged in “disloyal” speech.

Perhaps the most notorious example of the misuse of military tribunals during the Civil War was the case of Charles Vallandigham. In September 1862, Lincoln issued a presidential proclamation that persons “discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels” would be “subject to martial law and liable to trial by courts-martial or military commissions”.⁴⁵ This was followed, in April 1863, with the issuance by General Ambrose Burnside (commander of the military district of the Ohio) of General Order No. 38, which stated that : “the habit of declaring sympathies with the enemy will no longer be tolerated in this department. Persons committing such

³⁹ *Id.* For example, in September 1861, the Maryland publisher of *Hagerstown Mail* was arrested for publishing a “disloyal sheet” and released only after agreeing to take an oath of allegiance and stipulating not to correspond with any of the rebel states. ROBERT N. SCOTT, *THE WAR OF REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES SERIES II*, 248 (National Historical Society) (1971-2).

⁴⁰ For a full discussion of the federal government’s censorship of the press during the Civil War, see HARRIS, *supra* note 38.

⁴¹ See REHNQUIST, *supra* note 38, at 47-48.

⁴² *New Orleans Delta*, June 8, 1862.

⁴³ See REHNQUIST, *supra* note 38, at 49. Secretary of State Seward is reported to have bragged to Lord Lyons, the British Minister:

“My Lord, I can touch a bell on my right hand and order the imprisonment of a citizen of Ohio. I can touch a bell again and order the imprisonment of a citizen of New York; and no power on earth, except that of the president, can release them. Can the Queen of England do so much?”

⁴⁴ Article I, Section 9 of the Constitution (which lists limitations on the powers of Congress) states that “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” United States Constitution, Art. I, Sec. 9, cl. 2. Given the placement of this clause in Article I (which governs Congress), the Supreme Court – both during and after the Civil War – has held that only Congress, not the President, has the authority to suspend habeas corpus (and, then, only in the two narrow circumstances mentioned.) See *Ex Parte Merryman*, 17 Fed. Cas. 144, 148 (1861); *Ex Parte Quirin*, 371 U.S. 1, 24-25 (1942). See also JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* 342 (Carolina Academic Press) (1995).

⁴⁵ See REHNQUIST, *supra* note 38, at 60.

offenses will be at once arrested with a view to being tried as above stated or sent beyond our lines and into the lines of their friends".⁴⁶

The object of Burnside's wrath, Vallandigham, was an Ohio lawyer and anti-abolitionist who had served as a Democratic member and speaker of the state legislature, was a U.S. congressman for four years until defeated in 1862 and who had gubernatorial aspirations. Bitterly opposed to the war, in April 1863, Vallandigham gave two speeches at Democratic rallies in Ohio where he criticized Burnside's Order No. 38, denied the government's legal right to try civilians before military commissions and told listeners to exercise their right to vote and hurl "King Lincoln" from his throne. Four days later, at 2:00 a.m., Burnside's aid-de-camp and a company of sixty-seven soldiers arrested Vallandigham at his home in Dayton and placed him on a train to Cincinnati, where he was incarcerated at a military prison (but later transferred to a first-class hotel). The charge, ironically, was that Vallandigham -- a civilian -- had himself violated Burnside's Order No. 38 by "publicly expressing . . . sympathies for those in arms against the Government of the United States" and "declaring disloyal sentiments and opinions."⁴⁷ There was no charge that Vallandigham had broken any laws.

The following morning, only hours after his middle-of-the-night arrest, Vallandigham was summarily tried by a military commission comprised of General Burnside's subordinates, despite his protest that a military commission had no authority to try civilians. The military commission found Vallandigham guilty and sentenced him to imprisonment for the duration of the war. President Lincoln subsequently changed the sentence to banishment "beyond the Union lines," and Vallandigham was delivered to the confederates in Tennessee. His effort to secure Supreme Court review failed, the Court holding that it had no jurisdiction to review the decision of a military commission.⁴⁸

It was not until the end of the Civil War that the Supreme Court and the general public began to question the civil rights abuses arising from the widespread use of military tribunals. In the 1866 Ex Parte Milligan decision, the Court held that, even in times of war, the Constitution prohibits military courts from trying U.S. civilians in areas where the civil courts are open and functioning. In cataloging a litany of constitutional rights that were violated by subjecting civilians to martial law, including denial of the Sixth Amendment right "to a speedy and public trial by an impartial jury," the Milligan court found that:

Martial law destroys every guarantee of the Constitution . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.⁴⁹

⁴⁶ ROBERT N. SCOTT, *THE WAR OF REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES SERIES I 23* (National Historical Society) (1971-2).

⁴⁷ There was also a further specification that Vallandigham had declared in his speeches that "the present war is a wicked, cruel and unnecessary war, one not waged for the preservation of the Union, but for the purpose of crushing our liberty and to erect a despotism." *Id.*

⁴⁸ See Ex Parte Vallandigham, 68 U.S. 243, 251-2 (1863). Shortly after being delivered to the South, Vallandigham promptly escaped by sea, ran the Union blockade and wound up in Windsor, Ontario (across from Detroit). In July 1863, the Ohio Peace Democrats nominated Vallandigham as their candidate for Governor (while he was still in Canada), but he was defeated. He eventually returned to Ohio in 1864, was ignored by the federal government and died in 1871.

⁴⁹ Ex Parte Milligan, 71 U.S. at 2, 124 (1866).

A fitting end to the civil rights abuses of the Civil War came about with the trial of John Booth's accomplices for conspiracy in the assassination of President Lincoln. Military tribunals, closed to the public and press, were established to try the alleged conspirators. Not unlike today, the public's desire to observe proceedings of such enormous consequence to the nation prompted reporters to complain to General Ulysses S. Grant about lack of access. Grant met with President Andrew Johnson, and the military tribunals were opened to the public and the press the following day.⁵⁰

Examining the "extent to which the government sought to suppress public criticism" during the Civil War, Chief Justice Rehnquist has observed that "the government used a heavy-handed, blunderbuss approach" replete with "gross violations of the First Amendment."⁵¹ These excesses, including use of secret military tribunals to punish dissent, are an unfortunate part of our history and, we believe, a sharp reminder of the danger posed by conducting military proceedings in secret.

C. World War II - 1942 Nazi Saboteurs case: Secret and Corrupt

After the September 11, 2001 attacks, the Bush Administration did not point to the Boston Massacre or even the Civil War military tribunals when it was seeking to justify its decision to set up military tribunals to possibly prosecute non-citizen terrorists. Instead, the Administration pointed to President Franklin D. Roosevelt's similar decision in 1942 to try eight German saboteurs before a secret military commission. In the span of less than two months – June to August, 1942 -- the eight men were all caught, tried by a heavily guarded, secret military tribunal inside the Justice Department and convicted. Six were executed, one was sentenced to life at hard labor and one was given 30 years at hard labor. While the Supreme Court upheld President Roosevelt's power to try the men before a secret military tribunal, the facts underlying the case reveal that the secrecy of the proceedings permitted a travesty of justice to go undetected by the press and public.⁵²

Early in the morning on June 13, 1942, four Germans landed on the beach in Amagansett, Long Island from a U-Boat carrying explosives, pre-made bombs, incendiary devices, several maps, and thousands of dollars in cash. The men, who had been trained at a sabotage school outside Berlin, had orders to initiate a two-year sabotage plan to destroy "key railroad installations, aluminum factories, power plants, bridges and canal locks, plus targets of opportunity, such as Jewish-owned department stores, that could create public panic."⁵³

⁵⁰ See James H. Johnston, *Swift and Terrible*, WASH. POST, Dec. 9. 2001, at F1. To this day, thanks in part to press access and reporting on the trial, controversy exists about the conviction of Dr. Samuel Mudd, the Maryland physician who set Booth's broken leg and gave him food and lodging the night Booth shot the President and sought to escape south. Did Mudd learn that Booth had just assassinated the President and helped in his escape, or was he simply an innocent physician fulfilling his Hippocratic oath to aid a patient? The tribunal thought the former and sentenced Mudd to life imprisonment at hard labor. After serving four years in prison with Dry Tortugas, he was pardoned by President Andrew Johnson for his valiant efforts to halt a yellow fever epidemic. Mudd and his descendents to this day have sought to vindicate the good doctor's name – still immortalized in the expression "his name is Mudd."

⁵¹ See REHNQUIST, *supra* note 38, at 221.

⁵² For a discussion of the Supreme Court's decision in *Ex Parte Quirin*, 317 U.S. 1 (1942), see *infra* notes 244-46.

⁵³ George Lardner Jr., *Saboteurs Captured! FDR Orders Secret Tribunal; 1942 Precedent Invoked by Bush Against Al Qaeda*, WASH. POST, Jan. 13, 2002, at W12.

The Germans left the beach in Amagansett, ran to the train station and boarded a train to Jamaica, Queens. They took pains to blend in, purchasing their clothing in several steps, making them progressively nicer clothing, as not to appear to make too drastic a “transformation from rags to riches.”⁵⁴ The men then paired off and took the subway into Manhattan.

On June 17th, a second team of four Germans landed on the beach in Ponte Vedra Beach, Florida, south of Jacksonville. Both groups were scheduled to meet in Cincinnati on July 4th, to begin their mission.

By June 20th all four members of the Long Island group were arrested by the FBI. Two members of the Florida group were arrested in New York City on June 23rd, and the remaining two were arrested in Chicago on the 27th.⁵⁵

The men all confessed immediately and on the evening of June 27th. J. Edgar Hoover, the head of the FBI, announced the arrests of the eight men.⁵⁶ He praised the work of his men in the FBI and the country was relieved. *The New York Times* reported:

The rapid and effective action of the G-men in seizing the Germans almost as they landed on the sandy beaches gave a feeling of comfort and security. Men and women felt satisfaction and confidence that the government was infinitely better prepared to cope with spies and saboteurs than during the last war.⁵⁷

Since they were apprehended prior to committing their planned crimes, if the men had been indicted in the courts they could be charged only with attempted sabotage which carried a maximum-sentence of 30 years. Lawyers at the War Department were skeptical that even those charges would stick, claiming that if the men were tried in civilian court, they could be convicted of “only a two-year offense” most likely “conspiracy to commit a federal crime.”⁵⁸ “Correspondence between Roosevelt Administration officials makes it clear that they avoided civilian courts partly because of concern that the “defendants would not receive the death penalty.”⁵⁹ Trial by court-martial would have allowed for the death penalty, but strict rules of

⁵⁴ See Andy Newman, *Terrorists Among Us (1942): Detecting the Enemy Wasn't Easy Then, Either*, N.Y. TIMES, Jan. 17, 2002, at B1.

⁵⁵ See *FBI Website*. (visited Feb. 5, 2002) <<http://www.fbi.gov/fbinbrief/historic/famcases/nazi/nazi.htm>>.

⁵⁶ By announcing the arrests, Hoover compromised his later claims of threats to national security. A declassified communique from Major Gen. George V. Strong to Secretary of War Henry Stimson stated “The premature breaking of the story had wrecked our plans for seizing two additional groups of four men each who are apparently scheduled to land on our shores in August. . . In consequence, the only benefit to national defense that can be obtained is the deterrent effect upon possible sabotage by the prompt trial and execution of the eight men now in the hands of the FBI.” See Seth Kantor, *How Hoover Sold Out an Authentic American Hero*, THE ATLANTA JOURNAL AND CONSTITUTION, July 4, 1980, at 1-A.

⁵⁷ Lewis Wood, *Nazi Saboteurs Face Stern Army Justice*, N.Y. TIMES, July 5, 1942, at E6.

⁵⁸ George Lardner Jr., *Saboteurs Captured! FDR Orders Secret Tribunal; 1942 Precedent Invoked by Bush Against Al Qaeda*, WASH. POST, Jan. 13, 2002, at W12.

⁵⁹ Wayne Washington, *Fighting Terror Legal Considerations; FDR Move Cited in Tribunals*, BOSTON GLOBE, Dec. 2, 2001, at A1.

evidence, coupled with the need for a unanimous verdict led the administration to opt for an alternative.

President Roosevelt issued a Military Order, on July 2nd, 1942, calling for the establishment of a military commission to try all eight Germans “for offenses against the Law of War and the Articles of War.”⁶⁰ The following day, Attorney General Francis Biddle and Major Gen. Myron C. Cramer released the charges – Violation of the Law of War, Violation of the 81st Article of War, Violation of the 82nd Article of War; and Conspiracy to Commit All of the Above Acts.

A military order would allow for the result of a court-martial, without the high standards of evidence. Under the commission, hearsay could be admitted and the “standard of guilt was what a “reasonable man” would determine.” “The whole thing was kind of a legal farce because you knew what was going to happen from the beginning,” said Lauson H. Stone, one of the defense attorneys.⁶¹

It would also help the United States with its war initiative. A military commission had not been used since the inquiry into President Lincoln’s assassination in 1865. As Yale Professor Boris Bittker, who was a junior member of the prosecution team, stated, “According to gossip in the corridors of the Justice Department, the White House hoped that the drama of a military trial would help to convince the public that we were really at war, and to end the civilian complacency that prevailed even in 1942, six months after the debacle at Pearl Harbor.”⁶² Lloyd Cutler, also a junior attorney on the prosecution team concurred: “When these eight people were dumped in our laps, we wanted it to be a big victory.”

It was decided that the trial should be held in secret, adding to the drama and intrigue. The order called for the trial to convene “in Washington, DC. On July 8, 1942, or as soon there after.” Prior to the start of the trial officials would not confirm even the exact location, nor the start date of the trial. As the *Times* reported on July 7th, “Preparations, apparent to any visitor, gave almost positive proof today that the trial of the eight Nazi saboteurs before the military commission, would be held in the Department of Justice Building... Nobody at the department would discuss the matter. There was a hush hush atmosphere everywhere.”

Prior to the start of the trial there was speculation about one of the saboteurs, George John Dasch: “FBI officials refused to comment upon a report that George John Dasch, leader of one group of the saboteurs had cooperated with government authorities and thus might escape the death penalty.”⁶³

On the day after the trial began the *New York Times* headline read *Spy Trial Starts in Grim Secrecy; 8 Saboteurs Hidden from Public*. The “extraordinary secrecy” provided “no inkling of what occurred was revealed to the public... [and] never a visual proof that the captives were even in the building.”⁶⁴ Although reporters were able to identify several of the

⁶⁰ *Text of Presidential Orders*, N.Y. TIMES, July 3, 1942, at A3.

⁶¹ See Seth Kantor, *Secret Trial of ‘German 8,’* THE ATLANTA JOURNAL AND CONSTITUTION, July 5, 1980, at 1-A.

⁶² Boris I. Bittker, *The World War II German Saboteurs’ Case And Writs Of Certiorari Before Judgment By The Court Of Appeals: A Tale Of Nunc Pro Tunc Jurisdiction*, 14 CONST. COMMENTARY 431 (1997).

⁶³ *Trial of 8 Nazis Rushed in Capital*, N.Y. TIMES, July 7, 1942 at A7.

⁶⁴ Lewis Wood, *Spy Trial Starts in Grim Secrecy; 8 Saboteurs Hidden From Public*, N.Y. TIMES, July 9, 1942, at A1.

witnesses including Hoover, four coast guardsmen, and Mrs. Gerda Meling, “a 24 year old former fiance of one of the saboteurs, with everyone in the court room sworn to utter silence, attempts to gain information about the inquiry were futile. The only scrap of ‘news’ leaking out was that Mr. Hoover sat beside Mr. Biddle.”⁶⁵ On that same day, July 9, the *New York Times* reported that the Senate Judiciary Committee gave unanimous approval to authorize President Roosevelt to award Hoover an “appropriate medal” for the round-up of the Nazis.⁶⁶

The following day two communiqués were issued from the trial, which, according to the *Times*, officially revealed for the first time even that the trial was actually proceeding. According to the *Times*, the “stiffly written account” of the previous day’s proceedings “by General McCoy were of the most formal military character and revealed virtually nothing beyond the fact that seven witnesses had testified and were cross-examined.”⁶⁷

Elmer Davis, head of the Office for War Information, repeatedly expressed his dissatisfaction with the amount of information coming from the trial. “Discussing the trial at his press conference, Mr. Davis said he based his argument for some publicity on the theory that the public would feel better if the trial were reported by outside observers. The public, he thought, had a right to know what went on, if this did not injure national security.”⁶⁸ He proposed the creation of a three-person press pool to hear the testimony, and the dissemination of censored transcripts, but was overruled.

Representative Mike Monroney, an Oklahoma Democrat criticized the “stiff and inadequate Army communiqués that suppress all news under the guise of withholding military information strain our credulity...Every one...realizes that phases of the trial must be secret’ but he complained against suppression rather than common sense censorship.”⁶⁹

The following day the courtroom was opened briefly to the press for a photo-op. Proceedings were suspended and sixteen newspaper representatives were admitted to the room. The 15 men and 1 woman were not permitted to ask any questions to anyone but General Cox, but notes could be written and anything they could “record with your eyes you may write about.” Consequently press accounts were limited to the appearance of the defendants, the seating arrangement, the fluorescent lighting, and the piles of evidence.⁷⁰ The next day, the *Times* ran the account along with photos of the room, the prisoners, and photos of incendiary devices made to look like pens.

The brief fifteen-minute tour was the only time the press was allowed into the meeting room. The following day, it was announced that transcripts of the trial would not be released during the trial. The trial continued, with only terse communiqués issued. They provided only slightly more information. For example, The *Times* reported on July 17 that “photographs of explosives, abrasives, clothing and other accessories found on the Florida

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Lewis Wood, *7 Witnesses Heard in Nazi Spy Case; Communique Vague*, N.Y. TIMES, July 10, 1942, at A1.

⁶⁸ *Gen. McCoy Predicts a Long Spy Trial*, N.Y. TIMES, July 11, 1942, at 15.

⁶⁹ *Id.*

⁷⁰ Lewis Wood, *Spy Court Session Viewed by Press*, N.Y. TIMES, July 12, 1942, at A1.

beach were presented this afternoon.” The brief statements led to a great deal of speculation. It was assumed, for example, in the *Times* that a lengthy document was a confession (which took 3 days to read into the record) “Part of the prosecution testimony was a long statement made to the Federal Bureau of Investigation by one of the accused. This is believed to be a statement made by Dasch.”⁷¹

Although the court released virtually no substantive information about the military proceeding, the FBI released a considerable amount of information about the investigation indirectly by announcing the arrest of the “immediate contacts” of the saboteurs. Detailed biographies of each of the 8 male and 6 female “aides” were released, along with their photos and addresses and connection to the saboteurs.

In the middle of the trial, a recess was called so that the saboteurs could ask the United States Supreme Court to release them because the military tribunal had been unconstitutionally created by President Roosevelt. An eight hour hearing was held before the Court on July 29 and 30 in which the parties debated the Court’s jurisdiction to hear a case from a military tribunal and President Roosevelt’s executive power in creating them. The next day the Court issued a brief unsigned opinion upholding the constitutionality of the tribunals and its own jurisdiction with an opinion to follow.⁷²

On August 8th the newspapers reported that six of the men were executed in the electric chair. Ernst Peter Burger was sentenced to life and George Dasch was sentenced to 30 years in jail. The two men were sent to a Federal Penitentiary in Atlanta.

The case of the Nazi saboteurs always had a shroud of suspicion around it. After the war, when Harry Truman was President, his Attorney General, Tom Clark, decided that “the time had come to open the files of the secret trial of the eight German saboteurs.”⁷³ It turned out that George Dasch and Ernst Burger “were haters of the Hitler regime, who left Germany with the real saboteurs with the determination to expose the plot immediately on arrival.”⁷⁴ They “phoned the FBI headquarters in New York immediately on their secret arrival, went to Hoover’s Washington office at once, and poured out the full story of the plot and told of how and why they had led the real saboteurs into the trap.”⁷⁵

One of Hoover’s men later wrote: “Ironically, [Dasch] was most probably an authentic American war hero, responsible for saving many lives. But fate had made him a threat to the FBI’s public image.”⁷⁶ As Lloyd Cutler, former White House Counsel and a junior member of the Nazi prosecution team, explained, Hoover “had announced to the world that his men had captured these little fellows, as if the FBI had been on the beach when they arrived in their little rubber boats.... Actually, they called from the Mayflower [Hotel], and it took the

⁷¹ New York Times, July 20 1942.

⁷² The formal decision was not issued until October 1942, about three months after the six men had already been executed.

⁷³ WILLIAM W. TURNER, *HOOVER’S FBI: THE MEN AND THE MYTH* 109 (Shelbourne Press) (1970).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

FBI four hours to get over there.”⁷⁷ Hoover “grabbed all the glory,” Cutler told *The Atlanta Journal Constitution* in 1980. “I think the major reason the trial was kept secret,” said Cutler, “was the fact that it wasn’t the FBI that had done the real work in capturing the Nazis who did it.”⁷⁸

Dasch and Burger would probably not have been convicted if the trial had been open. Dasch’s confession, which took three days to read into the record, detailed his plot to undermine the Nazis. Hoover’s refusal to make public how the enemy was captured, especially where Dasch was concerned, “contributed toward a prison riot inside the Atlanta penitentiary more than two years after the secret trial.”⁷⁹ The prisoners complained that it was “unbearable to be housed with Nazis” and almost threw Dasch off the roof. Dasch was then transferred into solitary confinement at Leavenworth, Kansas, forbidden to have even a pencil.⁸⁰ In April 1948, both Dasch and Burger were deported and granted executive clemency. Dasch, forced to return to Germany, was branded both a Nazi criminal and a traitor to the fatherland in the magazine *Der Stern*. His hometown paper, in a front page article, dubbed him “The Judas of Speyer.” Dasch tried to return to the United States many times during his life but was never permitted.⁸¹ His records contain speculation, among other things, that he was a communist.⁸² Dasch died in Germany in 1991.

Just eleven years after the secret Saboteur trial, in 1953, Felix Frankfurter, one of the Justices who sided with FDR in *Quirin*, deemed the case “not a happy precedent.”⁸³ Justice William Douglas regretted ruling so quickly without issuing a fully reasoned opinion. “It is extremely undesirable to announce a decision on the merits without an opinion accompanying it.” John Frank, a clerk to Justice Black during the *Quirin* case wrote: “The Court allowed itself to be stamped.”

The military tribunal of 1942 served the purpose of exacting severe and swift punishment on the saboteurs. Had the trial been opened to the public, the six men who were legitimately saboteurs would have gone to their death all the same. However, Hoover would not have been able to suppress the work of Dasch and Burger in exposing the plot to the American government.

⁷⁷ David Savage, *Military Trials Have Roots in Nazi Case*, L.A. TIMES, Nov. 18, 2001, at A5.

⁷⁸ Seth Kantor, *How Hoover Sold Out ‘An Authentic American Hero,’* THE ATLANTA JOURNAL AND CONSTITUTION, Jul. 4, 1980, at 6-A.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Seth Kantor, *German Spy George Dasch Wants to See America Again*, THE ATLANTA JOURNAL AND CONSTITUTION, Mar. 11, 1984, at 36-A.

⁸² Seth Kantor, *How Hoover Sold Out ‘An Authentic American Hero,’* THE ATLANTA JOURNAL AND CONSTITUTION, Jul. 4, 1980, at 6-A. See also Seth Kantor, *Broad Law Used to Bar Dasch*, THE ATLANTA JOURNAL AND CONSTITUTION, Mar. 11, 1984.

⁸³ Danielsky, *The Saboteurs’ Case*, 1 J.S. Ct. Hist. 61, 80 (1996) (quoting memorandum from Justice Frankfurter) (Cited in Congressional testimony of Neal Katyal, Nov. 28, 2002, at 7) (Visited Feb. 5, 2002) <<http://judiciary.senate.gov/te112801f-katyal.htm>>.

D. World War II - The 1946 Trial of Tomoyuki Yamashita

General Tomoyuki Yamashita served as the commanding general of the Fourteenth Army Group of the Imperial Japanese Army in the Philippines from October 9, 1944 and September 3, 1945.⁸⁴ Immediately after his surrender on September 3, 1945, Yamashita was indicted and tried for war crimes committed not by Yamashita as an individual, but by the soldiers under his command.⁸⁵

Yamashita's trial was governed by the "Rules Governing the Trial of War Criminals," penned by General Douglas MacArthur on September 25, 1945.⁸⁶ The regulations, which consisted of all of six pages of text and twenty-two regulations, afforded the accused only minimal due process rights and did away with most evidentiary rules.⁸⁷ The regulations were designed to bring Japanese war criminals to swift and immediate justice and were issued at the same time as a directive from MacArthur that he would "stand for no quibbling or unnecessary delay. This will be a military court and will follow strict rules of war. There will be no stalling."⁸⁸

Yamashita's trial began in Manila on October 8, 1945 and lasted until December 5, 1945.⁸⁹ Despite the minimal protections afforded the defendant, the government this time was more hesitant to hide anything from public view; newspaper reporters were allowed into the hearing room, for at least some of the proceedings. The New York Times reported that "fifty accredited press correspondents and about 300 spectators will be admitted to the court."⁹⁰ Before the trial began, press accounts about Yamashita characterized him as "Beast of Bataan,"⁹¹ "The Tiger of Malaya,"⁹² and the "author of Philippine Massacre and Destruction."⁹³ As a result of being able to sit in the hearing room and listen to the evidence, as the trial progressed, newspaper stories regarding the trial shifted dramatically in tone. One by one, publications like the New York Times, Newsweek and the London based Daily Express, printed articles critical of the proceeding.⁹⁴ Newsweek went so far as to say that it was "scandalized by the break with Anglo-Saxon Justice."⁹⁵ By the end of the trial, reporters had changed their mind about the Tiger -- a straw vote taken of the twelve reporters who

⁸⁴ BRUCE D. LANDRUM, NOTE: THE YAMASHITA WAR CRIMES TRIAL: COMMAND RESPONSIBILITY THEN AND NOW, 149 MIL. L. REV. 293, 294 (1995).

⁸⁵ GEORGE F. GUY, THE DEFENSE OF GENERAL YAMASHITA (Supreme Court Historical Society) (1981).

⁸⁶ JOHN DEANE POTTER, A SOLDIER MUST HANG 179 (Frederick Muller Ltd.) (1963).

⁸⁷ See GUY, *supra* note 85.

⁸⁸ See POTTER, *supra* note 86.

⁸⁹ See GUY, *supra* note 85.

⁹⁰ Robert Trumbull, *Yamashita Pleads Innocent at Trial*, N.Y. TIMES, Oct. 8, 1945, at A7.

⁹¹ Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trial*, 60 ALB. L. REV. 801, 802 (1997).

⁹² *Id.*

⁹³ Lindesay Parrot, *Yamashita's Trial Speeded in Manila*, N.Y. TIMES, Oct. 3, 1945.

⁹⁴ See POTTER, *supra* note 86, at 179-181.

⁹⁵ *Id.* at 180.

had conscientiously covered the trial resulted in a unanimous agreement that Yamashita should not be convicted.⁹⁶

The military commission disagreed. In a decision that has been widely criticized ever since, the military tribunal convicted Yamashita solely on the basis of command responsibility. Despite an appeal to the Supreme Court,⁹⁷ Yamashita was hanged on February 23, 1946.⁹⁸

The parallels with the Boston Massacre of 1770 and the saboteurs trial are instructive. The public was disappointed that the soldiers were acquitted in Boston but were satisfied – having viewed the trial themselves – that a fair trial had taken place. In Yamashita, the press, having watched the trial, thought the general should have been acquitted. In both cases, though, the press and public played the essential role of seeing for themselves and making informed, independent judgments on the conduct and character of their respective governments. However, the saboteurs trial had inappropriately foreclosed that ability.

The timing of Yamashita's hasty trial overlapped with the beginning of the proceedings at Nuremberg. As discussed more fully below, extensive deliberation went into creating the tribunal at Nuremberg and into developing procedures to be used at the trial. However, no one, not even Justice Robert H. Jackson who took no part in the Supreme Court decision that sent Yamashita to his death expressly because he was involved in the Nuremberg Trial, ever thought of applying those procedures to General Yamashita. This historical omission is known to us only because of the reports of the newspapermen who covered the Yamashita trial.

E. Nuremberg

The War Criminals Before the International Military Tribunal or the Nuremberg Trial, as it is commonly known, is perhaps the most famous war crime trial of all time. The Nuremberg trial, conducted in Nuremberg, Germany, opened on November 20, 1945 and continued until October 1, 1946.⁹⁹ It involved 31 defendants – twenty four individuals and seven organizations, including the SS and the Gestapo – who were charged with war crimes, conspiracy to commit crimes against peace, planning, initiating and waging wars of aggression, and, most significantly crimes against humanity.¹⁰⁰ While the conduct of the trial itself has been written about extensively, of interest for the purposes of this discussion is the creation of the judicial procedures to be applied at the Nuremberg Trial. As the war progressed and an Allied victory became inevitable, the discussion of how to address the problem of war criminals took on great significance among the Allied forces. Originally, most military and political officials, including President Roosevelt, Chief Justice Stone and several cabinet members, favored the swift execution of Nazi leaders without trial.¹⁰¹

⁹⁶ See GUY, *supra* note 85.

⁹⁷ See *In Re Yamashita*, 327 U.S. 1 (1946) (upholding conviction on habeas corpus grounds).

⁹⁸ See GUY, *supra* note 85.

⁹⁹ Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 YALE L.J. 449 (1995).

¹⁰⁰ WHITNEY R. HARRIS, TYRANNY ON TRIAL xxiii-xxiv (Southern Methodist University) (1954).

¹⁰¹ See WHITNEY R. HARRIS, TYRANNY ON TRIAL xxxiii (Southern Methodist University) (1954); FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMAN 15-17 (Greenwood Press) (1989).

However, Secretary of War Henry Stimson convinced President Franklin D. Roosevelt that the criminals should be tried and protected by “at least rudimentary aspects of the Bill of Rights” as a symbol of the triumph of justice over tyranny.¹⁰² As a result, Robert H. Jackson, on leave from the U.S. Supreme Court, was appointed chief American prosecutor at the war crimes trials. Along with the chief prosecutors from England, France and the Soviet Union, Jackson developed protocols for an international tribunal to try the Nazi war criminals.¹⁰³ On August 8, 1945, by an agreement known as the London Agreement, the Allied powers formed the International Military Tribunal and began preparing for trial.¹⁰⁴ As the trial drew nearer, Jackson emphasized the need for the trial to bear witness to the Nazi atrocities in Europe. In so doing, Jackson transformed the trial from a mere legal proceeding into a tool to carve the horrors of the Holocaust onto the collective memory. Jackson made his mission clear in his opening statement when he said “ the wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. . . .We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow.”¹⁰⁵

The press was very important to Jackson’s memory-creating mission. All proceedings at the trial were open to the press and to the public, and transcripts of the proceedings were made available to the press in four languages.¹⁰⁶ Newspaper reporters covered every aspect of the trial, and photographs of the proceedings were made available to the public.¹⁰⁷

While the procedural differences between the Nuremberg Trial and the Yamashita Trial are staggering, particularly since they were happening at the same time, the role of the press in both trials was similar. At Nuremberg, even more so than at Yamashita’s trial, the press served the purpose of educating the public and creating a collective memory of Nazi atrocities. In addition, the press contributed to the world’s perception that, through the orderly application of judicial procedures, justice had prevailed over the Nazi regime.

III. The First Amendment Right of Access to Criminal Proceedings

Public criminal trials are so commonplace in our society that few think twice about the rights underlying such openness. When they do, the criminal defendant’s Sixth Amendment right to a public trial usually comes to mind. However, it is now beyond dispute that a separate right of access to attend trials also arises from the First Amendment. That right to attend all criminal trials, belonging to the press and public not to the defendant, mandates that proceedings be open absent compelling and clearly articulated reasons for closing them. This independent constitutional right of access was first recognized by the

¹⁰² See BUSCHER, *supra* note 101, at 16.

¹⁰³ *Id.*

¹⁰⁴ See HARRIS, *supra* note 100, at 22-24.

¹⁰⁵ Henry T. King, Jr., *Symposium: Universal Jurisdiction: Myths, Realities, And Prospects*, 35 NEW ENG. L. REV. 281 (2001).

¹⁰⁶ Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT’LL. REV. 203, 210 (1998).

¹⁰⁷ See Douglas, *supra* note 99, at 455.

United States Supreme Court in 1980 in *Richmond Newspapers, Inc. v. Virginia*.¹⁰⁸ Soon thereafter, the United States Court of Military Appeals recognized the same right, mandating the same test for closure, in courts-martial.¹⁰⁹ These rights belonging to the public, not to the government or the defendant, are fundamentally necessary for the effective functioning of our criminal justice system, and neither the defendant, nor the government, nor both jointly can shield a proceeding from public view without meeting the constitutional test.¹¹⁰

A. First Amendment Right of Access To Criminal Trials in Article III Courts

Recognition of the public's independent right of access to criminal proceedings came about in the midst of the development of a broad spectrum of speech-protective law that has taken place in the past 40 years. The cornerstone was laid by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There, the Court recognized, for the first time, that the foundation for the broad protection of speech is, in fact, our republican form of government itself.

[T]he Constitution created a form of government under which '[t]he people, not the government, possess the absolute sovereignty.' The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels.¹¹¹

For the Court, the "central meaning of the First Amendment," was the "right of free public discussion of the stewardship of public officials. . . ." ¹¹² Thus, the First Amendment "'was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" ¹¹³

In the decades following *Sullivan*, these principles became embedded in the First Amendment -- and thus the rule of law -- through dozens of rulings of the Supreme Court. In particular, and following from the First Amendment protection of public discussion, is the right of the public to receive information about government, including the courts, both civilian and military. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information

¹⁰⁸ 448 U.S. 555, 580 & n.17 (1980). See also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (right to attend testimony at criminal trial of minor victim of sexual offense); *People v. Harris*, 57 N.Y.2d 335, 347 n.4 (1982) ("right of the public to attend criminal trials is implicit in the guarantees of the First Amendment"), cert. denied, 460 U.S. 1047 (1983). The Supreme Court also has recognized the existence of this right in a variety of pre-trial proceedings. See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (preliminary hearing in criminal case); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*voir dire* examinations of jury venire).

¹⁰⁹ See *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985).

¹¹⁰ *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

¹¹¹ *New York Times v. Sullivan*, 376 U.S. 254, 274 (1964) (citation omitted).

¹¹² *Id.* at 273, 275.

¹¹³ *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

from which members of the public may draw."¹¹⁴ It was in this context that the Supreme Court faced the question of whether the public and press had a First Amendment right to observe criminal trials and proceedings. Unquestionably, the court found, that right exists.¹¹⁵

In the inaugural decision confirming the right, *Richmond Newspapers*, Justice Burger took pains to rest this conclusion upon historical tradition, dating back to the "days before the Norman Conquest."¹¹⁶ Throughout the middle ages and during the American colonial period, "part of the very nature of a criminal trial was its openness to those who wished to attend."¹¹⁷ Members of the community always possessed the "right to observe the conduct of trials."¹¹⁸ In late colonial and early federalist America, this constituted much more than a formalistic privilege of "access". Rather, observing proceedings -- going to them, learning about them, judging them -- was interwoven into the fabric of routine social life. The "administration of justice" was built upon participation by nearly all of the local community in what was referred to as "court day". "It would be hard to overemphasize the importance of the ceremonial at the center of coming together on court day."¹¹⁹ In the small, face-to-face communities that comprised the era of the founders, citizens encountered authority chiefly "through participation in courthouse proceedings," and attending them involved "participat[ing] in discovering the meaning of the law. . . ." ¹²⁰ Doing so "served not only to make the community a witness to important decisions and transactions but also to teach men the very nature and forms of government."¹²¹ Citizens "left the stage of court day . . . secure in the sense that they had shaped and ratified communal affairs" ¹²²

¹¹⁴ *First National Bank v. Bellotti*, 435 U.S. 765, 783 (1983); *accord* *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'") (citation omitted).

¹¹⁵ *See* *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596.

¹¹⁶ 448 U.S. at 565.

¹¹⁷ *Id.* at 568.

¹¹⁸ *Id.* at 572.

¹¹⁹ RHYSAAC, *THE TRANSFORMATION OF VIRGINIA 1740-1790* 88 (1982).

¹²⁰ A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS* 74 (1981).

¹²¹ ISAAC, *supra* note 119, at 88.

¹²² ROEBER, *supra* note 120, at 74. Today, the vast majority of Americans are precluded from physically attending trials, and, therefore, from observing them firsthand due to courtroom space constraints and the changing times. The Supreme Court, recognizing these practical realities, also has recognized the important surrogate function of the news media in these circumstances. The Court stated in *Richmond Newspapers v. Virginia* that "[i]nstead of acquiring information about trials by first-hand observation or word of mouth from those who attended, people now acquire it chiefly through the printed and electronic media." 448 U.S. 555, 572-73 (1980). Moreover, "the right to attend any may be exercised by people less frequently today when information as to trials generally reaches them by way of print and electronic media." *Id.* at 577 n.12. One commentator has observed,

"[s]ince the establishment of the colonies in America, the public has had a role in the judicial process, not only as a litigant but also as a spectator and participant... Conditions in the twentieth century have not altered the public's desire to participate, but they have altered some of the consequences of such participation. Trials continue to be open but only a few spectators witness them personally."

These constitutional rights to view criminal trials do not consist of simply the right to publish what transpires at the proceedings after the fact. The rights are ones of observation - by the public. "People in an open society do not demand infallibility from their institutions," the Court has stated, "but it is difficult for them to accept what they are prohibited from observing."¹²³ It was "not crucial" to the Court whether the "right to attend criminal trials to hear, see and communicate observations concerning them [is described] as a 'right of access' or a 'right to gather information.'"¹²⁴ Rather, what mattered to the Court was captured by its assertion that "[t]he explicit, guaranteed rights to speak and to publish . . . what takes place at a trial would lose much meaning if access *to observe* the trial could, as it was here, be foreclosed arbitrarily."¹²⁵

Following *Richmond Newspapers*, the right was clarified and extended to include many pre-trial proceedings. That case and its progeny, taken together, stand for the now unquestioned proposition that only in compelling and clearly identified circumstances may government foreclose the opportunity for citizens to obtain information central to understanding the workings of the government in general, and criminal trial proceedings in particular.¹²⁶ In the words of the Supreme Court, the First Amendment right of access to judicial proceedings may be overcome only after a court makes "specific, on the record findings . . . that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"¹²⁷ Under this standard, commonly referred to as the *Press-Enterprise* test, "conclusory assertion[s]" simply do not suffice.¹²⁸

The constitutional right to attend and observe trials serves to reinforce public acceptance -- crucial in a democratic society -- of "both the process and its results."¹²⁹

Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the

HERBERT JACOB, *JUSTICE IN AMERICA: COURTS, LAWYERS, AND THE JUDICIAL PROCESS* 135 (4th ed. 1984) (emphasis added).

¹²³ See *Richmond Newspapers*, 448 U.S. at 572.

¹²⁴ *Id.* at 576 (citations omitted).

¹²⁵ *Id.* at 576-77 (emphasis added).

¹²⁶ *Id.* at 575, 576 ("Plainly, it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted...").

¹²⁷ *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) (quoting *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)).

¹²⁸ *Id.* at 15.

¹²⁹ See *Richmond Newspapers*, 448 U.S. at 571.

quality of that system by subjecting it to the cleansing effects of exposure and public accountability.¹³⁰

The law is clear: under *Richmond Newspapers* and its progeny, the public and the press possess presumptive constitutional rights to attend and observe criminal trials.

B. First Amendment Right of Access To Courts-Martial .

The public's First Amendment right of access to criminal proceedings – and a criminal defendant's Sixth Amendment right to a public trial -- apply in courts-martial, as well. As early as 1956, interpreting the defendant's Sixth Amendment rights, the Court of Military Appeals held that “[i]n military law, unless classified information must be elicited, the right to a public trial includes the right of representatives of the press to be in attendance.”¹³¹ Nearly thirty years later, following *Richmond Newspapers*, the Court of Military Appeals observed that the test for closure outlined by the Supreme Court in that case mirrored the standard applied by the military for evaluating whether a defendant's Sixth Amendment right to a public trial had been violated. The Court of Military Appeals then expressly held that the First Amendment right of access to criminal trials also extends to courts-martial.¹³²

Nearly a decade before the Supreme Court explicitly recognized a public right of access to criminal proceedings, in an unrelated context, the Court affirmed that, “[T]he constitutional grant of power to Congress to regulate the armed forces ... itself does not empower Congress to deprive people of trials under Bill of Rights safeguards”¹³³ Applying that general principle, military courts have confirmed in numerous cases that, “Without question, the sixth amendment right to a public trial is applicable to courts-martial.”¹³⁴

¹³⁰ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J. concurring); *accord, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (“Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process, with benefits to both the defendant and the society as a whole[,] permit[ting] the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.”). The Supreme Court has recognized the existence of the right of access in a variety of pre-trial proceedings, as well. *See Press-Enterprise*, 478 U.S. 1 (preliminary hearing in criminal case); *Press-Enterprise*, 464 U.S. 501 (*voir dire* examination of jury venire).

¹³¹ *United States v. Brown*, 7 C.M.A. 251, 258 (1956). This case is the first Court of Military Appeals ruling on this issue. It predates, and, therefore, does not rely on the United States Supreme Court's express recognition of public and press access to criminal proceedings in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). However, because the defendant had been able to invite whomever he wished to attend, and only the general public and press were excluded, the case foreshadowed the issues raised in *Richmond Newspapers* and its progeny. “We are met at the outset with an issue of fundamental important which is property before us for the first time,” the military court wrote in *Brown*. 7 C.M.A. at 254. “[W]e will develop both the civilian and military rule.” *Id.* at 255. Although ultimately relying on the Sixth Amendment right, the Court's decision rested largely on the same logic and historical experience later cited by the Supreme Court in *Richmond Newspapers*.

¹³² *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985).

¹³³ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-22 (1955).

¹³⁴ *See Hershey*, 20 M.J. at 435. *See also United States v. Brown*, (C.M.A. 1956), *overruled* by *United States v. Grunden*, 2 M.J. 116, 120 n.3 (C.M.A. 1977), *rev. denied*, 6 M.J. 7 (C.M.A. 1978) (*overruling Brown* to the extent that it implies an exception to the right to a public trial); *United States v. Terry*, 52 M.J. 574 (N-M.C.C.A. 1999); *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997) (Article 32 hearing).

Significantly, the Court of Military Appeals has relied on and adopted the procedural aspects of *Press-Enterprise* in Sixth Amendment cases, finding that “the principles enunciated in regard to the government’s attempts to prevent the disclosure of matters in the name of ‘security’ are applicable to the ‘public trial’ aspects of the Sixth Amendment . . .”¹³⁵

Soon after the Supreme Court’s recognition of a separate First Amendment right of access to criminal trials in Article III courts, the Court of Military Appeals followed suit for courts-martial. In *United States v. Hershey*, a United States Army Staff Sergeant was accused of various crimes relating to alleged sexual abuse of his thirteen-year-old daughter. Before testimony commenced, trial counsel observed that the complaining witness, who was only thirteen, would be “somewhat timid or a little bit uncomfortable” having to recount her experiences with her father. He requested that the courtroom be closed during her testimony, and the military judge agreed, ordering the bailiff to escort the few spectators (who all were court personnel) out of the courtroom. Following the secret testimony, the Staff Sergeant was convicted and sentenced to five years confinement, forfeiture of all pay and allowances, a reduction in rank, and a bad-conduct discharge.¹³⁶

Hershey appealed his case, ultimately reaching the Court of Military Appeals. The issue that the military court agreed to consider was whether the defendant had been deprived of his constitutional right to a public trial. The court found there to be a constitutional right to a public trial, grounded not only in the Sixth Amendment, but also in the First Amendment. Relying explicitly on *Richmond Newspapers* and *Waller v. Georgia*,¹³⁷ the Court of Military Appeals held that the “stringent” test set forth in *Press-Enterprise Co.* applies equally to courts-martial.¹³⁸

Since *Hershey*, military courts have recognized the First Amendment right of access to court-martial proceedings, including preliminary hearings under Article 32, and that the press and public have standing to exercise those rights. Most recently, in a challenge to closure of a preliminary hearing by a media coalition, the United States Court of Appeals for the Armed Forces held that all of the substantive and procedural rights of access to criminal proceedings articulated by the Supreme Court in *Richmond Newspapers*, *Globe Newspaper Co.*, and *Press-Enterprise Co.* apply to courts-martial.¹³⁹ Other cases recognize the right, as well.¹⁴⁰

The existence of a public right of access to courts-martial is reflected in

¹³⁵ See *Grunden*, 2 M.J. at 122 n.11.

¹³⁶ See *Hershey*, 20 M.J. at 434-36.

¹³⁷ 467 U.S. 39 (1984). In *Waller*, the Supreme Court applied the same test to a defendant’s Sixth Amendment objection to a closed suppression hearing as had been applied in First Amendment cases, observing that “the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.” *Id.* at 46.

¹³⁸ See *Hershey*, 20 M.J. at 437. Despite finding constitutional infirmities with the trial court’s approach, the C.M.A. upheld the conviction because “[t]here is no evidence that members of the public were actually barred entry during the short period when the bailiff was asked to prohibit spectators from entering the courtroom.” *Id.* at 438.

¹³⁹ See *ABC*, 47 M.J. at 365.

¹⁴⁰ See, e.g., *United States v. Scott*, 48 M.J. 663, 665 (Army Ct. Crim. App. 1998).

The Manual for Courts-Martial, which generally provides that “courts-martial shall be open to the public,”¹⁴¹ and adds that “‘public’ includes both members of both the military and civilian communities.”¹⁴² Similarly, the Rules for Court Martial (“R.C.M.”) state that “[o]pening courts-martial to public scrutiny reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process.”¹⁴³ As the Court of Military Appeals has stated, “[p]ublic confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public.”¹⁴⁴

Regardless of whether the challenge arises under the Sixth or First Amendment, the same standard applies to closure of courts-martial.¹⁴⁵ “The authority to exclude [the public] should be cautiously exercised, and the right of the accused to a trial completely open to the public must be weighed against the public policy considerations justifying exclusion.”¹⁴⁶ As outlined by the United States Court of Military Appeals, parroting *Press-Enterprise Co.*, “the party seeking closure must advance an overriding interest that is likely to be prejudiced; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and [the trial court] must make adequate findings supporting the closure to aid in review.”¹⁴⁷ Discretion to determine if an “overriding interest” justifies closure rests with the military judge.¹⁴⁸

Whether an accused criminal is prosecuted in a traditional, Article III court or in a court-martial conducted by a United States military tribunal, history and law lead to the same result. The public and the press have an independent constitutional right of access to observe the proceedings, one that can only be overcome by a compelling need in circumstances where there are no alternatives. This test, when applied in recent experience, has proven extraordinarily difficult to meet.

IV. Experience in Terrorist and National Security Prosecutions.

One of the more appealing justifications offered in support of military tribunals is the importance of protecting classified and sensitive national security information. Although sensible in theory, history provides compelling evidence of the government’s ability to conduct proceedings involving classified information and acts of terrorism in open courts. Previous

¹⁴¹ Rules for Courts-Martial (hereinafter “R.C.M.”), 806(a) (2000), in MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000).

¹⁴² *Id.*

¹⁴³ R.C.M. 806(b), Discussion ¶ 8; *see also Scott*, 48 M.J. at 664.

¹⁴⁴ *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

¹⁴⁵ *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985).

¹⁴⁶ *United States v. Grunden*, 2 M.J. 116, 121 (C.M.A. 1977).

¹⁴⁷ *See Hershey*, 20 M.J. at 436 (*citing* *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984)). *See also, United States v. Anderson*, 46 M.J. 728, 729 (C.C.A. 1997), *rev. denied*, 48 M.J. 22 (C.A.A.F. 1997) (“[T]he military judge placed no justification on the record for her actions. Consequently, she abused her discretion in closing the court-martial.”).

¹⁴⁸ *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997).

terrorist acts – perpetrated on U.S. soil and against U.S. interests or citizens overseas – have been successfully prosecuted in federal courts time after time, with the public in attendance. In the majority of these cases, some of which involved activities akin to those perpetrated on September 11, procedures already established and in place for dealing with classified information¹⁴⁹ were applied successfully. In the military context, courts have mandated the same process. While some recent cases included an occasional sealed document or closed hearing, generally after the *Press-Enterprise* test or its equivalent was found to have been met, the trials themselves were open to the public with no significant adverse consequences.

A. Grunden & Lonetree – U.S. Courts-Martial

Historically, the most common circumstance under which courts-martial have been closed is when classified information is introduced at trial.¹⁵⁰ But in such cases, “even when the interest sought to be protected is national security, the Government must demonstrate a compelling need to exclude the public from a court-martial over defense objection, and the mere utterance by trial counsel of a conclusion is not sufficient.”¹⁵¹

In *United States v. Grunden*,¹⁵² for example, a serviceman had conversations with three individuals he believed to be foreign agents, but who really were U.S. government investigators, and attempted to deliver classified information to them.¹⁵³ When the court-martial convened, because of the national security issues involved, the trial judge required all courtroom personnel to have security clearances, and, over the objection of the defense, he closed the courtroom to observers during testimony regarding the espionage charge.¹⁵⁴ Grunden was convicted of two specifications of failing to report contact with persons believed by him to be agents of governments hostile to the United States and one specification of attempted espionage.¹⁵⁵

On appeal, the defense argued that the closure of the courtroom violated his right to a public trial.¹⁵⁶ The government, on the other hand, argued that there was no harm since 60 percent of the entire record of the proceeding, including pretrial proceedings, was not closed.¹⁵⁷ Rejecting the formulaic approach advocated by the government, the Court of

¹⁴⁹ See Classified Information Procedure Act, 18 U.S.C. app. 3 § 1, discussed *infra* Section VI.

¹⁵⁰ See R. MIL. EVID. 505(j) (providing for introduction of classified information into evidence).

¹⁵¹ See *Hershey*, 20 M.J. at 436 (*citing Grunden*, 2 M.J. at 120 n.3).

¹⁵² 2 M.J. 116

¹⁵³ *Id.* at 119.

¹⁵⁴ *Id.* at 120.

¹⁵⁵ *Id.*

¹⁵⁶ As a defendant, Grunden based his argument on his Sixth Amendment right to a public trial. However, the procedural and substantive requirements that must be overcome to close a proceeding in the face of a Sixth Amendment challenge are no different than those required in a First Amendment challenge. See *Hershey*, 20 M.J. 433.

¹⁵⁷ See *Grunden*, 2 M.J. at 120.

Military Appeals held that “[t]he propriety or impropriety of the exclusion of the public from all or part of a trial cannot, as attempted by the government in this case, be reduced to solution by mathematical formulas. The logic and rationale governing the exclusion, not mere percentages of the total pages of the record, must be dispositive.”¹⁵⁸

In the words of the court:

The blanket exclusion of the spectators from all or most of a trial, such as in the present case, has not been approved by this Court, nor could it be absent a compelling showing that such was necessary to prevent the disclosure of classified information. The simple utilization of the terms “security” or “military necessity” cannot be the talisman in whose presence the protections of the Sixth Amendment and its guarantee to a public trial must vanish. Unless an appropriate balancing test is employed with examination and analysis of the need for, and the scope of any suggested exclusion, the result is, as here, unsupportable.¹⁵⁹

The majority then went on to state the procedure and test that courts-martial should use to balance a defendant’s right to a public trial against the prosecution’s request that a proceeding be closed to protect classified information.

It is our decision that the balancing test employed by a trial judge in instances involving the possible divulgence of classified material should be as follows. His initial task is to determine whether the perceived need urged as grounds for the exclusion of the public is of sufficient magnitude so as to outweigh “the danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy.” This may be best achieved by conducting a preliminary hearing which is closed to the public at which time the government must demonstrate that it has met the heavy burden of justifying the imposition of restraints on this constitutional right. The prosecution to meet this heavy burden must demonstrate the classified nature, if any, of the materials in question. It must then delineate those portions of its case which will involve these materials.¹⁶⁰

¹⁵⁸ *Id.* at 120 n.2. The majority said that,

“[u]nfortunately what both the dissenting judge and the government have failed to do is analyze what portions of the record are involved in this question. The ‘over 60 percent’ question which has been bandied about entails the preliminary procedural matters the entire trial on the merits as to the charge of which the appellant was acquitted, final instructions, and the sentencing phase of the trial. The fact that these portions of the trial were open to the public can have no bearing on the resolution of the propriety of the judge’s exclusion of the public from virtually the entire trial as to the espionage matters.”

Id. at 120.

¹⁵⁹ *Id.* at 121 (footnotes omitted).

¹⁶⁰ *Id.* at 121-22 (citation and footnote omitted). *See also* United States v. Travers, 25 M.J. 61 (C.M.A. 1987) (upholding trial judge’s refusal to close courtroom during sentencing phase to avoid public revelation of the fact that a proposed witness was an informant for the Criminal Investigation Command because the prosecutor neglected to take steps to present the witness’ testimony in another way, such as by affidavit, which would have limited exposure of his CID information status).

With the procedural framework firmly in place after *Grunden*, the military has successfully conducted public trials involving classified information. For example, the highly publicized court-martial of Clayton Lonetree was, for the most part, open to the public. Lonetree was a guard at the United States embassy in Moscow who fell in love with a Russian woman. Seemingly unaware that he had been targeted by Moscow as a potential source of information and believing that she would keep his confidence, he passed classified information to his Russian girlfriend, who in fact was working for the KGB.¹⁶¹

During Lonetree's trial, which necessarily involved some classified information, the trial judge found that there was a compelling need to protect certain classified information from disclosure, and closed the courtroom for the testimony of certain witnesses. The closed portions of the proceeding included witness testimony regarding classified information, as well as certain intelligence sources and methods.¹⁶² On appeal, the Navy-Marine Corps Court of Military Review affirmed the limited closure, pointing out that the military judge had followed proper procedure and had made appropriate findings on the record, and because it would be impractical to close only portions of the witness testimony.¹⁶³

B. Hijackings

Previous prosecutions of airline hijackers provide a chilling factual parallel to the potential prosecution of individuals involved in the September 11 attacks. Despite the fact that some of these incidents took place overseas and did not involve domestic airlines, the United States government nonetheless prosecuted the hijackers in public trials in federal courtrooms.

For example, on June 11, 1985, Fawaz Yunis and four other Lebanese Shiite Moslems took control of the cockpit of a Royal Jordanian Airlines flight shortly before it was scheduled to depart from Beirut, Lebanon. Seeking to go to Tunis, where an Arab League conference was underway, they forced the pilot to take off. Unfortunately for them, authorities in Tunis blocked the airport runway, and following stops in Sicily and Cyprus, the aircraft returned to Beirut. After refueling, the plane took off again, this time heading for Syria. They were once again turned away and returned to Beirut. Left with few options, they released the passengers (which included two Americans), held a press conference, and then blew up the plane and fled.

An investigation by United States authorities including the FBI and CIA, presumably conducted overseas using classified intelligence gathering techniques and sources, identified Yunis as the "probable" leader of the hijackers. Various U.S. civilian and military agencies, including the FBI, developed a plan and plotted Yunis's capture. Undercover agents lured Yunis onto a yacht in the Mediterranean with promises of a drug deal and a party, and arrested him once the boat entered international waters. He was transferred to a Navy munitions ship and ultimately transported to the United States to stand trial under a then-

¹⁶¹ United States v. Lonetree, 31 M.J. 849 (C.M.R. 1990).

¹⁶² *Id.* at 853.

¹⁶³ *Id.* at 854. ("To require a military judge to make specific findings each time a series of questions is to be asked of a witness, after the judge had already determined the responses were classified, would be to create unnecessary and disruptive bifurcation of the trial and constitute an exercise in redundancy.")

new anti-terrorism statute that authorizes United States courts to try foreign nationals who take Americans hostage anywhere in the world.¹⁶⁴ The trial, which was billed by some as “the United States’ first international terrorism trial,”¹⁶⁵ was open to the public. Yunis admitted participation in the hijacking, but argued that he was merely obeying military orders issued to him by Lebanon’s Amal Militia. Unconvinced, the jury convicted him of conspiracy, hostage taking, and air piracy.¹⁶⁶ He was sentenced to thirty years in prison.¹⁶⁷

Successful prosecution in open courtrooms of hijackers continued throughout the 1990’s. On November 23, 1985, a group of Palestinians including Omar Mohammed Ali Rezaq hijacked an Air Egypt flight shortly after takeoff from Athens, ordering the pilot to fly to Malta. Following a gun battle with the air marshal stationed on the airplane that resulted in the death of one of Rezaq’s fellow hijackers, Rezaq took charge of the operation. Upon arrival in Malta, Rezaq moved the Israeli and U.S. passengers to the front of the plane and released some of the others. When the authorities in Malta refused to refuel the plane, Rezaq announced that he would shoot a passenger every fifteen minutes until fuel was provided. He made good on his threat, shooting two Israelis and three Americans, including a U.S. Air Force employee who was killed. A little less than a day after the standoff began, Egyptian commandos stormed the aircraft, setting off an explosive device. The ensuing fire killed fifty-seven passengers and all of the other hijackers.

Rezaq pled guilty to murder, attempted murder, and hostage taking in Malta, agreeing to a sentence of twenty-five years in prison. Seven years later, for reasons that remain unclear, Rezaq was released. En route from Malta to Sudan, Rezaq stopped in Nigeria and was taken into custody by local authorities. He was quickly handed over to FBI agents, who whisked him away to the United States on a waiting aircraft. He was convicted in a public trial of the single count with which he had been charged and sentenced to life in prison.¹⁶⁸

Despite the necessary involvement of United States intelligence agencies in investigating these crimes, at no time does anyone appear to have considered holding anything other than a public trial. The government never wavered from that approach, even when faced with a situation where sensitive classified information undoubtedly would be involved in the trial. In February 1964, Reinaldo Juan Lopez-Lima and his partner, Enrique Castillo-Hernandez, brandishing guns, forced the pilot of a Piper Apache airplane to fly them from Monroe County, Florida to Cuba. Landing in Cuba, Lopez-Lima did not receive the welcome he expected. He was tossed in jail for illegal entry, where he remained until 1987 when he returned to the United States. Two years later, the State Department attempted to recruit Lopez-Lima to supply information about Cuba, at which point an outstanding 1969 indictment from the hijacking incident was discovered. Instead of an informer, Lopez-Lima became a criminal defendant.

¹⁶⁴ See 18 U.S.C. § 1203.

¹⁶⁵ See Julie Brienza, *Lebanese Terrorist Sentenced to 30 Years*, U.P.I. WASH. NEWS, Oct. 4, 1989.

¹⁶⁶ See *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

¹⁶⁷ See, e.g., Tracy Thompson, *Hijacker Gets 30-Year Prison Term; Case Was First to Involve Air Piracy Overseas*, WASH. POST, Oct. 5, 1989, at A39.

¹⁶⁸ See *United States v. Rezaq*, 134 F.2d 1121 (D.C. Cir. 1998); *Hijacker Gets Life: Sentenced for 1985 Air Piracy in Malta*, NEWSDAY, Oct. 8, 1996, at A17.

Facing multiple charges and significant penalties, Lopez-Lima set out to defend himself by arguing that the CIA had sanctioned the hijacking. He claimed that he and his partner were planning to pose as defectors from the Cuban exile community who sought to return to Cuba. Once there, they were to pursue efforts to destabilize Castro's regime. The CIA, for its part, admitted that Lopez-Lima did participate in covert activities against Castro on behalf of the United States, but claimed that the Agency had broken ties prior to the hijacking.¹⁶⁹ To prove his case, the defendant announced that he was going to rely on classified information in U.S. government files. District Judge Ryskamp, following proper procedure, considered each category of classified information that Lopez-Lima sought to introduce in light of its relevance to the defenses proffered and ruled that some of the evidence was admissible. The trial never took place, because the Court later threw out the case on the grounds that Lopez-Lima's right to a speedy trial had been violated, but if it had gone forward, it would have been open to the public.¹⁷⁰

C. United States v. Noriega

The expected complexity of the terrorist cases also does not weigh against a public trial. On February 4, 1988, the Commander of the Panamanian Defense Forces, Manuel Antonio Noriega, was indicted in a twelve-count indictment by a federal grand jury in the Southern District of Florida on various drug-related charges. The breadth and gravity of the charges were immense. Two RICO counts, encompassing twenty-three pages of the indictment, alleged a five-year conspiracy by high ranking members of the government of Panama and the alleged leader of Columbia's Medellin drug cartel. The allegations related to, among other things, ties between Noriega and Cuban President Fidel Castro; the Iran-Contra scheme; manufacture and distribution of cocaine; Panamanian political corruption; and international money laundering.¹⁷¹

Seventeen months after the indictment was handed down, United States armed forces descended on Panama, ultimately defeating Noriega's forces and taking him into custody. Noriega was transported to Miami, where he stood trial on the pending charges. The scope and complexity of the trial were acknowledged by the court when it granted an unusual "ends of justice" continuance, extending the time for pre-trial matters without violating the defendant's speedy trial rights.¹⁷² Noriega's co-defendants sought to sever their trials on the grounds that the "excessive and inflammatory media publicity surrounding Noriega ... will result in guilt by association."¹⁷³

The trial included testimony from a parade of government witnesses and thousands of pages of documentary evidence relating to Noriega's alleged agreement with the Medellin Cartel to transport substantial amounts of cocaine through Panama to the United States. Details were provided about meetings Noriega and his associates had with Cartel leadership throughout Central and South America and the payment arrangements. "Secret" bank accounts opened in the Noriega's name and the names of his family members at the Bank of

¹⁶⁹ See Lauren Weiner, *Hijack Charge Erased, Cuban Must Face INS*, WASH. TIMES, June 25, 1990, at A9.

¹⁷⁰ United States v. Lopez-Lima, 738 F. Supp. 1404 (S.D.Fla. 1990).

¹⁷¹ United States v. Noriega, 746 F. Supp. 1548, 1551, 1553 (S.D.Fla. 1990).

¹⁷² *Id.* at 1559.

¹⁷³ *Id.*

Credit and Commerce International (BCCI) were identified, and specific transactions involving large cash deposits were revealed. It goes without saying that this type of detailed evidence of overseas drug trafficking activity was not acquired through open, unclassified maneuvers.

For his part, Noriega argued at trial that his subordinates had engaged in these activities without his knowledge. As part of his defense, Noriega sought and was permitted to introduce evidence of payments made to him by the United States for intelligence work. Although he wanted to introduce additional classified details, the district court ruled that those details were inadmissible because the probative value of those details was substantially outweighed by its tendency to confuse the issues. After a seven-month trial, on April 9, 1992, Noriega was convicted on eight of the twelve counts and sentenced to 40 years imprisonment, which later was reduced to 30 years.

During the sentencing phase of the trial, several current and former United States officials testified on Noriega's behalf. The former CIA Chief of Station in Panama City described how the General assisted the United States. A U.S. Air Force Colonel who worked with the Southern Command in Panama testified that Noriega had provided assistance in Chile, Salvador, the Dominican Republic, and Honduras. And the United States Ambassador to Panama described Noriega as an "asset" that former CIA Director William Casey considered to be a "protégé."¹⁷⁴

Despite the intricacy and sensitivity of the underlying issues, the trial was open and the public was able "to participate in and serve as a check upon the judicial process"¹⁷⁵ Acknowledging the importance of an open trial in a "controversial" case such as this one, the court specifically "sought to make public all aspects of the[] proceedings to the extent legally permissible."¹⁷⁶ The 11th Circuit upheld the conviction, and on April 6, 1998, the United States Supreme Court declined to hear the case.¹⁷⁷

D. Timothy McVeigh

Until September 11, 2001, the most devastating act of terrorism and mass murder ever committed on U.S. soil was the bombing of the Alfred P. Murrah federal building in Oklahoma City on April 19, 1995.¹⁷⁸ One-hundred sixty-eight people were killed, including a number of children, and hundreds of others were injured. In addition, the State of

¹⁷⁴ United States v. Noriega, 40 F. Supp. 2d 1378, 1380 (S.D.Fla. 1999).

¹⁷⁵ United States v. Noriega, 752 F. Supp. 1037, 1044 (S.D.Fla. 1990).

¹⁷⁶ *Id.* The *Noriega* court also went down an unusual tangent when faced with a difficult and relatively novel free speech issue. CNN had obtained copies of audiotapes made by officials at the Metropolitan Correctional Center of conversations between Noriega and his attorney. Noriega sought and obtained a prior restraint prohibiting CNN from broadcasting the tapes. See *Id.* at 1038-39. After the 11th Circuit upheld the district court's injunction pending an *in camera* review of the contents of the tapes and a great deal of publicity, the district court concluded that the information on the tapes was not sufficient for Noriega to meet the heavy burden imposed on him by the Constitution to justify a prior restraint of speech. *Id.* at 1045.

¹⁷⁷ See United States v. Noriega, 117 F.3d 1206 (11th Cir. 1997); United States v. Noriega, 40 F. Supp. 2d 1378, 1379 (S.D.Fla. 1999).

¹⁷⁸ United States v. McVeigh, 918 F. Supp. 1467, 1471 (W.D. Ok. 1996) (quoting Oklahoma Governor Frank Keating).

Oklahoma estimated the cost of the incident to be \$ 651,594,000.¹⁷⁹ Following an intense effort by law enforcement personnel involving a multitude of government agencies, Timothy McVeigh was arrested and charged with a variety of crimes, including using a bomb as a weapon of mass destruction and first degree murder.

From the outset, publicity was pervasive and intense. The whole nation was watching. Massive amounts of secret government materials were involved in the case, including, for example, more than 10,000 FBI interview reports.¹⁸⁰ As part of his defense, McVeigh's counsel posited several hypotheses concerning the bombing which, if true, might have resulted in an acquittal. They believed that information to support those hypotheses was in the hands of various government agencies, including those who routinely traffic in classified and top secret material. McVeigh's counsel argued that the Department of Justice had failed to complete a full investigation, ignoring leads available in the records of the CIA, NSA, and Defense Intelligence Agency. They therefore sought discovery from these agencies of voluminous records, many of which were classified.

Despite the myriad of complications, McVeigh nonetheless received a public trial. At the pre-trial stage, the court meticulously addressed each issue when public access to additional information was sought. In the first instance, the news media sought access to a variety of documents that had been filed under seal. In granting partial access, Judge Matsch specifically articulated the importance of open criminal trials. Extensively quoting Chief Justice Berger, he stressed the "crucial prophylactic aspects" of public trials and the vital importance of "satisfy[ing] the appearance of justice' ... by allowing people to observe it."¹⁸¹ At the same time, Judge Matsch carefully identified and articulated certain circumstances where there is no tradition of access and where secrecy is necessary. Examples include documents filed under the statutory provision requiring court authorization for certain publicly-funded defense expenditures that would prematurely reveal defense investigation and strategy.¹⁸²

Balancing these interests, Judge Matsch condemned "routine[] seal[ing] without due regard for any particular need for secrecy" and granted access to some of the documents sought.¹⁸³ With respect to those records that were kept sealed, Judge Matsch emphasized the pre-trial status of the proceedings, pointing out that the question was not whether, but when, those records would be made public.¹⁸⁴

¹⁷⁹ *Id.* at 1469.

¹⁸⁰ *United States v. McVeigh*, 918 F. Supp. 1452, 1464 (W.D. Ok. 1996).

¹⁸¹ *Id.* at 1456 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570-72 (1980)).

¹⁸² *Id.* at 1465.

¹⁸³ *Id.* at 1466.

¹⁸⁴ Like many cases involving complicated discovery disputes over classified or confidential information, certain pre-trial proceedings were conducted in camera. These closed hearings were rare, and expressly limited to circumstances when the presiding judge had determined closure was necessary to preserve the defendant's right to a fair trial. Indeed, in at least one instance, the Court held multiple hearings on the same issues so that any portion of the discussion and debate that could be open was. *See, e.g., United States v. McVeigh*, 954 F. Supp. 1441, 1444 (D.Colo. 1997).

The trial itself, of course, was open to the public.¹⁸⁵ Judge Matsch went to extreme lengths to address the unique issues presented by this high-profile case without closing the proceedings. He erected a custom-built wall between the jury and spectators.¹⁸⁶ He scrambled juror numbers so that the public could not match individual jurors with the answers given to questions during voir dire and kept the identity of individual jurors confidential. The voir dire also was sealed.¹⁸⁷ Each of these actions was challenged by a coalition of 70 press representatives at the time, but citing juror safety and privacy, Judge Matsch refused to budge.

At the same time, once the jury was empanelled, the Court went to great lengths to ensure that the trial was not only open, but also accessible to every member of the news media who wanted to cover it. In the words of Judge Matsch:

Half the public seating has been reserved for those who obtained press credentials. The trial exhibits are shown on a television type monitor to those in the public area as they are introduced and discussed by the witnesses. Trial transcripts and copies of the exhibits admitted are provided at the conclusion of each trial day. The proceedings are being monitored by sound transmission to an auxiliary courtroom and to a pressroom in an adjacent building. Part of the plaza in front of the courthouse has been set aside for exclusive use of news organizations for telecasting and broadcasting by reporters and commentators observing the trial.¹⁸⁸

Victims' relatives also were provided special access, through a video feed that reached as far as Oklahoma City.¹⁸⁹

The publicity surrounding the case, both prior to and during the trial, was enormous. The pervasive, detailed coverage nationally and in Oklahoma were documented meticulously in Judge Matsch's decision ordering a change of venue from Oklahoma to Colorado.¹⁹⁰ Yet, no consideration was ever given to closing the courtroom during the trial. "Crimes are prosecuted publicly. The Constitution commands it."¹⁹¹

¹⁸⁵ *Id.* at 1465; *see also* United States v. McVeigh, 931 F. Supp. 756, 757 (D.Colo. 1996) (quoting protective order which provided that "such materials may be disclosed as necessary: (a) during court proceedings, including trial, ...").

¹⁸⁶ *See Judge Refuses to Remove Wall Shielding Bombing Jury*, L.A. TIMES, Apr. 27, 1997, at A14.

¹⁸⁷ *Id.*; Iver Peterson, *Press Seeks an End to Trial's Secrecy*, N.Y. TIMES, Apr. 25, 1997, at A24.

¹⁸⁸ United States v. McVeigh, 964 F. Supp. 313, 316 (D. Colo. 1997).

¹⁸⁹ *See Judge Refuses to Remove Wall Shielding Bombing Jury*, L. A. TIMES, at A14.

¹⁹⁰ United States v. McVeigh, 918 F. Supp. 1467 (D. Colo. 1996).

¹⁹¹ United States v. McVeigh, 955 F. Supp. 1281, 1282 (D. Colo. 1997).

E. 1993 World Trade Center Bombing Cases

Almost immediately, the events of September 11, 2001, reminded New Yorkers and those around the country of another attack on the World Trade Center nearly ten years earlier. On February 26, 1993, a group of Middle Eastern men trained at a terrorist camp on the Afghanistan-Pakistan border drove a rented Ryder van carrying a homemade bomb into the below-ground parking lot on the B-2 level of the World Trade Center Complex. At 12:18 p.m., the bomb exploded, killing six people, injuring hundreds of others, and causing hundreds of millions of dollars in damage. A thorough investigation – aided by one of the attackers inexplicably returning to the Ryder truck rental agency to claim his deposit – ultimately led to a multitude of federal charges against sixteen individuals that were detailed initially in a 150-page indictment. Each was tried and convicted in two separate public trials in the United States District Court for the Southern District of New York.¹⁹²

The first trial presided over by Judge Duffy involved six defendants charged with multiple offenses relating directly to the bombing of the World Trade Center. “Smothering” and “stringent” security was summoned to ensure the safety of trial participants and spectators. Precautions included hundreds of extra police officers outside the courthouse, dozens of armed federal marshals inside the courthouse, a separate metal detector at the courtroom entrance, sealing windows, and an extra layer of screening for visitors.¹⁹³ Despite all of the concerns and the need to establish specific protocols to screen visitors, which included requiring spectators to sign in and present identification, no suggestion was made to close the trial. To the contrary, the specific courtroom for the trial was chosen in part because of its size – it holds approximately 150 spectators. Twenty-five percent of the public seating in the courtroom was reserved for journalists covering the trial.¹⁹⁴

Other efforts to accommodate public interest in the proceedings also were made. During jury selection, Judge Duffy conducted interviews with prospective jurors in private when asking them about their “personal” reasons for not wanting to be on the jury. These closed proceedings were not secret, however. Although the individual jurors were referred to only by their numbers to ensure anonymity, at the end of the day, transcripts of the private sessions were released to the public.¹⁹⁵

The trial lasted for five months and involved over 1000 exhibits and 200 witnesses. The government meticulously took the jury and spectators in the courtroom through every aspect of the preparation and attack. Evidence was presented showing that two of the defendants met at a terrorist training camp known as “Camp Khaldan,” where they learned to construct homemade explosive devices and hatched a plot to use their newly acquired skills to attack targets in the United States. Testimony and documents established how and when

¹⁹² See *United States v. Salameh*, 152 F.3d 88, 105-08 (2d Cir. 1998); *United States v. Rahman*, 189 F.3d 88, 102-05 (2d Cir. 1999).

¹⁹³ See Scott Ladd, *Security Tight Around Courthouse*, NEWSDAY, Aug. 26, 1993, City Edition at 6; William K. Rashbaum and Scott Ladd, *Secured for Trouble; A tight net for bombing trial*, NEWSDAY, Sept. 9, 1993, City Edition at 8. Some criticized security precautions as discouraging Arab reporters and spectators from attending the trial. See Ron Scherer, *Muslims Watch N.Y. Trial, But Only From a Distance*, THE CHRISTIAN SCIENCE MONITOR, Dec. 2, 1993, at 2.

¹⁹⁴ See Scott Ladd, *Security Tight Around Courthouse*, at 6.

¹⁹⁵ See *Jury selection begins in N.Y. bombing trial*, HOUSTON CHRONICLE, Sept. 15, 1993, at A4.

those defendants entered the United States and recruited the rest of their team. Step by step, the government explained the execution of the plan, from the source of financing, to the acquisition of the ingredients for a bomb, to its assembly and detonation.¹⁹⁶

The evidence presented included a videotape and notebooks containing instructions on how to make explosives and timing devices; a document encouraging acts of terrorism against the enemies of Islam entitled, "Facing the enemies of God / terrorism is a religious duty and force is necessary;" a book containing instructions on how to demolish buildings with explosives; and homemade nitroglycerine and other bomb making ingredients seized from a Jersey City storage facility used by the defendants.¹⁹⁷ The government also presented evidence about the impact of the attack through testimony of rescue workers and photographs of some of the victims.¹⁹⁸ All of this evidence was presented in open court, with the public watching. All of the defendants were convicted of multiple crimes and sentenced to in excess of 100 years in prison.¹⁹⁹

The second trial, presided over by Judge Mukasey, involved a complex web of accusations that included but were by no means limited to rendering assistance to those who bombed the World Trade Center. In that trial, ten defendants were accused of conspiring to commit a slew of offenses in the course of a campaign to conduct "urban terrorism." In addition to assisting those who bombed the World Trade Center, the accusations against these defendants ranged from possession of fraudulent foreign passports, to planning to bomb bridges and tunnels in New York City and murder the President of Egypt, to killing Rabbi Meir Kahane.²⁰⁰

The trial took nine months, also under heavy security while remaining open to the public, in the federal courthouse in Manhattan.²⁰¹ The comprehensive presentation by the government revealed a complicated, wide-ranging conspiracy to carry out "jihad" against those the defendants had identified as enemies of Islam, including the United States and the secular Egyptian government. Sheik Omar Ahmad Ali Abdel Rahman, a blind Islamic scholar and cleric, was presented as the leader of the conspiracy. Evidence was adduced of his overall supervision and direction, sometimes through dispensing a "fatwa," or religious opinion that a particular course of conduct was holy and in furtherance of jihad. The formation of

¹⁹⁶ See *Salameh*, 152 F.3d at 107-08; Robert L. Jackson & John J. Goldman, *4 Found Guilty in Plot to Bomb N.Y. Trade Center; Terrorism: Muslim Extremists Are Convicted a Year After the Blast that Killed Six and Injured 1,000. Verdict Is Met with Angry Outbursts in Manhattan Courtroom*, LOS ANGELES TIMES March 5, 1994, at A1.

¹⁹⁷ *Id.* at 110, 112.

¹⁹⁸ *Id.* at 122.

¹⁹⁹ See *United States v. Salameh*, 261 F.3d 271, 274-75 (2d Cir. 2001).

²⁰⁰ See *United States v. Rahman*, 189 F.3d 88, 103-04 (2d Cir. 1999).

²⁰¹ Security precautions included police sharpshooters on the roof of the courthouse, a score of federal marshals inside the courtroom, and daily patrols by a bomb-sniffing dog. Robert L. Jackson, *Terror Plot Trial Opens for Sheik, 11 Followers; Courts: Prosecution Paints Picture of Radicals Bent on Vast Destruction in N.Y. Defense Portrays Charges As Empty Talk, Religious Rhetoric*, LOS ANGELES TIMES, Jan. 31, 1995, at A20; *Sheik and nine others convicted in bomb plot; Holy war against U.S. charged; one is guilty of killing radical rabbi*, THE BALTIMORE SUN, Oct. 2, 1995, at 1A.

Rahman's jihad army, made up of small "divisions" and "battalions," was detailed, along with numerous specific actions taken by its members.²⁰²

The breadth of the conspiracy resulted in a six-month long presentation by the government. The shooting of Rabbi Meir Kahane, which could have been a trial itself, was described. Preparations and planning for the bombing of the World Trade Center and the Lincoln and Holland tunnels were meticulously detailed through documents and the government's key witness at trial, an undercover informant named Emad Salem who had ingratiated himself with Rahman and was taken into the fold by the conspirators.²⁰³ On the other side, the defendants called 71 witnesses over the course of two months. It was not, however, enough. Each defendant was convicted on various counts, with sentences ranging from 25 years to life.²⁰⁴

While there were minor skirmishes over access to a few specific documents and the Court's efforts to limit prejudicial publicity in both cases, at no point did anyone suggest or even seem to consider that the proceedings be closed to the public. For example, at one point Judge Duffy *sua sponte* entered a gag order prohibiting counsel for all parties from publicly discussing the case. As Judge Duffy put it at the time:

There will be no more statements [in the press, on TV, in radio, or in any other electronic media] issued by either side or their agents. The next time I pick up a paper and see a quotation from any of you, you had best be prepared to have some money. The first fine will be \$200. Thereafter, the fines will be squared.²⁰⁵

The order was quickly vacated by the Second Circuit, which found it to be overly broad and unsupported by any findings that it was either necessary or the least restrictive alternative.²⁰⁶

In the second trial, Judge Mukasey received multiple motions challenging a series of protective orders that precluded disclosure of the contents of discovery materials produced by the government to defense counsel, including transcripts reflecting conversations recorded pursuant to wiretap orders and by a government informant. The tapes were made at his own behest by Salem, who apparently taped, among other things, some of his conversations with his FBI handlers. After the government learned of the tapes, it obtained them from Salem, had them transcribed, and disclosed any relevant portions to defense counsel. Despite the protective order, both *Newsday* and *The New York Times* obtained copies of the transcripts and published several stories summarizing and excerpting the tapes.²⁰⁷

²⁰² United States v. Rahman, 189 F.3d at 103-05.

²⁰³ *Id.* at 104-12.

²⁰⁴ *Id.* at 111.

²⁰⁵ *See* United States v. Salameh, 992 F.2d 445, 446 (2d Cir. 1993).

²⁰⁶ *See id.* at 447.

²⁰⁷ *See In re* Application of New York 1 News, No. S393Cr.181 (MBM), 1994 U.S. Dist. LEXIS 612, at *1-2 (S.D.N.Y. Jan. 15, 1994).

In separate motions at different times, freelance writer Stephen L. Pope and cable channel New York One and CBS sought to vacate the protective order. Finding “a substantial likelihood that release of the tapes would have an impact not only on jury selection in this proceeding, but also on the ongoing prosecution in [the trial in front of Judge Duffy, which was underway at the time of the second motion], and on any grand jury investigation that may be in progress,” the Court refused to vacate the order.²⁰⁸ In his opinion, however, Judge Mukasey made a point of limiting his order to the pre-trial phase of the proceeding:

There is nothing in the ... order that places these tapes permanently beyond the reach of intervenors and others. There is no reason why the tapes cannot be released either during the trial, if they are introduced in evidence, or after the trial if they are not.²⁰⁹

While a reasonable argument certainly can be made that Judge Mukasey’s refusal to vacate the original order was inappropriate given that the information already was in the public domain, even he did not attempt to extend the secrecy to the trial itself.

Judge Mukasey used a similarly specific approach when dealing with the sealed portions of the trial transcript, consisting primarily of robing room conferences. In response to the Judge’s proposal to unseal nearly all of the transcript, the government argued that certain pages should remain sealed. In detailed findings, Judge Mukasey unsealed all of the pages of the transcript except for those which contained: confidential intelligence-gathering activities, information regarding safety of persons who have provided information to the government, information that could compromise ongoing investigations, information that could compromise the anonymity or privacy of jurors, prejudicial information to the defendant, and, confidential information disclosed by the government to which defendants were found to have no right of disclosure.²¹⁰

Each of these categories of information obviously was involved in the prosecution of the terrorists involved in the 1993 World Trade Center bombing and other plots to commit terrorist acts against the United States, and each was effectively protected from public disclosure by established law and procedure applied to a public trial. There was no need to conduct those proceedings in secret.

A. al Qaeda I

On January 3, 2001, four alleged members of al Qaeda who had been jointly charged with Osama bin Laden in a far-reaching indictment went on trial in United States District Court for the Southern District of New York on a variety of charges arising out of their alleged participation in the 1988 bombings of two United States embassies in East Africa. Extraordinary security measures, among other things, resulted in unprecedented restrictions on public access to portions of the proceedings. Nonetheless, the trial itself was public, as any future trials of al Qaeda members or sympathizers also could be.

²⁰⁸ *Id.*; United States v. Rahman, No. S393Cr.181 (MBM), 1993 U.S. Dist. LEXIS 15404 (S.D.N.Y. Nov. 2, 1993).

²⁰⁹ *See In re Application of New York 1News*, 1994 U.S. Dist. LEXIS 612, at *9.

²¹⁰ *See United States v. Rahman*, No. S593Cr. 181(MBM), 1996 U.S. Dist. LEXIS 4968 (S.D.N.Y. Apr. 17, 1996).

The initial indictment charged fifteen individual defendants with 267 discrete criminal offenses in furtherance of or complementing six conspiracies that had the same four objectives: (1) murder of U.S. nationals; (2) killing of U.S. military personnel stationed in Somalia and on the Saudi Arabian peninsula; (3) killing of U.S. nationals employed at the U.S. embassies in Kenya and Tanzania; and (4) concealment of their activities using a variety of means.²¹¹ The conspiracy was alleged to span at least ten years, during which time al Qaeda organized, financed, inspired, and facilitated violent attacks against United States personnel and property abroad. Overt acts are alleged throughout the world – from Pakistan to the Sudan to the United Kingdom to California. Activities purportedly in furtherance of the conspiracy range from detonating explosives and transporting weapons to establishing businesses and lecturing.²¹²

The pinnacle of the criminal enterprise, at the time, was the near simultaneous truck-bombing of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, on August 7, 1998. Two-hundred twenty-four people, including 12 Americans, were killed, and over 4,500 others were injured. Trial preparation took over two years due to “the complexity of the charges, the voluminous discovery ... the location of many relevant documents and witnesses in various countries around the world, special procedures for handling classified material, the need to translate literally thousands of documents, and the potential availability of capital punishment for some of the Defendants.”²¹³ During that time, the Court started down the path of what would end up being unparalleled limitations on public access to the proceedings, which nevertheless pale in comparison to the notion of a closed trial. Once again, this experience demonstrates the ability to successfully prosecute terrorists, specifically members of al Qaeda, without the need to resort to secret trials.

Although no one knew it at the time, the clandestine court proceedings began with two secret plea agreements involving al Qaeda supporters. The first came to light when a docket sheet listed a scheduled hearing in “United States v. John Doe.” At the hearing in December 1998, which was open, the prosecutor reported to the court that plea negotiations were ongoing, without identifying the defendant. The defendant turned out to be Ali A. Mohamed, a former United States Army sergeant accused of conspiring with Osama bin Laden.²¹⁴ The subject of the second secret plea agreement was not identified until he testified at trial. Having secretly pled guilty to terrorism in 1996 and now cooperating with the FBI, he was referred to in all pre-trial documents and hearings as CS-1.²¹⁵ Judge Sand also closed the courtroom during at least two pre-trial hearings and sealed relevant documents in the al Qaeda case while defense counsel objected to the isolated, high-security jail conditions under which the defendants were being held.²¹⁶ Despite the closure of specific

²¹¹ See *United States v. Bin Laden*, 92 F. Supp. 2d 225, 227-28 (S.D.N.Y. 2000).

²¹² *Id.* at 229, 234-35.

²¹³ *Id.* at 232.

²¹⁴ See Benjamin Weiser, *Reporter's Notebook; Many Layers of Secrecy Shroud Terrorism Cases*, N.Y. TIMES, Dec. 26, 1998, at B3.

²¹⁵ See Benjamin Weiser, *Secret Witness Set to Testify In Terror Trial*, N.Y. TIMES, Feb. 5, 2001, at B1.

²¹⁶ See Benjamin Weiser, *Reporter's Notebook; Many Layers of Secrecy Shroud Terrorism Cases*, N. Y. TIMES Dec. 26, 1998, at B3; Benjamin Weiser, *Lawyers in Terror Case Say Client Access Was Blocked*, N. Y. TIMES, Nov. 17, 2000, at B4.

proceedings and documents, the bulk of the proceedings were conducted in open court. Moreover, recognizing the importance of open proceedings, early on the Court “set up a mechanism to ensure that non-sensitive court materials are released publicly as soon as practical.”²¹⁷

Once the trial began, Judge Sand continued his efforts to balance the need for secrecy at times with the general principle that the trial must, except in extraordinary circumstances, be open to the public. Jury selection, for example, was closed, based on the Court’s determination that openness would discourage prospective jurors from being candid about their views of capital punishment. Judge Sand also ruled that the identity of the jurors would not be released at any time.²¹⁸ Similarly, when CS-1 took the witness stand, Judge Sand ordered the courtroom artists not to sketch him for security reasons.²¹⁹ The Court closed a hearing on whether to suppress a statement made by one of the defendants, citing witness safety and the risk of inadvertent disclosure of information that could impact the fairness of the trial and national security. However, Judge Sand also stated that he would release a transcript of the proceedings the following morning, after both the government and defense had an opportunity to delete material pertaining to the safety of witnesses or the substance of the statement at issue.²²⁰

At least two other closed hearings were held during the six-month trial. One arose after a defendant sought to issue a subpoena to CNN. A short hearing on the matter was closed to the public, although counsel for CNN was permitted to attend.²²¹ Another closed hearing dealt with issues relating to the penalty phase of the trial that arose prior to the jury returning with a verdict of guilt.²²²

The restricted access to many of these proceedings was challenged or criticized at the time, and legitimate questions can be raised about its constitutionality. Nonetheless, in the context of a trial that involved four months of testimony, 92 witnesses called by the prosecution, and over 1300 documents,²²³ the actual limitations on access were minimal. When word came down that a verdict was in, “Within minutes, the rows in the courtroom filled with visitors, including several dozen witnesses, victims and family members who had

²¹⁷ See Benjamin Weiser, *Reporter’s Notebook; Many Layers of Secrecy Shroud Terrorism Cases*.

²¹⁸ See Benjamin Weiser, *Jury Selection in Embassy Bombing Case Faces Hardship Challenges*, N. Y. TIMES, Jan. 4, 2001, at B1.

²¹⁹ Benjamin Weiser, *Ex-Aide to bin Laden Describes Terror Campaign Aimed at U.S.*, N. Y. TIMES, Feb. 7, 2001, at A1.

²²⁰ See Benjamin Weiser, *Public Barred From Hearing in Bombing Trial*, N.Y. TIMES, Jan. 20, 2001, at B3. Citing *Press-Enterprise* and its progeny, counsel for *The Times* and other news media argued against the closure, asserting that closure to protect against accidental disclosure is at odds with the First Amendment. Rather, the media argued, the presumption of openness must carry the day unless and until a specific need for closure is demonstrated. The Court disagreed. *Id.*

²²¹ See Benjamin Weiser, *Fear Stifled Defense Case, Lawyer Says in Terror Trial*, N.Y. TIMES, Apr. 17, 2001, at B2.

²²² See Benjamin Weiser, *2 Strategies in Pleas for Life in Bombing Trial*, N.Y. TIMES, May 24, 2001, at B4.

²²³ See Benjamin Weiser, *The Terror Verdict: The Overview; 4 Guilty in Terror Bombings of 2 U.S. Embassies in Africa; Jury to Weigh 2 Executions*, N.Y. TIMES, May 30, 2001, at A1.

come to New York, some flown from Africa.”²²⁴ That development alone is the most compelling evidence of the unquantifiable and enduring value of an open trial.

V. Executive Powers Do Not Trump The Right of Access.

Recent experience with open trials against terrorists indicates that few circumstances legitimately warrant closure of a courtroom in a criminal trial. So long as the public’s First Amendment rights persist, therefore, closed trials should be hard to come by. It has been suggested, however, that with the President’s expanded powers during times of war comes a parallel reduction in civil rights, such as the free speech rights that give rise to the right to attend criminal trials. Whether or not that proposition may be true as a general matter, legal precedent precludes relying on such logic to support secret terrorist tribunals.

A. The President’s Article II Power As Commander In Chief During Wartime.

The primary source of authority cited for the post-September 11 Military Order’s various provisions, including the provision empowering the Secretary of Defense to regulate “closure of, and access to” the military tribunals, is the President’s power as “Commander in Chief of the Armed Forces” under Article II of the Constitution.²²⁵ In other words, the Order provides that the executive branch, not First Amendment principles, will determine whether the trials are open to the public. This raises the fundamental question of whether the President’s power during a time of war (albeit, an undeclared war) may be employed to curtail domestic civil liberties, including the First Amendment right of our civilian population and press to attend criminal trials. Whatever may be the broad scope of presidential power in prosecuting war, controlling constitutional principles and the factual circumstances of the current conflict prohibit the President from replacing First Amendment principles that ordinarily govern press access with unchecked executive fiat.²²⁶

²²⁴ *Id.*

²²⁵ Military Order, § 4(b) and (c) (4) (B).

²²⁶ One important open question is whether authority for the Military Order is premised solely on the President’s Article II war power, or is also supported by congressional legislation as well. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636-37 (1952) (Jackson, J., concurring) (“[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum for it includes all that he possesses in his own right plus all that Congress can delegate . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks the power.”).

In this regard, in addition to the President’s Article II powers, the Military Order also cites as authority the Authorization for use of Military Force Joint Resolution (Pub. No. 107-40, 115 Stat. 224). However, as its title suggests, the Resolution specifically and solely authorizes the President to use “force” against those involved with the September 11 attacks. It makes no mention of military tribunals, much less authorize the President to try suspected terrorists by way of military tribunals closed to the public.

As a second source of claimed congressional authority, the Order also cites Articles 21 and 36 of the Uniform Code of Military Justice (10 U.S.C. §§ 821 and 836), which is a 51 year old statute that attempted to introduce due process from the civilian criminal justice system into a command-driven military paradigm. *See, e.g.,* Brig. Gen. John S. Cooke, Ret’d, *Fiftieth Anniversary of the Uniform Code of Military Justice*, 165 MIL. L. REV. 1 (2000). Article 21 provides that the court-martial system established under the UCMJ does not dislodge military tribunals of “concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by . . . military tribunals”; and Article 36 provides that in

It is “beyond cavil that the President has broad powers by virtue of . . . his position as Commander in Chief.”²²⁷ Yet, while the President is undoubtedly imbued with added authority in time of war, the constitutional “purpose of lodging dual titles in one man was to insure that the civilian would control the military” and, accordingly, a President cannot “escape control of executive powers . . . through assuming his military role.”²²⁸ Thus, while war-time presidents from Lincoln to Truman have not infrequently invoked the ancient Roman maxim *Inter Arma Silent Leges* -- “in times of war the laws are silent” -- as justification for executive curtailment of domestic civil rights, this principle of executive fiat in times of war has been repudiated several times by the Supreme Court as repugnant to our republican values.

In the civil war case of *Ex Parte Milligan*,²²⁹ for example, a group of civilians in Indiana were tried and convicted by a military tribunal for conspiring against the United States. Milligan thereafter sought a writ of habeas corpus for his release, arguing that a military court had no authority to try civilians who were not in a theater of war, and that he had been denied his Fifth and Sixth Amendment rights to indictment by grand jury and “public trial by an impartial jury.”²³⁰ Defending the executive’s actions, Attorney General Speed asserted that “[d]uring the war [the President’s] powers must be without limits” and that, “in truth”, the guarantees of the Bill of Rights “are all peace provisions of the Constitution [that], like other conventional and legislative laws . . . , are silent amidst arms.”²³¹ Rejecting the Government’s broad contention that civil liberties may be suspended in time of war, Justice Davis wrote in the Court’s majority opinion:

cases under the UCMJ the President may prescribe by regulation the procedures for military commissions. This power, however, is subject to an important qualification. Article 36 specifies that the procedures promulgated by the President “may not be contrary to or inconsistent with this chapter [i.e., the UCMJ].” 10 U.S.C. § 836. As discussed above, contrary to the Military Order, the Court of Military Appeal has held that a First Amendment right of access applies to court-martial proceedings under the UCMJ. *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985). *See also* R.C.M. 806 (b) (“courts-martial shall be open to the public”). We therefore conclude that Sections 21 and 36 of the UCMJ do not constitute congressional authorization for the President to try suspected terrorists in secret. As one legal scholar has generally noted in criticizing the President’s invocation of the UCMJ as evidence of congressional ratification of his Military Order, “[t]he dusting off of an old statute passed for an entirely different purpose and in another era raises significant constitutional concerns when that statute is used to justify the deprivation of individual rights.” *Testimony of Neal Katyal*, SENATE JUDICIARY COMMITTEE – DOJ OVERSIGHT: PRESERVING OUR FREEDOMS WHILE DEFENDING AGAINST TERRORISM (Visited Feb. 5, 2002) <<http://judiciary.senate.gov/te112801f-katyal.htm>>.

²²⁷ *New York Times v. United States*, 403 U.S. 713, 741 (1971) (Marshall, J. concurring).

²²⁸ *Youngstown Sheet & Tube Co.*, 343 U.S. at 646 (Jackson, J., concurring). *See also* *Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1944) (Murphy, J., concurring), (“[t]he supremacy of the civil over the military is one of our great heritages”) Indeed, the first charge lodged against King George III in the Declaration of Independence was that “[h]e has affected to render the military independent of and superior to the civil power.” THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

²²⁹ 71 U.S. 2 (1861).

²³⁰ *Ex Parte Milligan*, 71 U.S. 2.

²³¹ *Id.* at 29, 32. The Government’s position that civil liberties have no application in wartime was vehemently denounced by Milligan’s lawyer, James Garfield (later 20th President of the United States):

Such a doctrine, may it please the court, is too monstrous to be tolerated for a moment . . . [A] republic can wield the vast engineering of war without breaking down the safeguards of liberty; can suppress insurrection

The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.²³²

On the facts before it, the *Milligan* majority held that the Constitution prohibits military trials of civilians outside of war zones when the civilian courts are open and functioning - - as they were in Indiana. More important to the issues of First Amendment access, the *Milligan* Court established a rule (frequently echoed in later Supreme Court decisions) that only “actual” military “necessity” can constitutionally justify executive abrogation of domestic civil rights during wartime or crisis.²³³

Milligan's constitutional requirement of actual military necessity was likewise applied in *Duncan v. Kahanamoku*,²³⁴ which arose from the declaration of martial law in Hawaii following the Japanese attack on Pearl Harbor in December 1941. Even though bars, places of amusement and other aspects of Hawaiian society were functioning again by February 1942, the military authorities barred the civil courts from trying even routine criminal cases and, instead, all civilians were tried in military courts without juries until martial law was lifted in October 1944. The two petitioners in *Duncan* -- a civilian stockbroker convicted of embezzlement and a civilian shipfitter convicted of brawling with marines -- thereafter challenged the constitutionality of their trials by military tribunal. Justice Murphy's opinion concurring in the Court's grant of habeas corpus captures the exacting and extremely heavy burden the Government must meet before constitutional rights of citizens may be stripped away in wartime:

and put down rebellion, however formidable, without destroying the bulwark of the law; can, by the might of its armed millions, preserve and defend both nationality and liberty.

See REHNQUIST, *supra* note 38, at 123. Another of *Milligan's* counsel, David Field, also retorted with understated wit:

Much confusion of ideas has been produced by mistaking executive power for kingly power. Because in monarchical countries the kingly office includes the executive, it seems to have been inferred that, conversely, the executive carries with it the kingly prerogative. Our executive is in no sense a king, even for four years.

Milligan, 71 U.S. at 52.

²³² *Milligan*, 71 U.S. at 120-21. See also REHNQUIST, *supra* note 38, at 137 (“The *Milligan* decision is justly celebrated for its rejection of the government's position that the Bill of Rights has not application in wartime”).

²³³ Thus, the *Milligan* Court held that “[i]f in foreign invasion or civil war, the courts are actually closed, . . . [and] there is a necessity to furnish a substitute for the civil authority, thus overthrown, . . . it is allowed to govern by martial rule until the laws can have their free course.” *Id.* at 127. The Court cautioned, however, that “[t]he necessity must be actual and present” and that, “[a]s necessity creates the rule, so it limits its duration; for if [martial rule] is continued after the courts are reinstated, it is a gross usurpation of power.” *Id.* at 127.

²³⁴ 327 U.S. 304 (1946).

There can be no question but that when petitioners were subject to military trials on August 25, 1942 and March 2, 1944, respectively, the territorial courts of Hawaii were perfectly capable of exercising their normal criminal jurisdiction had the military allowed them to do so In short, the bill of Rights disappeared by military fiat rather than by military necessity.

* *

We may assume that the threat [of future Japanese attacks on] Hawaii was a real one; we may also take it for granted that the general declaration of martial law was justified. But it does not follow that the military was free under the Constitution to close the civil courts or to strip them of their criminal jurisdiction, especially after the initial shock of the sudden Japanese attack had been dissipated.

From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised. The right to a jury trial and other constitutional rights . . . are too fundamental to be sacrificed merely through a reasonable fear of military assault. There must be some overpowering factor that makes recognition of these rights incompatible with the public safety before we should consent to their temporary suspension.²³⁵

Claims that presidential war powers are “unlimited” and justify curtailment of domestic rights were likewise rejected in the Steel Seizure case.²³⁶ There, during the height of the Korean War, President Truman - - in the face of congressional enactments to the contrary - - ordered seizure of the nation’s steel mills to ensure that labor-management disputes would not interrupt steel production for the war effort.²³⁷ In joining the Court’s

²³⁵ *Id.* at 327, 329-30 (Murphy, J., concurring). One of the few instances where the Supreme Court has upheld government claims of military necessity as justification for abrogating domestic civil rights was the infamous *Korematsu* case, 323 U.S. 214 (1944), involving the forced internment of Japanese-Americans during World War II based on fears that some might be loyalists or spies for the Japanese government. As noted by Chief Justice Rehnquist, “[p]ostwar public opinion reached the conclusion that the forced relocation and detention of the entire population of Japanese on the West Coast was a grave injustice, and that the Court was too willing to heed the claim of ‘military necessity.’” REHNQUIST, *THE SUPREME COURT* 145 (1987). See also *id.* at 274 (“a governmental order classifying people solely on the basis of race without any inquiry into disloyalty in a particular case strains the bounds of the Constitution even in time of war”). In 1988, Congress passed The Civil Liberties Act, 50 U.S.C. App. § 1989, apologizing to Japanese-Americans for the World War II internment program.

²³⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²³⁷ Reminiscent of the executive claims made in *Ex Parte Milligan*, the government’s lawyer in the Steel Seizure case, Assistant Attorney General Holmes Baldrige, argued to the district court judge that the President held “unlimited power” during times of national emergency:

When Baldrige advanced the theory of absolute power, Judge Pine interrupted with, ‘Is that your concept of Government?’

Baldrige said that it was.

holding that Truman had exceeded his constitutional “war powers”, Justice Jackson stated in his now-famous concurring opinion:

‘[N]o doctrine that the court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the nation’s armed forces to some foreign venture.

* * *

. . . I should indulge the widest possible latitude of interpretation to sustain [the President’s] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no indulgence. His command structure . . . is subject to limitations consistent with a constitutional Republic. . . . What the power of command may include I do not try to envision, but I think it is not a military prerogative . . . to seize persons or property because they are important or even essential for the military and naval establishments.²³⁸

The constitutional principle of narrowly confining the power of wartime presidents to curtail domestic civil liberties prohibits any effort to displace the First Amendment guarantees governing public and press access to criminal trials of suspected terrorists. No claim of actual military necessity has been proffered by the President as justification for the Military Order’s secrecy provision; nor do we believe such a claim could be made.

The events of September 11 were horrifying, and a credible threat of future terrorist attacks surely exists. Yet, as Justice Murphy observed in *Duncan* (which similarly involved the surprise attack on Pearl Harbor and a real threat of further attacks), the constitutional rights of our citizenry “are too fundamental to be sacrificed” even when there exists a reasonable fear of future attacks upon our shores. Since shortly after September 11, our court system and civil administration have been fully functioning - - and, indeed, the fact that Zacharias Moussaoui (the suspected 20th hijacker), John Reid (the foiled sneaker bomber) and John Walker (the American Taliban fighter) are being tried in open court proceedings renders dubious any claim that holding military trials in secret is required by military necessity.

Chief Justice Rehnquist perhaps put it best: “It is all too easy to slide from a case of genuine military necessity, where the power sought to be exercised is at least debatable, to one where the threat is not critical and the power either dubious or non-existent.”²³⁹ Whatever may be the President’s constitutional power as Commander in Chief to wage war on

“Then the Constitution limits Congress and limits the Judiciary, but does not limit the Executive?” asked the judge “That is the way we read the Constitution,” replied the Assistant Attorney General.”

WASH. POST, Apr. 25, 1952.

²³⁸ *Youngstown*, 343 U.S. at 642, 645-46 (Jackson, J., concurring).

²³⁹ See REHNQUIST, *supra* note 38, at 224-25.

terrorism, it does not include holding terrorism trials in secret from the American public or press.

Perhaps the best illustration of the First Amendment protection afforded the public's right to know, even in wartime, is the Pentagon Papers case.²⁴⁰ There, during the Vietnam war, the contents of a classified study about American involvement in the war were purloined from the Department of Defense and leaked to *The New York Times* and the *Washington Post*. The Nixon administration promptly sought a prior restraint enjoining further publication of the Pentagon Papers on national security grounds, arguing that "the authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from . . . the constitutional power of the President . . . as Commander-in-Chief."²⁴¹ Affirming the fundamental First Amendment principle that prior restraints of the press are presumptively unconstitutional, Justice Brennan noted in his concurring opinion that, even when the nation is at war, enjoining the press is constitutionally impermissible except in the most extreme and narrow case where "publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea."²⁴² Finding that the President's allegations that publication of the Pentagon Papers "could" or "might" harm national security were constitutionally insufficient to justify the extraordinary remedy of a prior restraint, Justice Stewart pointed out in his concurring opinion precisely why the press and public must have meaningful access to information about government activities *particularly* during wartime:

In the governmental structure created by our Constitution, the Executive is endowed with enormous powers in the two related areas of national defense and international relations . . .

In 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 enlightened citizenry -- in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.²⁴³

The Pentagon Papers case (the most recent of the wartime civil liberties cases) reinforces that the Military Order cannot constitutionally strip away First Amendment press access rights.

Last, while the Administration has relied on *Ex Parte Quirin*²⁴⁴ as precedent for using military tribunals to try *non-citizens* for acts of terrorism and crimes of war, *Quirin* provides

²⁴⁰ *New York Times v. United States*, 403 U.S. 713 (1971).

²⁴¹ *Id.* (Black, J., concurring) (quoting Brief for the United States at 13-14).

²⁴² *Id.* (Brennan, J., concurring). "[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *Id.* at 726.

²⁴³ *Id.* (Stewart, J., concurring).

²⁴⁴ 317 U.S. 1 (1942).

no support for denying the U.S. public and press access to those trials. In *Quirin*, the Supreme Court held that Nazi saboteurs tried by military commission for espionage could claim no Fifth or Sixth Amendment protections (such as trial by jury in open court) because, at the time of the Constitution's adoption, no such protections had historically been afforded belligerents tried in military proceedings for offenses against the laws of war.²⁴⁵

Whatever *Quirin* has to say with regard to the constitutional protections -- including the Sixth Amendment right to a "public trial" -- of non-citizens in military tribunals, it is clear that the status of a defendant's constitutional rights cannot impair the independent First Amendment right of the U.S. public and press to demand that those proceedings be open (an issue not remotely addressed in *Quirin*).²⁴⁶

Indeed, in its First Amendment access decisions, the Supreme Court has repeatedly emphasized that "the First Amendment, of its own force . . . , secures the public an independent right of access to trial proceedings" that is wholly separate from the defendant's Sixth Amendment rights.²⁴⁷ It is not the presence or absence of the accused's right to public trial, but rather the paramount importance of allowing citizens to effectively observe and discuss the functioning of our government, that animates the right of access:

Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.' . . . By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican form of self-government.²⁴⁸

Neither the awesome power of the President in time of war, nor the asserted lack of rights of non-citizens tried for terrorism, serve as a basis for dispensing with First Amendment access principles.

²⁴⁵ *Id.* at 39-40.

²⁴⁶ For an excellent discussion of the constitutional issues surrounding the trial of suspected September 11 terrorists by way of military tribunals, see COMMITTEE ON MILITARY AFFAIRS AND JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, INTER ARMA SILENT LEGES: IN TIMES OF 'WAR' SHOULD THE LAWS BE SILENT?: A REPORT ON THE PRESIDENT'S MILITARY ORDER OF NOVEMBER 13, 2001 REGARDING 'DETENTION, TREATMENT, AND TRIAL OF CERTAIN NON-CITIZENS IN THE WAR AGAINST TERRORISM' (2002).

²⁴⁷ *Richmond Newspapers v. Virginia*, 448 U.S. at 584-85 (Brennan, J., concurring); *id.* at 576 (Burger, C.J., plurality op.) ("the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors"); *id.* at 599 (Stewart, J., concurring) ("the First and Fourteenth Amendments clearly give the press and the public a right of access to trials") *id.* at 604 (Blackmun, J., concurring) ("with the Sixth Amendment [right of the accused to a public trial] set to one side in this case, I am driven to conclude, as a secondary position, that the First Amendment must provide some manner of protection for public access to the trial"); *Press-Enterprise I*, 464 U.S. at 516 (Stevens, J., concurring) ("[t]he constitutional protection for the right of access . . . is found in the First Amendment rather than the public trial provision of the Sixth"); *Press-Enterprise II*, 478 U.S. at 7 ("[h]ere, . . . the right asserted is not the defendant's Sixth Amendment right to a public trial since the defendant requested a closed preliminary hearing. Instead, the right asserted is that of the public under the First Amendment").

²⁴⁸ *Globe Newspaper*, 457 U.S. at 604 (citations omitted).

B. Holding Military Tribunals Overseas Should Not Negate Public Right of Access

A related issue concerns the physical location of the military tribunals. It is quite possible that, for security reasons, terrorism trials of captured al Qaeda or Taliban members will be conducted on overseas U.S. military bases (for example, Guantanamo Bay, Cuba, where numerous Taliban fighters are now being held) or even aboard U.S. warships.²⁴⁹ And, in *Greer v. Spock*,²⁵⁰ a case unrelated to military trials, the Supreme Court upheld the general exclusion of the press and public from military bases on the ground that bases are not forums traditionally open to the public.²⁵¹

Whatever restrictions might otherwise govern public access to military bases under *Greer*, however, these limitations do not apply to public attendance at criminal trials held by military authorities. After all, the Court of Military Appeals squarely held in *Hershey* that the press and public have a First Amendment right to attend court-martial proceedings²⁵² - - which invariably occur on military bases or in theaters of operation. Additionally, the Manual for Courts-Martial provides that, while “[m]ilitary exigencies may occasionally make attendance at courts-martial difficult or impracticable, for example, when a court-martial is conducted on a ship at sea or . . . in a combat zone”, “[s]uch exigencies should not be manipulated to prevent attendance at a court-martial.”²⁵³

To date, the Administration has made no assertion that military exigencies require that trials of captured al Qaeda or Taliban members be conducted in an inaccessible combat zone (and, to the contrary, captured fighters suspected of terrorist activities have been relocated by the military to secure U.S. installations far from any fighting). We, therefore, believe that there is no credible logistical basis for denying media access to military trials of suspected terrorists.

Additionally, the fact that military trials of suspected terrorists may occur overseas, rather than in the United States, is similarly insufficient to place them beyond the legal reach of First Amendment access principles. Holding criminal trials in secret implicates the First Amendment rights of all American citizens to observe the proceedings; and, even in cases involving U.S. military proceedings abroad, the Supreme Court has held that the “constitutional protections for the individual [citizen] were designed to restrict the United

²⁴⁹ See, e.g., Elisabeth Bumiller, *Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, N.Y. TIMES, Nov. 15, 2001, at B6.

²⁵⁰ 424 U.S. 828 (1976).

²⁵¹ *Id.* at 838-40.

²⁵² *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985).

²⁵³ R.C.M. 806(a) discussion (1995). Prior to the 1985 decision in *Hershey*, one lower military court opinion did raise the possibility that restraints on public access to military installations could be used as a proxy for restricting access to courts-martial. *United States v. Czarnecki*, 10 M.J. 570, 572 n.3 (A.F.C.M.R. 1980) (“[m]embers of the public not otherwise authorized to be present upon a military installation are not so authorized by virtue of the trial of a court-martial on the installation”). Because *Czarnecki* predates the 1985 decision in *Hershey* that a First Amendment right of access applies to court-martials and is also at odds with the current Manual for Courts-Martials, we conclude that it is not good law.

States Government when it acts abroad, as well as here at home.”²⁵⁴ In *Reid v. Covert*, Justice Black sharply articulated this principle:

At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in

accordance with all the limitations imposed by the Constitution. . . .

* * *

This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are “fundamental” protect Americans abroad, we can find no warrant in logic or otherwise, for picking and choosing among the remarkable collection of “Thou shalt nots” which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.²⁵⁵

We accordingly conclude that, whether military trials are held in the United States, at foreign U.S. bases or at sea, provision must be made for press and public access under First Amendment principles.

VI. Special Procedures In Cases Involving Classified and National Security Information.

Regardless of where they are conducted, perhaps the most convincing reason for open trials of accused terrorists is that the framework to overcome the government’s primary justification for closure – protection of classified and national security information -- already exists. In 1980, Congress passed the Classified Information Procedures Act (“CIPA”).²⁵⁶ CIPA creates a roadmap for courts to follow when dealing with classified information in the context of a criminal trial. It does not establish or alter any substantive rights, instead focusing on ensuring that the rights of criminal defendants and others are effectively protected while giving appropriate consideration to the importance of protecting certain information in the interest of national security.

At the time it was promulgated, CIPA primarily targeted classified information already in the hands of a criminal defendant. Greymail – the common name for the tactic employed when a defendant threatens to disclose classified information during the course of the trial in the hopes of persuading the prosecution to drop the case – had been a growing problem. CIPA established a procedural mechanism for dealing with classified information so as to eliminate the pre-trial uncertainty that generates the defendant’s leverage in a greymail

²⁵⁴ *Reid v. Covert*, 354 U.S. 1, 7 (1957).

²⁵⁵ *Id.* at 5-6, 8-9.

²⁵⁶ Classified Information Procedures Act, 18 U.S.C. app. 3 § 1, *et seq.* (2000). (hereinafter “CIPA”).

situation.²⁵⁷ CIPA as applied, however, also encompasses circumstances where classified information initially exists only in the hands of the prosecutor.²⁵⁸

A. The Operation of CIPA

The statute is relatively complex, but its operation ultimately is quite simple. The first section of CIPA defines the type of information impacted -- classified and national security information. The law explicitly takes the decision as to what qualifies as classified or national security out of the hands of the court, defining what is covered as follows:

Any information or material that has been determined by the United States government pursuant to an Executive Order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security”

A court is not permitted to second-guess the government’s decision about the need for protecting any specific information, and in practice, courts have refused to do so. “[Q]uestions of national security and foreign affairs are ‘of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.’”²⁵⁹

Recognizing the importance of a criminal defendant’s right to a fair trial and the practical effect of case-law and rules requiring disclosure of certain information to the defendant, CIPA §§ 3 and 4 provide a mechanism for the government to ensure that classified information is disclosed only to the extent constitutionally required and that it will remain confidential throughout the pre-trial process. Section 3 requires the court to enter an order “to protect against the disclosure of any classified information disclosed by the United States to any defendant” Section 4 authorizes the court “to delete specified items of classified information from documents to be made available to the defendant through discovery” and “to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove.” Before substitution is authorized, the government must demonstrate to the court that a substitution is necessary, which can be done *in camera and ex parte*. This approach – permitting an *in camera* hearing to effectuate the substitution of comparable, non-classified information for classified information before it is turned over to the defendant -- ensures that his rights are protected and ultimately that the public’s access to the trial is maximized without injuring national security.

²⁵⁷ *E.g.*, United States v. Pappas, 94 F.3d 795, 799 (2d Cir. 1996); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1363 (11th Cir. 1994); United States v. Collins, 720 F.2d 1195, 1197 (11th Cir. 1983).

²⁵⁸ *See, e.g.*, United States v. Bin Laden, No. S(7) 98 Cr. 1023 (LBS), 2001 U.S. Dist. LEXIS 719 (S.D.N.Y. Jan. 25, 2001).

²⁵⁹ United States v. Morison, 844 F.2d 1057, 1083 (4th Cir. 1988) (quoting Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)). *See also* United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990) (“We are not asked, and we have no authority, to consider judgements made by the Attorney General concerning the extent to which the information in issue here implicates national security.”); *Collins*, 720 F.2d at 1198, n.2 (“It is an Executive function to classify information, not a judicial one.”); United States v. Musa, 833 F. Supp. 752, 755 (E.D. Mo. 1993) (“The determination whether to designate information as classified is a matter committed to the executive branch. [Citations omitted.] This Court will not consider whether the government may have unnecessarily designated matters as classified which, in reality, do not affect the national security.”)

Following discovery, CIPA establishes a process that ensures that both parties are aware of what classified information will be permitted at trial and what will be excluded. A defendant is required, in advance, to provide timely notice if she intends to introduce classified information during the trial, either through documents or through witnesses (on direct or through anticipated cross-examination). After it receives a CIPA notice, the government can call for a pre-trial hearing to determine the use, relevance, and admissibility of the classified information.²⁶⁰ The court will hear argument *in camera* and inform the defendant and the government if any classified material will be admitted in the criminal trial. This process ensures that the government need not wait until trial, as ordinarily would be the case, for evidentiary rulings relating to sensitive information.²⁶¹

If the court finds classified information admissible, § 6 includes a separate provision that again gives the government the opportunity to substitute an unclassified summary, admit relevant facts, or redact unnecessary portions of documents. Should the court determine that the alternative proposed by the government “will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information,” the classified material will remain secret.²⁶²

Regardless of how the court rules on the question of admissibility or substitutions, the ultimate arbiter of whether or not classified information will be disclosed remains the Executive Branch. All that the Attorney General must do is file an affidavit with the Court objecting to disclosure of the classified information, and disclosure of that information is strictly prohibited regardless of the court’s evidentiary rulings.²⁶³ The Court cannot, under any circumstances, order public disclosure of classified information.

²⁶⁰ See CIPA § 6. A conflict exists among the Circuits as to whether the trial court should take the classified nature of the information into consideration when ruling on its admissibility. Some Circuits, including the 11th, have concluded that CIPA mandates that admissibility be determined strictly in accordance with ordinary rules of evidence, without considering the fact that it is classified. See *United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1985); *Collins*, 720 F.2d at 1199. Others, such as the 4th Circuit, have concluded that the classified nature of information demands a more stringent test for admissibility. In a CIPA § 6 hearing, the court must find the material to be at least “essential,” or “helpful” to the defense and “neither merely cumulative nor corroborative” before it is found admissible. *United States v. Smith*, 780 F.2d 1102, 1107-10 (4th Cir. 1985). Significantly, the stepped-up test for admissibility was adopted precisely because once found admissible, the evidence will become public at the trial.

²⁶¹ See, e.g., *Baptista-Rodriguez*, 17 F.3d at 1363-64; *Collins*, 720 F.2d at 1197. In one instance that we are aware of, CIPA was not applied pre-trial, but instead a CIPA hearing was called on the 55th day of trial. See *United States v. LaRouche Campaign*, 695 F. Supp. 1282 (D. Mass. 1988). In that case, defendants had sought to invoke CIPA pre-trial, but their efforts were rebuffed because either the information they proposed to disclose was not classified or the information sought from the government did not need to be disclosed. However, the government produced additional classified materials before trial that the court deemed disclosable. Finding that, “[r]egardless of the time when the issue comes to the court’s attention – whether before, during, or after trial – it would be fundamentally inconsistent with the intent Congress has manifested in CIPA regarding protection of classified information for a trial judge to bypass the provisions of section 4 regarding the procedures for determining whether documents not previously disclosed to defendants or their counsel should be disclosed pursuant to any discovery obligation,” the court convened a CIPA hearing mid-trial. *Id.*

²⁶² CIPA § 6(c)(1)(b). See *United States v. Clegg*, 846 F.2d 1221, 1224 (9th Cir. 1988); *Juan*, 776 F.2d at 258-59; *United States v. George*, 20 Media L. Rep. 1511 (D.D.C. July 23, 1992); *LaRouche*, 695 F. Supp. at 1286-89.

²⁶³ CIPA § 6(e). Once the Attorney General files an affidavit prohibiting disclosure, CIPA permits the court to dismiss the criminal charges unless the interests of justice would not be served, or impose some lesser penalty on the government to protect the defendant’s right to a fair trial. *Id.* In the 20 years that

CIPA contains a number of other provisions, each designed to ensure that classified information remains protected as much as possible. Section 7 provides for interlocutory review of any decision authorizing disclosure of information covered by CIPA²⁶⁴ or penalizing the government for refusing to disclose such information, and § 8 authorizes partial disclosure wherever feasible. Security procedures for handling classified information also are covered.²⁶⁵

As a practical matter, CIPA often has been invoked in cases legitimately involving classified information, as well as to combat greymail. In those instances, government substitutions frequently take the place of classified information during the public trial. Because CIPA also permits the court to dismiss the case if the government objects to disclosure of classified information deemed to be relevant, the prosecution possesses a strong motive to work to declassify or substitute other material. This incentive has resulted in scores of successful prosecutions in public view of terrorists, conspiracies, and other criminals who have obtained or been caught through classified techniques and information.

B. Access Under CIPA

CIPA, while authorizing closed proceedings in a number of instances, ultimately serves to provide public access to criminal trials in even the most sensitive cases. Closed proceedings under CIPA, from a broader perspective, are conducted precisely to ensure protection for sensitive government information during the course of a *public* trial.

CIPA mandates closed proceedings in certain limited circumstances which, on their face, appear to meet the *Press-Enterprise* standard. First, in the discovery context, CIPA sensibly authorizes *ex parte* submissions by the government and, where necessary, a closed, *ex parte* proceeding to discuss further those submissions. In *United States v. Rezaq*, for example, the government determined that certain classified information may have to be disclosed to the accused hijacker. The government filed an *ex parte, in camera* motion for a protective order and submitted additional information about how the documents may relate to the case at the

CIPA has been in effect, we could locate only one reported case of such a dismissal. In *Fernandez*, 913 F.2d 148, the district court dismissed all charges with prejudice against the former CIA Chief of Station in San Jose, Costa Rica. He had been charged by the Independent Counsel with making false statements and obstructing an internal CIA investigation in relation to what came to be known as the Iran-Contra affair. Fernandez sought to introduce certain classified documents to support his defense and the district court ruled that at least some of the information was relevant and admissible. The Attorney General then filed a § 6(e)(1) affidavit prohibiting disclosure of the information, and the court, finding that Fernandez's defense would be "eviscerated" without the classified material, dismissed all charges. The 4th Circuit upheld the decision. *Id.* at 164. Although potentially troubling, the outcome of this case appears to have been by design for political reasons, more than anything else. See, e.g., Eric M. Freedman, *Open Legal Questions Remaining after Iran-Contra* in *PRESIDENT REAGAN AND THE WORLD* 266-67 (Hofstra Univ. 1997). In his report to Congress, the Independent Counsel called for CIPA to be amended to shift authority from the Attorney General to the Independent Counsel for submitting a § 6(e)(1) affidavit in cases where an Independent Counsel has been appointed because a conflict of interest exists for the Attorney General. Otherwise, the Independent Counsel noted, the Attorney General has "the power to block almost any potentially embarrassing prosecution that requires the declassification of information." Final Report of the Independent Counsel for Iran/Contra Matters, vol. I, at xxi, Aug. 4, 1993, *quoted in* David I. Greenberger, *NOTE: An Overview of the Ethical Implications of the Classified Information Procedures Act*, 12 *Geo. J. Legal Ethics* 151, 161-62 (Fall 1988). Ironically, by the end of the Iran-Contra prosecutions, nearly all of the related classified information had become public, either through the courts, at the congressional hearings, or by the media, apparently with little or no adverse consequence for national security. See *Greenberger*, 12 *Geo. J. Legal Ethics* at 164.

²⁶⁴ See *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989).

²⁶⁵ See CIPA § 9.

request of the court. After reviewing the submissions, the court ruled that some of the materials were discoverable. The government then filed another *in camera, ex parte* motion to substitute unclassified admissions. After the court reviewed the government's submissions and concluded that they "fairly stated the relevant elements of the classified documents," the substituted admissions were disclosed to the defendant. Reviewing the case on appeal, the 4th Circuit found the district court's application of CIPA "commendable."²⁶⁶

The United States District Court for the District of New Jersey recently went even further. On June 21, 2000, a federal grand jury indicted reputed Philadelphia mobster Nicodemo Scarfo on charges of gambling and loansharking. Among other things, the government's evidence included material gathered from a "Key Logger System" that had been installed on Mr. Scarfo's computer. When Scarfo sought discovery to determine whether the KLS had been operating when Scarfo was communicating via modem, thereby illegally intercepting a wire communication without a warrant and rendering the information obtained inadmissible, the government invoked CIPA, stating that the characteristics and functional components of the KLS are classified. Pursuant to CIPA, the court held an *ex parte, in camera* hearing during which several high-ranking government officials presented the court with "detailed and top-secret, classified information regarding the KLS, including how it operates in connection with a modem."²⁶⁷ The court found some of the information should be disclosed, but that an unclassified summary "would be sufficient" for the defense. It then entered a protective order granting the defense access to the summary and sealing the transcript of the hearing and affidavits submitted by the government regarding the KLS.²⁶⁸

Second, CIPA § 6, which often is described as the "guts" of CIPA, authorizes a court to hold a closed pre-trial hearing on the relevance and admissibility of classified information, once the Attorney General has certified that an open proceeding may result in the disclosure of classified information. If the classified information is ruled inadmissible or if the court approves the substitution of unclassified material, the secret information remains confidential.²⁶⁹ Unlike in the discovery proceedings, defense counsel (and generally the defendant) participate in the § 6 hearing.

Finally, CIPA § 3 also provides a basis for limiting access in some circumstances, as courts have broadly interpreted the scope of permissible protective orders. In the first al Qaeda trial, for instance, the court ruled that CIPA authorizes additional restrictions on access by defendants. Judge Sand entered a protective order prohibiting any defendant from having

²⁶⁶ See *United States v. Rezaq*, 134 F.2d, 1121, 1142-43 (D.C. Cir. 1998); see also *Yunis*, 924 F.2d at 1094-95; *Yunis*, 867 F.2d 617; *United States v. Rahman*, 870 F. Supp. 47, 53 (S.D.N.Y. 1994) (sealing any materials that discuss the substance of classified information submitted for *in camera* review).

²⁶⁷ *United States v. Scarfo*, Criminal Action No. 00-404 (NHP), 2001 U.S. Dist. LEXIS 21561, *6-7 (D.N.J. Dec. 26, 2001).

²⁶⁸ *Id.*

²⁶⁹ See *United States v. Anderson*, 872 F.2d 1508, 1510, 1514-16 (11th Cir. 1989); *United States v. Smith*, 780 F.2d 1102, 1103; *George*, 20 Media L. Rep. 1511. If the court determines that the classified information must be admitted in its original form, the government then must decide whether or not to go forward with the prosecution, knowing the material will become public at trial. See *Collins*, 720 F.2d at 1197; *United States v. Bin Laden*, No. S(7) 98 Cr. 1023 (LBS), 2001 U.S. Dist. LEXIS 719, *4 (S.D.N.Y. Jan. 25, 2001). The Attorney General ultimately will determine whether the public interest is best served by prosecuting the individual or protecting the sensitive data. *Id.*; *Fernandez*, 913 F.2d 148.

access to classified information unless he had received “the necessary security clearance.”²⁷⁰ The effect of the order was to prohibit defendants from reviewing some of the materials disclosed by the government to their defense counsel (who had obtained security clearance) and from attending certain *in camera* hearings. Defendants challenged the constitutionality of the order, claiming that their inability to assist their counsel in preparing a defense and their inability to see the evidence against them violated a variety of rights arising from the Fifth and Sixth Amendments. Finding the government’s interest in non-disclosure of the information “compelling,” and having been presented with no evidence of specific, material harm, the district court rejected the challenge.²⁷¹

In one particularly unusual case, Judge Greene of the United States District Court for the District of Columbia relied on CIPA to preclude the news media from attending the videotaped deposition of former President Ronald Reagan that was being taken in lieu of requiring him to appear at trial in the criminal case against former National Security Advisor John Poindexter arising out of the Iran-Contra affair. Because of the unusual nature of the case and the witness, the Court determined that the deposition in fact will include an ongoing “CIPA-type hearing,” as the Court planned to rule on the relevance and admissibility of questions designed to elicit classified information during the deposition. After also finding that “national security concerns may be expected to permeate the questioning,” that it is “unforeseeable[]” when national security information will be revealed, and that there are no reasonable alternatives available during the deposition, the Court held that the media would not be permitted to attend the deposition. At the same time, implicitly recognizing the limitation of CIPA’s reach, Judge Greene ruled that a copy of the videotape would be released as soon as the classified information was redacted.²⁷²

On the other hand, CIPA clearly does not authorize closure or secrecy in any other context. Once a district court has made its discovery and evidentiary rulings, the constitutionally-mandated procedure outlined in *Press-Enterprise Co.* must be followed before a proceeding may be closed. For example, on August 6, 1985, a Ghanaian national was indicted for espionage. Eventually, the United States and Ghana negotiated a plea agreement which ultimately would result in the defendant being returned to Ghana in exchange for the release of a number of individuals being held by Ghana on charges of spying for the United States. The parties then moved, in papers filed under seal, to have the plea taken and sentencing conducted *in camera* without being docketed, and to have all of the pleadings and transcripts sealed. The district court granted the motion, relying on CIPA.²⁷³

In the meantime, a *Washington Post* reporter had begun looking into the case. The district court unsealed transcripts of the plea and sentencing hearings and some other documents, but others remained under seal. When the district court refused to unseal the additional information, the *Post* appealed the decision. The United States Court of Appeals for the 4th Circuit applied the “historical tradition” and “public purpose” test laid out in *Globe Newspaper*, and found that a right of access extends to the types of proceedings and documents sought by the newspaper. Rejecting the government’s argument that *Press-Enterprise* “should not apply where national security interests are at stake,” the Court ruled that the district court had erred by failing to provide public notice, an opportunity for the *Post*

²⁷⁰ See *Bin Laden*, 2001 U.S. Dist. LEXIS 719, at *5.

²⁷¹ *Id.*

²⁷² *United States v. Poindexter*, 732 F. Supp. 165 (D.D.C. 1990).

²⁷³ *In re Washington Post Co.*, 807 F.2d 383, 385-87 (4th Cir. 1986).

to be heard, or make findings on the record supporting closure.²⁷⁴ Substantively, the 4th Circuit found that CIPA is “simply irrelevant” to the merits of this type of closure petition, because the procedural statute has no bearing on whether closure is “essential to preserve higher values and is narrowly tailored to serve that interest.”²⁷⁵ CIPA authorizes an *in camera* hearing for the purpose of making advance evidentiary determinations regarding classified material, not for any other purposes.

CIPA has been successfully and effectively applied in a multitude of cases since it was first implemented. In some, the “greymail” tactics the statute was adopted to address prompted the process.²⁷⁶ Others legitimately involved classified information because of the nature of the crimes charged.²⁷⁷ Accused hijackers,²⁷⁸ drug dealers,²⁷⁹ mobsters,²⁸⁰ spies,²⁸¹ and terrorists²⁸² all have been prosecuted in open courts, with CIPA serving to effectively protect against the harmful disclosure of national secrets. There is no reason why these same procedures cannot be used in the tribunals authorized following September 11, 2001.

²⁷⁴ *Id.* at 390-92.

²⁷⁵ *Id.* at 393.

²⁷⁶ *See, e.g.*, United States v. Pappas, 94 F.3d 795 (2d Cir. 1996); United States v. Johnson, 139 F.3d 1359 (11th Cir. 1998); United States v. Byers, No. 90-5305, 1991 U.S. App. LEXIS 15228 (4th Cir. July 16, 1991); United States v. Juan, 776 F.2d 256 (11th Cir. 1985); United States v. Cardoen, 898 F. Supp. 1563 (S.D. Fla. 1995).

²⁷⁷ *See In re* Oliver L. North, 37 F.3d 663 (D.D.C. 1994); United States v. Baptista-Rodriguez, 17 F.3d 1354 (11th Cir. 1994); United States v. Fowler, 932 F.2d 306 (4th Cir. 1991); United States v. Fernandez, 913 F.2d 148 (4th Cir. 1990); United States v. Oliver L. North, 910 F.2d 843, 901-04 (D.C. Cir. 1990); United States v. Smith, 899 F.2d 564 (6th Cir. 1990); United States v. Ivy, Criminal Action No. 91-00602-04, 1993 U.S. Dist. LEXIS 13572 (E.D. Pa. Aug. 12, 1993); United States v. George, 20 Media L. Rep. 1511 (D.D.C. July 23, 1992); United States v. George, Criminal Action No. 91-0521 (RCL), 1992 U.S. Dist. LEXIS 10539 (D.D.C. July 16, 1992); United States v. George, Criminal Action No. 91-0521 (RCL), 1992 U.S. Dist. LEXIS 10493 (D.D.C. July 16, 1992); United States v. George, Criminal Action No. 91-0521 (RCL), 1992 U.S. Dist. LEXIS 9632 (D.D.C. June 24, 1992); United States v. George, 786 F. Supp. 11 (D.D.C. 1991); United States v. Poindexter, 732 F. Supp. 142, 153 n.43 (D.D.C. 1990); United States v. Poindexter, 725 F. Supp. 13 (D.D.C. 1989); United States v. Poindexter, 727 F. Supp. 1470 (D.D.C. 1989); United States v. North, 713 F. Supp. 1452 (D.D.C. 1989); United States v. North, 713 F. Supp. 1436 (D.D.C. 1989); United States v. North, 708 F. Supp. 399 (D.D.C. 1988); United States v. North, Criminal No. 88-0080-02, 1988 U.S. Dist. LEXIS 16008 (D.D.C. Dec. 12, 1988); United States v. North, 698 F. Supp. 322 (D.D.C. 1988).

²⁷⁸ *See, e.g.*, United States v. Rezaq, 134 F.2d 1121 (D.C. Cir. 1998); United States v. Rezaq, 899 F. Supp. 697 (D.D.C. 1995); United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991); United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989); United States v. Lopez-Lima, 738 F. Supp. 1404 (S.D. Fla. 1990).

²⁷⁹ *See, e.g.*, United States v. Klima Vicius-Viloria, 144 F.3d 1249 (9th Cir. 1998); United States v. Noriega, 117 F.3d 1206 (11th Cir. 1997); *Baptista-Rodriguez*, 17 F.3d 1354; *Juan*, 776 F.2d 256; United States v. Pringle, 751 F.2d 419 (1st Cir. 1984).

²⁸⁰ *See Pappas*, 94 F.3d 795; United States v. Scarfo, Criminal Action No. 00-404 (NHP), 2001 U.S. Dist. LEXIS 21561, *6-7 (D.N.J. Dec. 26, 2001).

²⁸¹ *See, e.g.*, United States v. Wen Ho Lee, 90 F. Supp. 2d 1324 (D.N.M. 2000); United States v. Miller, 874 F.2d 1255 (9th Cir. 1989); United States v. Smith, 780 F.2d 1102 (4th Cir. 1985); United States v. Smith, 592 F. Supp. 424 (E.D. Va. 1984).

²⁸² *See, e.g.*, United States v. Bin Laden, No. S(7) 98 Cr. 1023 (LBS), 2001 U.S. Dist. LEXIS 719, *4 (S.D.N.Y. Jan. 25, 2001); United States v. Bin Laden, 58 F. Supp. 2d 113 (S.D.N.Y. 1999); United States v. Rahman, 870 F. Supp. 47 (S.D.N.Y. 1994).

VII CONCLUSION

Terrorists will continue to be prosecuted by the United States Government. They may be brought before a federal court or a military tribunal, either in the United States or beyond our borders. So long as citizens or non-citizens are being brought to justice by the United States Government for alleged crimes committed against U.S. citizens, institutions, governments, or other U.S. interests, the public and press have a First Amendment right of access to those proceedings. The President may not take that right away just because there is a war. Nor is it in the interest of the United States to portray itself to the rest of the world as a country unwilling to open its criminal proceedings to inspection, criticism and review.²⁸³

This Report makes clear that just results come from openness. Secretiveness does little more than cloak corruption and prevent the community from seeing justice be done. National security concerns are extremely important, and the law correctly permits classified information to be excised from criminal proceedings. But closure must be extremely limited and the heavy presumption of openness must apply.

²⁸³ The U.S. State Department has repeatedly criticized the use of military tribunals to try civilians and other similar limitations on due process around the world. For example, the State Department described the Burmese court system, in its most recent Country Reports, as “seriously flawed, particularly in the handling of political cases,” where trials are not open to the public and military authorities dictate the verdicts. *See Fact Sheet: Past U.S. Criticism of Military Tribunals* (Human Rights Watch Press release, Nov. 28, 2001) (citing additional examples in China, Colombia, Egypt, Kyrgyzstan, Malaysia, Nigeria, Peru, Russia, Sudan, and Turkey).

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