FIRST AMENDMENT — RIGHT OF ACCESS — D.C. CIRCUIT HOLDS PRESS CANNOT UNSEAL CLASSIFIED VIDEOS OF GUANTANAMO BAY DETAINEE. — *Dhiab v. Trump*, 852 F.3d 1087 (D.C. Cir. 2017).

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press."[1] Because an effective press requires governmental information, courts have increasingly, starting with *Richmond Newspapers, Inc. v. Virginia*,[2] recognized a "qualified right of access" within the First Amendment through which the press and public are entitled to attend government proceedings or view related documents.[3] The circumstances in which the Constitution demands such access have been extensively litigated in lower courts.[4] Recently, in *Dhiab v. Trump*,[5] the D.C. Circuit held that media outlets were not entitled under the First Amendment to unseal classified videos of a Guantanamo Bay detainee's treatment.[6] The panel was unanimous in the result, but each judge wrote separately as to why. In doing so, the D.C. Circuit failed to clarify that this right of access should not extend to properly classified information and thus left open the possibility that such materials may be unsealed later, on questionable doctrinal grounds.

In 2002, the United States transferred Wa'el (Jihad) Dhiab to the U.S. Naval Base in Guantanamo Bay, Cuba.[7] Dhiab was captured in Pakistan for supposedly assisting al-Qaeda.[8] He was cleared for release in 2009[9] but held at Guantanamo until 2014, when he was released and transferred to the control of another country.[10] During this period, Dhiab went on a hunger strike and, in turn, was subjected to forced cell

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[1] U.S. CONST. amend. I.

[2] 448 U.S. 555, 580–81 (1980) (plurality opinion) (holding that both the press and public had a qualified First Amendment right to attend criminal trials).

[3] *See, e.g.*, Press-Enterprise Co. v. Superior Court (*Press-Enterprise II*), 478 U.S. 1, 13 (1986) (extending right of access to preliminary hearings); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510–11 (1984) (extending right of access to voir dire); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602 (1982) (clarifying that right of access applies to all criminal trials); *Richmond Newspapers*, 448 U.S. at 575; *see also* Archibald Cox, *The Supreme Court, 1979 Term — Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 20–21 (1980).

[4] *See* Jonathan L. Hafetz, *The First Amendment and the Right of Access to Deportation Proceedings*, 40 CAL. W. L. REV. 265, 288 (2004) (describing how circuit courts have been split on whether to expand or restrict application of *Richmond Newspapers*).

[5] 852 F.3d 1087 (D.C. Cir. 2017).

[6] *Id.* at 1089, 1098.

[7] Dhiab v. Obama, 70 F. Supp. 3d 486, 490 (D.D.C. 2014).

[8] *See* Memorandum from Mark H. Buzby, Commanding Rear Admiral, U.S. Navy, to Commander, U.S. S. Command 4 (Apr. 21, 2008), https://www.nytimes.com/interactive/projects/guantanamo/detainees/722-jihad-ahmed-mujstafa-diyab/documents/11 [https://perma.cc/DGR5-RVG9].

[9] *Dhiab*, 70 F. Supp. 3d at 490.

[10] *Dhiab*, 852 F.3d at 1090.

extraction (FCE) and force-feeding techniques by facility personnel.[11] The government recorded these actions for training purposes and classified the tapes as "SECRET."[12]

In 2013, Dhiab filed for an injunction in the United States District Court for the District of Columbia to prevent his force-feeding, but the district court denied his petition on the ground that it lacked jurisdiction over the conditions of a detainee's confinement.[13] After the D.C. Circuit reversed this jurisdictional premise on appeal in a different case,[14] Dhiab sought a new injunction to stop his force-feedings and an emergency temporary restraining order.[15] Over the course of litigation, the government disclosed the existence of the videotapes and the district court ordered that they be provided to Dhiab's counsel, who later filed them under seal.[16] Dhiab's motions were ultimately denied,[17] but soon after, sixteen media outlets filed their own motion in the same district court to intervene and unseal the videos,[18] citing their "qualified right under . . . the First Amendment . . . to inspect and copy this evidence."[19]

The district court granted their motion.[20] Senior Judge Kessler first affirmed the applicability of *Press-Enterprise Co. v. Superior Court*'s[21] (*Press-Enterprise II*) "experience and logic" test.[22] Under its framework, a court considers two prongs and then, if needed, any overriding interest. A "qualified . . . right of public access attaches"[23] when (i) "there has been a tradition of accessibility" to a proceeding (the experience prong),[24] and (ii) public access would "play[] a particularly significant positive role in [its] actual functioning" (the logic prong).[25] If both prongs are satisfied,

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[11] *Dhiab*, 70 F. Supp. 3d at 490–91.

[12] *Dhiab*, 852 F.3d at 1089. A "SECRET" classification connotes "information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security" of the United States. Exec. Order No. 13,526, § 1.2(a)(2), 75 Fed. Reg. 707, 707–08 (Dec. 29, 2009).

[13] Dhiab v. Obama, 952 F. Supp. 2d 154, 155–56 (D.D.C. 2013).

[14] Aamer v. Obama, 742 F.3d 1023, 1038 (D.C. Cir. 2014).

[15] *Dhiab*, 852 F.3d at 1089.

[16] *Id.* The tapes were put under seal due to a protective order governing all Guantanamo habeas proceedings. *See In re* Guantanamo Bay Detainee Litig., 577 F. Supp. 2d 143, 153 (D.D.C. 2008).

[17] *Dhiab*, 852 F.3d at 1089.

[18] *Id.* at 1090.

[19] Memorandum of Points and Authorities in Support of Press Applicants' Motion to Intervene and to Unseal Videotape Evidence at 1, Dhiab v. Obama, 70 F. Supp. 3d 486 (D.D.C. 2014) (Civ. No. 05-1457).

[20] *Dhiab*, 70 F. Supp. 3d at 501. The court did permit the government, however, to redact from the tapes any personally identifiable information about base personnel. *Id.*

[21] 478 U.S. 1 (1986).

[22] *Dhiab*, 70 F. Supp. 3d at 492, 494–95. *Press-Enterprise II* was the last of *Richmond Newspapers*' progeny. Lower courts have subsequently expanded the right of access to a host of proceedings. *See* Hafetz, *supra* note 4, at 288 (detailing expansion to pretrial, plea, and sentencing hearings, as well as court documents, civil trials, and administrative proceedings).

[23] *Press-Enterprise II*, 478 U.S. at 9.

[24] *Id.* at 10.

[25] *Id.* at 11.

a matter may only be closed if "closure is essential to preserve higher values and is narrowly tailored to serve that interest."[26] Judge Kessler found that habeas proceedings, like Dhiab's, met this test.[27]

The court also rejected the government's argument that the right of access did not carry over to classified information.[28] Judge Kessler noted that *Press-Enterprise II* applies to "particular *proceedings*, not the information that may arise during those proceedings."[29] Once a right of access is established, "courts may use narrowly tailored measures to protect compelling interests, like the safeguarding of sensitive information" if necessary.[30] Judge Kessler then examined whether the government carried its "heavy burden" in justifying closure.[31] The government specified five ways that releasing the tapes would harm national security.[32] Going through each, the court stated "that most of them are unacceptably vague, speculative, lack specificity, or are just plain implausible."[33] As a result, the court granted the intervenors' motion.[34]

The D.C. Circuit reversed.[35] Writing for the panel, Senior Judge Randolph[36] explained that even if a qualified public right of access existed, the district court order should still be overturned because the government had met its burden warranting closure.[37] He charged the district court with committing a clear error by replacing its own judgment for the military's expertise.[38] Reviewing the affidavits supporting closure, the court found that the "government identified multiple ways in which unsealing these recordings would likely impair national security."[39]

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[26] *Id.* at 13–14 (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984)).

[27] *See* Dhiab v. Obama, 70 F. Supp. 3d 486, 494–95 (D.D.C. 2014).

[28] *Id.* at 494.

[29] *Id.* at 495.

[30] *Id.*

[31] *Id.* at 496.

[32] According to the government, the videos could (i) "aid the development of countermeasures to FCEs," (ii) depict key camp infrastructure, (iii) incentivize detainees to undermine order and deliberately provoke FCEs, (iv) be used as foreign propaganda, and (v) cause "public curiosity" and risk protections for U.S. service personnel abroad. *Id.*; *see also id.* at 497–501.

[33] *Id.* at 497.

[34] *Id.* at 501. The government appealed the district court's decision. Dhiab v. Obama, 787 F.3d 563, 565 (D.C. Cir. 2015) (per curiam). The D.C. Circuit dismissed the appeal for lack of jurisdiction, but noted that keeping the case in the district court would allow that court to consider the government's supplemental declarations in favor of sealing the videos. *Id.* at 565–67. The district court subsequently denied the government's motion for reconsideration, Dhiab v. Obama, 141 F. Supp. 3d 23, 28–29 (D.D.C. 2015), and ordered the redacted videos unsealed, pending appeal, Order, *Dhiab*, 70 F. Supp. 3d 486 (No. 05-CV-1457), ECF No. 418.

[35] *Dhiab*, 852 F.3d at 1098.

[36] Senior Judge Randolph was joined by Judge Rogers and Senior Judge Williams except as to Part II.

[37] *Dhiab*, 852 F.3d at 1096–98.

[38] *Id.* at 1096–97. The court sidestepped deciding whether the appropriate standard of review for a district court's compelling interest analysis was clear error or de novo because, in their view, Judge Kessler's decision failed under even the higher clear error standard. *Id.* at 1096 n.18.

[39] *Id.* at 1096.

Judge Randolph, writing for himself, also denied that there is a right of access at all to classified information submitted in habeas proceedings.[40] He criticized the district court's use of *Press-Enterprise II*, stating that the Supreme Court "could not possibly have had in mind" classified information when creating the test and that its underlying logic becomes strained once applied in the civil context.[41] Judge Randolph argued too that the intervenors' motion failed on *Press-Enterprise II*'s own terms. Habeas proceedings not only lacked the sort of "unbroken, uncontradicted history"[42] necessary for the experience prong of the test,[43] but also conflicted with an opposing tradition whereby courts have been disinclined to release classified information in civil contexts.[44] As to the logic prong, the district court erred as a matter of first principles by neglecting that "there is no higher value" than national security.[45]

Judge Rogers concurred in part and concurred in the judgment.[46] She agreed that the government's interest justified closure, but departed from Judge Randolph's First Amendment analysis. Judge Rogers argued that a qualified public right of access did exist for habeas proceedings and that *Press-Enterprise II*'s framework was appropriate since it accounted for overriding interests like national security.[47] In turn, Judge Rogers took issue with Judge Randolph's application of *Press-Enterprise II*: namely, his opinion used the wrong level of generality for his historical review (the experience prong)[48] and also disregarded the functional benefits of public access in the habeas context (the logic prong).[49] The concurrence ultimately criticized the court for taking a narrow approach to First Amendment precedent, improperly framing the issue in terms of the rights of the government rather than those of the press.[50]

Senior Judge Williams also concurred in part and concurred in the judgment, writing separately to provide his own insight regarding "how to determine if [a] qualified right actually exists."[51] Judge Williams

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[40] *Id.* (Randolph, J.).

[41] *Id.* at 1092. In criminal trials, the government retains final control over classified information because it retains the power to change or dismiss charges. *Id.* (citing Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805, 828 (1985)). But for a civil *defendant*, no comparable protections exist. *Id.* (citing United States v. Reynolds, 345 U.S. 1, 12 (1953)).

[42] *Id.* at 1094 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (plurality opinion)).

[43] *Id.* at 1093–94. Judge Randolph also argued that courts must focus on the content of the disclosed materials rather than proceedings generally. *See id.* at 1094 & n.14.

[44] *Id.* at 1094–95.

[45] *Id.* at 1096 (citing Haig v. Agee, 453 U.S. 280, 307 (1981)).

[46] *Id.* at 1098 (Rogers, J., concurring in part and concurring in the judgment).

[47] *Id.* at 1101–02.

[48] *Id.* at 1099–101.

[49] *Id.* at 1101–02.

[50] *See id.* at 1099.

[51] *Id.* at 1103 (Williams, J., concurring in part and concurring in the judgment).

agreed with Judge Rogers insofar as the distinction between civil and criminal matters was not dispositive and "the fact that habeas proceedings are formally civil is no obstacle" to using *Press-Enterprise II*.[52] He ultimately raised some questions about applying *Press-Enterprise II*'s experience prong,[53] but did not answer them because the case could be decided on the government interest alone.[54] He was skeptical, though, whether Guantanamo habeas proceedings could pass the logic prong.[55]

By failing to render a controlling opinion about the First Amendment, the D.C. Circuit left *Press-Enterprise II* as an available framework for future cases involving classified information. This opening will invite both doctrinal and practical problems. Expanding a right of access to classified information intrudes upon a separate constitutional tradition that entrusts the executive branch with control over national security information. As such, it also eschews traditional judicial deference in this space and injects practical dilemmas into the functioning of the executive branch. The court should instead have held that classified information lies beyond the outer bounds of the First Amendment's right of access and rejected *Press-Enterprise II*'s applicability.

The Supreme Court has recognized that the President is given the "authority to classify and control access to information bearing on national security."[56] This authority stems "primarily from [a] constitutional investment of power in the President and exists quite apart from any explicit congressional grant."[57] Information is properly classified if it "reasonably could be expected to result in damage to the national security" and the government can "identify or describe the damage."[58] And judges have maintained that determinations concerning classified information "fall[] on the President as head of the Executive Branch and as Commander in Chief."[59] Courts are accordingly loath to second-guess these decisions, out of respect for this constitutional allocation of powers,[60] and self-perceived limitations of the judiciary.[61]

The *Press-Enterprise II* test is in tension with this division of responsibilities. In analogous situations where courts have had to oversee classified information, judges have preserved the Executive's constitutional role by adopting far more deferential standards. A key example

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[52] *Id.* at 1104.
[53] *Id.* at 1104–06.
[54] *Id.* at 1107.
[55] *See id.* at 1106.
[56] Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988).
[57] *Id.*
[58] Exec. Order No. 13,526, § 1.1(4), 75 Fed. Reg. 707, 707 (Dec. 29, 2009).
[59] *Egan*, 484 U.S. at 527.
[60] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 710–11 (1974).
[61] Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

is the "state secrets" privilege, a common law evidentiary privilege that allows the government to prevent *discovery* by showing "a reasonable danger that compulsion of the evidence will expose military matters" that will impair national security.[62] Courts are committedly deferential to the Executive as to what constitutes a "reasonable danger,"[63] even with the privilege's wide-reaching implications for civil litigation.[64] Relatedly, courts have given "substantial weight"[65] to agency classification judgments when adjudicating the national security exemption to the Freedom of Information Act[66] (FOIA), requiring only a "logical or plausible" explanation from the government.[67] The state secrets privilege and interpretations of FOIA together reflect a judicial recognition, grounded in the separation of powers,[68] of the President's primary control over the dissemination of classified information.

Against this doctrinal approach, the *Press-Enterprise II* test would stand out as a near total inversion of the usual deference applied to classification decisions. Information once properly classified because its release "could *reasonably* be expected"[69] to damage national security would be reevaluated by judges under *Press-Enterprise II*'s higher standard, which necessitates disclosure unless "closure is *essential* to preserve higher values."[70] Rather than providing the "utmost deference"[71] to the Executive's expertise and constitutional duties, courts would effectively be forced to make a separate determination as to whether there is a "substantial probability" of harm[72] and if closure is narrowly tailored, strictly necessary, and likely effective.

In short, for the range of proceedings possibly covered under *Press-Enterprise II*, this approach risks undercutting the Executive's longstanding constitutional prerogative via an expanding individual constitutional right of access. If courts follow Judges Kessler and

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[62] United States v. Reynolds, 345 U.S. 1, 10 (1953); *see also* Amanda Frost, Essay, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1935–37 (2007).

[63] *See, e.g.*, Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (finding that "[t]he asserted claim of privilege is accorded the utmost deference" (internal quotation marks omitted)); *see also* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1305–06 (2007).

[64] *See, e.g.*, El-Masri v. United States, 479 F.3d 296, 299–300 (4th Cir. 2007) (affirming dismissal of civil suit by individual alleging CIA torture).

[65] Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007) (emphasis omitted) (quoting Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984)).

[66] 5 U.S.C. § 552 (2012).

[67] *Wolf*, 473 F.3d at 375 (internal quotation marks omitted).

[68] *See* United States v. Reynolds, 345 U.S. 1, 6 (1953) (acknowledging "constitutional overtones" to the state secrets privilege); *see also* United States v. Nixon, 418 U.S. 683, 710 (1974).

[69] Exec. Order No. 13,526, § 1.4, 75 Fed. Reg. 707, 709 (Dec. 29, 2009) (emphasis added).

[70] *Press-Enterprise II*, 478 U.S. 1, 13 (1986) (emphasis added) (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984)).

[71] *Nixon*, 418 U.S. at 710.

[72] *Press-Enterprise II*, 478 U.S. at 14.

Rogers, judges would conduct their inquiries at a proceeding-based level and consider the nature of the requested materials only at the final stage of analysis. But *Press-Enterprise II*'s standard for closure was fashioned for unclassified information[73] and is purposefully onerous: Once a right of access is established, closure must be "essential to preserve higher values."[74] To carry this "heavy burden,"[75] the government must demonstrate (i) a "substantial probability" that a compelling interest will be harmed, (ii) that there are no "reasonable alternatives to closure," (iii) that the proposed limit is "narrowly tailored," and (iv) that "closure would prevent" the invoked harm.[76] This standard would cede to judges serious power: when information is submitted in any covered proceeding, the public would have the right to task courts with reassessing the merits of a classification decision against the demands of a constitutional right.

Such a system would impair the Executive's ability to balance competing duties, undermine compromises struck by the political branches, and override any functional benefits that attach to applying *Press-Enterprise II* to classified information. To begin, the test's closure standard would likely revive a problem — the forced choice between protecting classified information and pursuing certain prosecutions — that Congress solved for in the Classified Information Procedures Act[77] (CIPA). Designed to curb "graymail"[78] and mitigate the risks of disclosing classified information to certain defendants,[79] CIPA created "a comprehensive mechanism to govern the use of classified information in federal criminal cases."[80] Extending *Press-Enterprise II* to such information would not only create an easier alternative to CIPA, but also constitutionalize and augment this sort of dilemma in other settings. For instance, as *Dhiab* itself shows, the test can extend to law-of-war detention decisions and related habeas petitions by detainees.[81] Since

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[73] *Cf.* Fein, *supra* note 41, at 820–21.

[74] *Press-Enterprise II*, 478 U.S. at 13 (quoting *Press-Enterprise Co.*, 464 U.S. at 510).

[75] Dhiab v. Obama, 70 F. Supp. 3d 486, 496 (D.D.C. 2014).

[76] *Press-Enterprise II*, 478 U.S. at 13–14.

[77] 18 U.S.C. app. 3 (2012).

[78] "Graymail" is the practice where a defendant threatens to disclose classified information as part of her defense to force the government to drop or amend charges.

[79] *See* 2 DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS § 25:2 (2d ed. 2012).

[80] *Id.* § 25:1. In particular, CIPA § 4 allows the government to delete materials from discovery or provide suitable unclassified summaries or redactions upon making a "sufficient showing" that disclosure would harm national security. 18 U.S.C. app. 3, § 4; *see also* 2 KRIS & WILSON, *supra* note 79, § 26:7.

[81] Judge Williams voiced concern that Guantanamo habeas proceedings would fail the logic prong. *Dhiab*, 852 F.3d at 1106 (Williams, J., concurring in part and concurring in the judgment). A similar argument could find support from *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), which excluded from the qualified right of access "special interest" deportation proceedings that "present significant national security concerns," *id.* at 220. But this approach wins

detention decisions often involve classified information,[82] the specter of First Amendment intervention would alter the otherwise tactical calculation as to where a detainee is held.[83] *Press-Enterprise II* is ultimately a blunt tool to further worthwhile goals of transparency in the national security space,[84] whose purported benefits are outweighed by its circumvention of the legislative process and complications for the executive branch.

Existing First Amendment precedent does not necessitate this predicament. *Richmond Newspapers* and its progeny are best read as an exception to the principle articulated by the Court in *Branzburg v. Hayes*[85] "that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[86] Excluding classified information from the experience and logic test would be consistent with this background norm. Such an approach to interpreting the First Amendment would also rest on separation of powers underpinnings already used by the Court when reading statutes that may conflict with the President's inherent powers.[87]

Dhiab therefore represents a missed opportunity as well as a problematic opening. To be sure, a free press is an indispensable check on the immense national security powers afforded to the executive branch, and society needs to regularly hone the balance between secrecy and transparency.[88] But the consequential nature of properly classified information and the constitutional duties entrusted to the President demand an approach more tactful than the *Press-Enterprise II* test, itself replete with separation of powers issues and practical problems. In *Dhiab*, the D.C. Circuit should have thus closed this door and instead held that classified information is beyond the outer bounds of the qualified right of access derived from *Richmond Newspapers* and its progeny.

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the battle to lose the war: applying the test in the first place implicitly accepts its applicability to confidential information elsewhere (for example, prosecutions) and risks courts parsing proceedings to employ the test's stringent standard.

[82] *See, e.g.*, Bensayah v. Obama, 610 F.3d 718, 721 (D.C. Cir. 2010).

[83] Specifically, locations where courts have not extended the constitutional right of habeas corpus may become more desirable. *See* Al Maqaleh v. Gates, 605 F.3d 84, 99 (D.C. Cir. 2010) (holding that writ does not extend to Bagram Air Base in Afghanistan). *See generally* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1082–92 (2008).

[84] *See generally* ACLU v. Clapper, 785 F.3d 787, 831 & n.10 (2d Cir. 2015) (discussing press disclosures and problems with "overclassification," *id.* at 831 n.10).

[85] 408 U.S. 665 (1972).

[86] *Id.* at 684; *see also* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (concluding that the press does not have a constitutional right of access to a county jail above and beyond that of the ordinary public); Fein, *supra* note 41, at 819–20.

[87] Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 195 (2006) (arguing courts avoid statutory "conflicts with the President's general power to conduct foreign and military affairs").

[88] *See, e.g.*, *In re* Wash. Post Co., 807 F.2d 383, 391–92 (4th Cir. 1986).