



National Security Law Report

*Editor's Note: In this issue we present a series of six essays debating the vexing issue of criminal prosecutions relating to leaks of classified information. Contributors include **Professor Geoffrey R. Stone** of the University of Chicago Law School; **Gabriel Schoenfeld**, senior editor of the magazine *Commentary*; **Kate Martin**, director of the Center for National Security Studies; **Dr. John C. Eastman** of the Chapman University School of Law; **Professor Jonathan H. Adler** of the Case Western Reserve University School of Law; and **Bryan Cunningham**, formerly deputy legal adviser to the National Security Council and currently a Principal with Morgan & Cunningham LLC.*

The Lessons of History

Geoffrey R. Stone

For more than 215 years the United States has flourished in the absence of any federal legislation directly prohibiting the press from publishing government secrets. The absence of such legislation is no accident. It clearly fulfills the promise of the First Amendment: "Congress shall make no law . . . abridging the freedom . . . of the press."

Of course, the First Amendment is not an absolute. The press may be held accountable for publishing libel, obscenity, false advertising, and the like. As the Supreme Court observed more than sixty years ago, "such utterances are no essential part of any exposition of ideas, and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Government secrets are something else entirely. There is nothing about matters labeled "government secrets" that inherently makes their dissemination "no essential part of any exposition of ideas" and of only "slight value as a step to truth." To the contrary, the publication of such information may be extraordinarily valuable to the proper functioning of a self-governing society. The very notion of punishing the press for publishing information because the government wants to keep that information secret

What to Do About Leaks?

Gabriel Schoenfeld

"Disgraceful" is what President Bush called the *New York Times* for compromising the sources and methods by which the United States has been tracking al Qaeda finances. The House of Representatives followed suit, condemning disclosures like those made by our leading newspaper for impairing "the international fight against terrorism" and exposing "Americans to the threat of further terror attacks."

Bill Keller, executive editor of the *Times*, has cast his newspaper's action as a means of protecting the public from the potential depredations of the Bush White House in the realm of personal privacy. "We remain convinced," says Keller, "that the administration's extraordinary access to this vast repository of international financial data, however carefully targeted use of it may be, is a matter of public interest." But the congressional rebuke of the paper makes it clear that the American people, speaking through their representatives, are more distressed by the help given to al Qaeda by the *Times* than by some purely hypothetical danger to civil liberties.

A remaining question is whether the third branch of government, the courts, would, if charges were

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runs counter to the most fundamental tenets of public accountability.

Of course, there are secrets and there are secrets. It may be helpful to distinguish three different types of secrets. First, there are what we might call “illegitimate” government secrets. What renders such secrets “illegitimate” is that their secrecy does not in any way further the public good. They are secret because someone in government is attempting to hide an embarrassing or damning truth from public scrutiny. We know from both human nature and common experience that government officials may sometimes try to shield from public view their misjudgments, incompetence, venality, cupidity, and corruption. To protect their own interests, such officials may assert that secrecy is essential to the national security. Needless to say, this is illegitimate in a self-governing society. It is vital in a constitutional democracy that such deception must be ferreted out and exposed.

Second, there are what we might call “legitimate but newsworthy” government secrets. The disclosure of some government secrets might harm our national security, and the government certainly has a legitimate interest in preventing such harm. But the public disclosure of such secrets may *also* have salutary and substantial “value as a step to truth.” Indeed, this is often the case. For example, the publication of secret information that Army rifles routinely malfunction might be both harmful and beneficial to the national interest. That this publication might harm the national interest from one perspective does not preclude it from serving the national interest from another. Similarly, the publication of information that the security around our nuclear power plants is inadequate both threatens and serves the national interest. In such situations, which are quite common, it is often difficult to know with any confidence which effect predominates.

Third, there are what we might call “legitimate and non-newsworthy” government secrets. The public disclosure of such secrets might harm the national security but have only “slight value as a step to truth.” An example would be public disclosure that the government has broken the enemy’s code, where the disclosure serves no legitimate public interest. Of course, whether any particular disclosure actually furthers a legitimate public interest is often a matter of dispute, so it may be easier to define this category in the abstract than to apply it in practice.

A central challenge to a free society is to distinguish among these three types of secrets. In principle, the government should never be able to punish the publication of “illegitimate” secrets and should be able to punish the publication of “legitimate and non-newsworthy” secrets. The middle category, which is no doubt the largest, is also the most difficult to assess in terms of striking the proper balance. Moreover, this taxonomy is easier to state than to implement. When it comes to distinguishing among these three types of secrets in the real world, particularly in the context of criminal prosecutions of the press, the problems of complexity and vagueness can be overwhelming.

THE ABA NATIONAL SECURITY LAW REPORT

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To provide reasonable guidance to the press, avoid chilling the publication of information that is important to the public interest, and limit the dangers of unchecked prosecutorial discretion, we need clear, simple rules. Such rules, by definition, will be imperfect. They will inevitably protect either too much or too little expression; they will inevitably protect either too much or too little secrecy. This is a dilemma.

This brings me back to the lessons of history. As I noted earlier, for more than 215 years the United States has resolved this dilemma by *not* prohibiting the press from publishing government secrets. Perhaps even more important, there has not been a single instance in the history of the United States in which the press's publication of a "legitimate but newsworthy" government secret has gravely harmed the national interest. The lesson of this experience is that the best course for the United States is to refrain from prohibiting the press to publish "legitimate but newsworthy" government secrets. Although one can imagine hypotheticals in which such a publication could seriously harm the national interest, more than two centuries of experience has proved that the threat of such prosecutions is unnecessary, and would do more harm than good.

For the government to wield the power to prosecute the press for such publications would give government officials enormous capacity to intimidate and threaten the press and thereby undermine its vital role in our democratic system. To grant government officials such authority would seriously jeopardize the ability and willingness of the press to expose to public scrutiny what *should* be exposed.

I return now to my third category of government secrets – those that are "legitimate and *non*-newsworthy." The publication of these secrets could harm the national interest *without* contributing to informed public debate. Thus, in principle, the government should be able to prohibit the public disclosure of such secrets. The problem, though, is that it is not easy even to "know such secrets when

we see them." The very concept of "non-newsworthy" is elusive. Although that is a genuine difficulty, it is not necessarily an insurmountable obstacle. It should be possible reasonably to limit the uncertainty by clearly and narrowly defining precisely what is prohibited.

It may be useful in this regard to work backwards from the paradigm example of the government secret that should not be published. Suppose a newspaper publishes the fact that the United States has broken the al Qaeda code, and as a consequence the terrorists change their cipher. Suppose also that there is no legitimate public interest in the publication of this information. That is, the publication does not reveal any possible illegality, incompetence, venality, or misjudgment by government officials.

This example embodies two factors that might help define the scope of a constitutionally permissible criminal prohibition. First, the newspaper knew or was reckless in not knowing that the publication of this information would create a clear and imminent danger of a grave harm to the national security. Second, the newspaper knew or was reckless in not knowing that the publication of this information was "non-newsworthy."

With these two elements in place, it might be possible to enact a carefully crafted law that addresses the most serious dangers to the national security, while at the same time protecting the freedom of the press and the compelling national interest in free and robust debate and discussion of matters of legitimate public concern.

But would it be good public policy to enact such a law? On balance, I think not. Once again, I return to the lessons of history. Even if such a law would be constitutional, I doubt it would be either necessary or wise. In 215 years of experience, the problem has never actually arisen. And even if some might disagree with that assessment, the number of instances about which there might be disagreement can easily be counted on one hand. This would be a

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law in search of a problem. This is never a sound basis for legislation, and certainly not in dealing with a freedom as precious as the freedom of the press. I remain convinced that the Congress had it right in 1917. Even a law drawn this narrowly would cause more mischief than it is worth. Some things are simply best left alone.

I do not in any way mean to suggest that the government has no legitimate interest in keeping military secrets. Certainly, it does. But the way to protect this interest is *not* by threatening to prosecute the press. It is, rather, by preserving the confidentiality of the information by implementing effective (and constitutionally permissible) regulations governing public employees who unlawfully leak such information. As the Yale constitutional scholar Alexander Bickel once observed, this is surely a “disorderly situation,” but it may be the best we can do. If we give the government too much power to punish the press, we risk too great a sacrifice of public debate; if we give the government too little power to control secrecy “at the source,” we risk too great a sacrifice of essential secrecy. The American solution has been to reconcile the irreconcilable values of secrecy and freedom by protecting an expansive right of the press to publish and a strong power of the government to prohibit leaks. The American solution may be unruly, but it has served the nation well.

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brought, sustain legal action against the *New York Times*.

There can be little doubt that if the information published by the *New York Times* on June 23 had been passed to an al Qaeda operative on a microdot, an espionage prosecution would have

been immediately launched. Can it really be that publishing the same facts on the front page of a newspaper, and thereby purveying them to all members of al Qaeda at once, is perfectly legal?

Existing law would seem to make it nearly impossible to prosecute a newspaper for publishing classified information. The problem is not, as many civil libertarians erroneously contend, the First Amendment. The Supreme Court has decided in numerous cases that the guarantee of a free press is compatible with a variety of restrictions on what can and cannot be printed, as in the laws of libel or obscenity or truth in advertising.

National security fits easily into this mix. Even as the Supreme Court ruled in the Pentagon Papers case that prior restraint of the press was almost always impermissible, five justices held open the possibility of after-the-fact prosecution of the *Times* for publishing secrets. There is, then, no constitutional barrier to prosecuting the *Times*. The question is, rather, whether there are laws on the books that would enable prosecution.

The problem here is that, although we have laws protecting special categories of ultra-sensitive secrets, there are no laws that would seem to apply to the *Times* in this most recent instance. For blowing the NSA terrorist surveillance program back in December, the *Times* exposed itself to potential prosecution under a narrowly drawn law, Section 798 of Title 18, the so-called Comint statute, that protects communications intelligence. But the *Times*'s more recent story on the tracking of al Qaeda financing does not readily fall under any statutory proscription. Nor would, to take another injurious leak, the Washington Post story of last November by Dana Priest reporting the existence of clandestine CIA prisons for al Qaeda operatives in Eastern Europe.

A prosecutor itching to rein in the press might consider invoking the nearly century-old Espionage Act, but would probably reject it as a near miss. Congress's intent in passing this law, it is fairly clear, was to stop classic acts of espionage, not leaks to the press. But the law's drafters in 1917

were so clumsy that the plain language of the statute would make prosecution of a journalist hypothetically possible. But successful prosecution in these recent instances is another matter. Among other limitations, the Espionage Act requires that an offender acted “willfully” to injure the United States or to advantage a foreign country. In the case of a journalist publishing secrets out of a belief that he was promoting the “public interest”—the *Times*’ stated reason for acting as it did—it would be an uphill struggle for a prosecutor to demonstrate the requisite criminal intent.

If so, and given the steady accretion of dangerous leaks, should Congress now act to tighten the laws? This is a tough call.

To begin with, not all leaks are so damaging as these most recent ones have been, and some actually do quite a bit of good. By publishing leaks, the media can play an invaluable role in bringing vital information and instances of government misconduct before the public. At a minimum, a revised law would have to enable newspapers to contend in court that the information they disclosed was improperly designated as secret and that its disclosure did no harm. But the judicial branch, lacking expertise in foreign policy, is particularly ill-equipped to make considered decisions about what constitutes injury to national security. Furthermore, in the course of proving improper classification in a courtroom, a torrent of secret information might have to be revealed. The phenomenon of graymail, in which successful prosecution hinges on the release of yet more closely guarded secrets, would become an epidemic.

It should also be borne in mind that preserving things as they are is not without benefits. Even though the 1917 Espionage Act is vague and even unintelligible at junctures, it is by no means impossible to deploy it against the press. During World War II, the law came close to being used by the Roosevelt administration to prosecute the *Chicago Tribune* for revealing, directly after the Battle of Midway, the devastatingly vital secret that the United States had succeeded in breaking Japanese

naval codes. The case against the *Tribune* was very strong. A grand jury was empanelled, but the process was called off for fear of drawing notice to a story that evidently had escaped Japanese attention.

The case of the *New York Times* is not entirely dissimilar. Like the isolationist *Chicago Tribune*, which in opposing the Roosevelt administration’s foreign policy published damaging leaks at every turn, the isolationist *New York Times* has also been determinedly engaged in what amounts to a pattern of illicit behavior. And given the fact that in both its NSA and the terrorist-financing leak stories the newspaper was warned in advance by ranking executive branch officials, including (in the NSA case) by the president, that publication would assist al Qaeda and cause injury to national security, proving that the newspaper acted “willfully” to harm the United States might not be quite as difficult as has been generally assumed.

Given all this, the remedy for our current dilemmas probably does not lie in drafting new legislation. It would be far better to see that existing law is stringently enforced. Here, a prosecution of the *Times* under Section 798 for its NSA terrorist surveillance program stories would seem to be in order. It would have a welcome chilling effect on the *Times* and anyone else in the media tempted to disclose further secrets concerning active, ongoing counterterrorism programs in the highly sensitive realm of communications intelligence.

Even more important, the leakers inside government should be investigated and prosecuted. Those who violate their oaths to protect secrets are taking the law into their own hands and putting the rest of us at risk. Far from being admirable whistle-blowers, they are, for the most part, rather cowardly. Their insistence on the cloak of anonymity means that they are all too willing to jeopardize the security of their country but unwilling to jeopardize the progress of their careers. As for journalists who rely

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on leakers for stories, they are at the very least witnesses to a crime.

Prosecution of the leakers would obviously address the problem at its root. But uncovering them, when the only witnesses remain silent, has proven extraordinarily difficult. If identification of the leakers entails summoning reporters before a grand jury and compelling them to reveal their sources, we might see a pronounced shift in the journalistic calculus: the prospect of a contempt citation may make reporters think twice, if not about the damage they are doing to national security than about the prospect of going to prison for a spell of 18 months.

Stanching the most pernicious of these leaks, and thereby vindicating the rule of law, is both the right course in principle and an absolute necessity in these perilous times.

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Leaks, National Security and the First Amendment

Kate Martin

In August 2005, Paul McNulty, then US Attorney, announced: “When it comes to classified information, there is a clear line in the law. Today’s charges are about crossing that line. Those entrusted with safeguarding our nation’s secrets must remain faithful to that trust. Those not authorized to receive classified information must resist the temptation to acquire it, no matter what their motivation may be.” Thus began the prosecution of AIPAC officials for conspiring to obtain classified information. The US Attorney’s statement was clearly meant as a warning to national security reporters and the government officials who are their sources. While the government has long insisted that it has

broad authority to prosecute government officials who leak classified information to the press, it has rarely done so. But now the government is advancing a radical proposition: that the First Amendment does not bar the government from prosecuting journalists, who in order to write informatively beyond the official line about national security matters must often write about classified information.

Today, administration officials threaten prosecutions of Pulitzer-prize winning journalists and their sources for revelations about programs conducted outside and in violation of the law; secret prisons, renditions, and warrantless NSA surveillance of Americans. Such threats are clearly meant to chill future sources and reporting. While some disclosures undoubtedly make certain military, diplomatic or intelligence activities more difficult, every administration uses the classification stamp as a way to control public disclosure of information to suit its own purposes – whether political or otherwise. This administration has taken selective and manipulative disclosures of classified information to new heights – or depths – in the Plame case, as well as in the many instances of selective disclosures of classified information made to bolster the administration’s case for its Iraq policy.

The First Amendment’s protections for informed public debate are never more important than when questions of war and peace are at stake. As Justice Stewart wrote in the Pentagon Papers case: “the only effective restraint upon executive policy 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.” That view is confirmed by the reaction to the public disclosures that the administration is investigating: long-overdue congressional inquiry and attention to the legality and effectiveness of major counterterrorism programs affecting fundamental civil liberties and the United States’ standing in the world.

In the same way that the Constitution sets up “an invitation to struggle” between the political

branches, in order to secure the blessings of liberty and prevent tyranny, the First Amendment's protections may be viewed as setting up a struggle between the press and an informed public and the legitimate national security need for secrecy by the Executive. On the one hand, the Executive has the right to classify information and employees who leak properly classified information to the press may be punished by loss of their security clearances and in most cases their jobs and any future chance of government employment. In certain narrowly limited circumstances, they may face jail. But according any more powers than these to the government would so skew the balance against the possibility of informed public debate (or even congressional oversight) as to seriously undermine democratic decision-making.

The First Amendment protects the possibility of informed public debate not by providing an affirmative right to demand government information, but instead by forbidding overly broad restrictions on speaking about or publishing such information. Thus, the Supreme Court barred injunctions against publishing even harmful national security information, except, as Justice Stewart explained, in the most extraordinary circumstances where "direct, immediate, and irreparable damage to our nation or its people" is likely. Just as the government may not obtain a prior restraint against publication of properly classified information except in the most rare and compelling circumstances, it may not use the

heavy hand of the criminal law to prevent public access to crucial information about national security matters. Allowing criminal prosecutions of either journalists or their government sources, except in the most narrow of circumstances, would give the government powers that inevitably would be used not just to protect national security interests but to censor critics of the administration in power.

Indeed, there have been few criminal prosecutions for leaking classified information and none of any newspaper for publishing such. The most notorious was the failed indictment of Daniel Ellsberg for giving the Pentagon Papers to the press, part of a much broader White House effort to discredit critics of the war in Vietnam and the administration.

As evident in the current AIPAC prosecution, there is much controversy over the extent of existing statutory authority to prosecute leaks. The Justice Department claims that it has broad statutory authority for prosecuting leaks under the Espionage Act and otherwise. *See* Letter from the Attorney General to Congress, October 15, 2002. But many read Congress' intent otherwise. For the most comprehensive discussion of Congress' intent not to criminalize public disclosures of information in enacting the Espionage Act, see Harold Edgar and Benno C. Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973). Their reading was confirmed

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The First Amendment...

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by the Congress when it enacted the Intelligence Identities Protection Act in 1982, an act that would have been unnecessary if leaks were already covered by the Espionage Act.

Many civil libertarians approve the approach of the 1982 statute as consistent with First Amendment limits on government prosecution of speech. In our view, the First Amendment permits criminal sanctions for disclosures of government information only in the case of narrow categories of specifically identified information, where disclosure is likely to result in immediate and substantial harm to an important and identifiable national security interest and the information is of marginal relevance to public policy debate. Applying this standard in 1982, Congress criminalized leaks by government employees of the names of covert intelligence agents. Even then, it refused to enact criminal sanctions for publication of such identities except in the most limited circumstances, thereby affirming that no broader authority for prosecuting publication of classified information existed.

Nevertheless, the administration claims much broader authority to prosecute disclosures of any classified information in the AIPAC case and in threatening the *New York Times*. But numerous studies and examples confirm that millions of pages of documents in myriad agencies are unnecessarily classified. And the classified information that is published is important to the public debate. In the case of the leaks about the warrantless NSA surveillance, the administration threatens use of a provision of the Espionage Act relating to cryptographic and communications intelligence information, which unlike other sections of the Act, includes the word “publish.” But as Richard Clarke pointed out, the journalists published no details about surveillance directed against Al Qaeda that Al Qaeda did not already know. The journalists’ real “crime” was that they published information contradicting the President’s repeated claims during the Patriot Act debate that all surveillance of Americans was conducted pursuant to a warrant. If the First

Amendment does not protect the right to publish that, it will end up protecting little reporting of any consequence about government activities.

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Freedom of the Press Is Not Freedom from the Law

John C. Eastman

Major U.S. newspapers have over the past year published classified information about ongoing operational tactics in the effort to prevent another terrorist attack on our homeland: The *New York Times*’ revelation last December of the NSA program conducting surveillance on al Qaeda communications into or out of the United States; the *USA Today* disclosure in May that telephone companies were providing the government with pen-register databases; and the *Washington Post*’s story last November that some terrorists captured by U.S. forces were possibly being held by the CIA in other countries.

No one contests that classified information was illegally provided to these media outlets. And to my knowledge, no one seriously contends that the individuals who leaked the information are not subject to prosecution for violating the Espionage Act. Even those who would seek whistle-blower status for the leaker acknowledge that disclosing classified information to the world via the media does not meet the procedural requirements for whistle-blower protection.

But what of the publishers? Are the newspaper editors also subject to prosecution under the Espionage Act, or does the First Amendment bar such a prosecution? Last May, Bill Keller, Executive Editor of the *New York Times*, challenged the notion “that when presidents declare that secrecy is in the national interest, reporters should take that at face value.” Rather, Keller argued that reporters

are free to ignore the laws regarding publication of classified information when, *in their view*, the benefit to the public outweighs any harm that might flow from its disclosure. This was, and is, truly an extraordinary claim, that somehow the *New York Times* is above the law, entitled to weigh evidence and determine for itself whether to publish classified information.

Section 798 of the Espionage Act makes no such exception, of course. Its text is unambiguous. “Whoever knowingly and willfully . . . publishes . . . any classified information . . . concerning the communication activities of the United States . . . shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.” In the cloak and dagger world of intelligence gathering, this statutory prohibition is a model of clarity—it is illegal to publish classified information about our intelligence-gathering efforts.

Defenders of Keller’s claims find support in the Freedom of Press Clause, particularly as interpreted in the Vietnam War-era *Pentagon Papers* case. There are two fundamental flaws with that contention. First, the case dealt only with a request for prior restraint on publication, but five Justices recognized what our nation’s founders also understood—a prohibition on prior restraints does not eliminate liability for post-publication prosecution for abuses of the freedom. As James Wilson noted in December 1787, “the liberty of the press [means] that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government.”

The second fundamental flaw in relying on the *Pentagon Papers* case is that the Court’s *per curiam* opinion described a prior restraint on speech as “bearing a heavy presumption against its constitutional validity,” but it was not an irrebuttable presumption for a majority of the Court. The classified information at issue in the case did not involve ongoing tactical intelligence-gathering operations such as those described above, and all but the most absolutist of First Amendment jurists have recognized, quite rightly, that the freedom of

the press does not extend to publication of such things as troop movements. As Justice Blackmun noted in his dissenting opinion, “even the newspapers concede that there are situations where restraint is in order and is constitutional.” This view had been well articulated and accepted a half-century earlier by no less than Justice Oliver Wendell Holmes: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.” In other words, the *Pentagon Papers* case comes with a very big caveat for “exceptional cases,” and disclosure of classified operational intelligence tactics easily qualifies, particularly in the asymmetric war in which we are engaged, where intelligence gathering is the most critical front.

The second extraordinary claim made by Mr. Keller is the notion that the First Amendment creates a special preserve for the institutionalized press, as opposed to ordinary citizens. Although this is a common understanding among reporters and newspaper editors, it is wrong. The Freedom of the Press clause was designed to protect the published word of all citizens, not just an institutionalized fourth estate. As one of the anti-federalist opponents of the constitution noted, the liberty of the press insures that “the *people* have the right of expressing and publishing their sentiments upon every public measure.” James Madison’s initial proposal for the First Amendment clearly expressed this common understanding, guaranteeing the right of the people “to speak, to write, or to *publish* their sentiments.” The founders would never have accepted the view that the freedom of the press is limited to members of a particular industry called “the press” or “the media.”

The consequence of this original understanding, of course, is that the First Amendment does not afford any greater protection to “the press” than it does to ordinary citizens, nor exempt “the press” from “the basic and simple duties of every citizen” to report information regarding discovery or possession of

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secret government documents—a duty which Chief Justice Burger correctly noted rests equally “on taxi drivers, Justices, and the New York Times.” “The publisher of a newspaper has no special immunity from the application of general laws,” noted Justice Harlan in the *Curtis Publishing* case.

So where does that leave us with respect to the New York Times’ contentions? Once it is clear that the “Freedom of the Press” acknowledged in the First Amendment does not create a special preserve for the institutional media, the full import of Bill Keller’s claims come into view, and it is the old saw, long since disproved, that democratic governments are not permitted secrets, even in time of war. Our Constitution expressly recognizes the common-sense necessity of government secrets, for example, in the Article I requirement that each House of Congress shall publish a journal of its proceedings, “excepting such Parts as in their Judgment may require Secrecy.” The need for secrecy is even more urgent in the executive branch, and as Alexander Hamilton noted in Federalist 71, it is one of the key reasons the Constitution provides for an “energetic” executive who can operate with “secrecy” and “despatch” when necessary to protect “the community against foreign attacks.” As Justice Jackson noted in the *Waterman Steamship* case: “The President . . . has available intelligence services whose reports are not and *ought not to be published to the world.*”

The constitutionality of protecting intelligence gathering and other operational military secrets in time of war is therefore beyond dispute, and the institutional press is no more permitted to ignore the legal restrictions imposed by the Espionage Act than are ordinary citizens. Neither is it exempt from prosecution for willful violations of that Act. We may never know how great the damage to our national security the recent disclosures have caused, but with the seriousness of the threat to our lives and liberty posed by terrorist organizations such as

al Qaeda, it is certainly the right, and may well be the duty, of the executive to prosecute those responsible for them.

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Prosecuting Journalists Would Be Unprecedented and Unwise

Jonathan H. Adler

Recent media reports disclosing previously classified counter-terrorism programs have prompted some politicians and commentators to advocate prosecuting reporters who knowingly publish classified national security information. New York Congressman Peter King called on the Justice Department “to begin a criminal investigation and prosecution of *The New York Times*, its reporters, the editors . . . , and the publisher” for violating the Espionage Act. One-time Drug Czar William Bennett told his radio listeners that Pulitzer-winning articles on National Security Administration surveillance and overseas detention facilities were “not worthy of an award, but rather worthy of jail.”

At this point no charges have been filed, but the Department of Justice has not ruled out such action. Attorney General Alberto Gonzales said press prosecutions are “a possibility” because DoJ has “an obligation to enforce the law and to prosecute those who engage in criminal activity,” including federal laws limiting the disclosure of classified information, such as the Espionage Act of 1917. The current prosecution of two employees of the American Israel Public Affairs Committee (AIPAC) for conspiring to obtain and pass on classified information—activities quite similar to

newsgathering—suggests DoJ is willing to be quite aggressive in this regard.

Should the federal government go after journalists for reporting on classified counter-terrorism activities, they will face significant legal hurdles. For starters, it is not clear that recent news stories detailing various anti-terror operations, from counter-terrorism surveillance and monitoring of international financial transactions to detention sites and interrogation policies, violate existing statutes. Even if publishing these stories were statutorily proscribed, it is unclear whether the journalists could be prosecuted constitutionally. The First Amendment “does not simply vanish at the invocation of the words ‘national security,’” as Judge J. Harvie Wilkinson of the U.S. Court of Appeals for the Fourth Circuit observed in *United States v. Morison* (1988). While the press is not categorically immune to legal sanction, the First Amendment would prevent most prosecutions for nothing more than publishing information the government would prefer to keep under wraps.

Section 793(e) of the Espionage Act prohibits for anyone with “unauthorized possession” of documents or information “relating to the national defense” to “willfully communicate” such material “to any person not entitled to receive it” if “the possessor has reason to believe” the information “could be used to the injury of the United States or any foreign nation.” At first blush, this provision would seem to apply to many recent stories on previously undisclosed aspects of the War on Terror, such as the *Washington Post*’s report that the U.S. has operated secret interrogation and detention facilities overseas. These disclosures created serious diplomatic difficulties for the United States and may have discouraged foreign governments from continuing to cooperate with some anti-terror efforts. Nevertheless, though the Espionage Act prevents disclosures that make the United States and its interests more vulnerable to foreign attack, it does not prevent the publication of stories that undermine the nation’s diplomatic credibility or frustrate international diplomatic initiatives.

Any interpretation of 793(e) that covers such stories is almost necessarily overbroad, encompassing a wide swath of legitimate, constitutionally protected speech. Revealing classified information about internal deliberations, or even the existence of the secret prisons, could well “injure” the United States insofar as it damages U.S. credibility and prestige abroad. Published leaks may also discourage foreign governments from cooperating with U.S. intelligence-gathering and counter-terrorist activities. Yet if such harms are enough to trigger 793(e), the press has been flagrantly violating the law for years.

Assuming that the *Post*’s reports qualified as “national defense information,” and that the stories hampered administration policy, the government would still have difficulty prosecuting the *Post* under Section 793(e) without running afoul of the Constitution. Although the *Post* has been criticized for publishing its stories despite government entreaties to keep the existence of “black sites” secret, courts have required more than this to satisfy the statute’s requirement that one act “willfully”—indeed more would be required for a prosecution to be constitutional.

United States v. Morison is instructive. The federal government successfully prosecuted Samuel Morison for violating Section 793. Although he occasionally wrote news articles, Morison was not prosecuted for his journalistic endeavors. While working as a government employee, Morison deliberately stole secret satellite photographs of a Soviet aircraft carrier, removed indications of their source, and sold them to the press, facts the Fourth Circuit Court of Appeals found relevant in upholding his conviction. Morison went to jail, but the government never sought to prosecute either of the periodicals that published the photos (one of which was the *Washington Post*).

Congress supplemented the Espionage Act in 1950 with Section 798, a more tailored provision focused on disclosures related to communications intelligence. Section 798 is more narrowly drawn than

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793(e), but it is not without problems of its own. Among other things, if Section 798's prohibition on publishing "any classified information ... concerning the communication intelligence activities of the United States" applies to any classified description of government surveillance activities, irrespective of whether the publication adversely impacts national security, it too may be constitutionally overbroad. By its terms, Section 798 also applies to any communication of covered information to an "unauthorized person," so repeating disclosures contained in a news story could themselves be a legal violation.

Some have argued that media reports about efforts to monitor terrorist communications, such as the *New York Times* disclosure of the National Security Agency's surveillance activities, violate Section 798. Yet the *Times* stories do not discuss any specific procedure or method beyond the use of wiretapping—the availability of which is hardly a state secret. Nor did the stories disclose any new technological capability or decryption technique, nor did they detail how information is extracted from intercepted communications. Why does this matter? Because the text of Section 798, specifically the definition of "communications intelligence," suggests such details are necessary. Were such details not required, Section 798 could also face overbreadth problems, as evidenced by the many journalists who would have broken this law over the past decade. A law of such scope would raise serious constitutional concerns. On the other hand, were Section 798 to be narrowly construed to avoid constitutional concerns, it is not clear the *Times*' stories would violate this provision, whereas a story providing more detail on the operational aspects of communications intelligence—detailing how calls are intercepted, codes are broken and analyzed—might well have.

None of the above means that journalists could never be prosecuted for publishing classified information. National security is precisely the sort

of compelling interest that could justify limitations on the freedom of the press, but it takes more than the government's say-so to satisfy such strict scrutiny. Laws criminalizing press activity must be narrowly tailored, or at least subject to sufficiently narrow constructions so as not to criminalize or threaten protected speech. Our nation depends upon a press that is generally free to investigate undisclosed government activities and report them to the public. Such freedom inevitably means some stories will be published that one could sincerely wish never saw the light of day. The *New York Times* may have been irresponsible in choosing to publish certain facts, but that does not make it criminal.

There is also a meaningful distinction between clamping down on the media's sources of classified information and targeting those journalists or media outlets that publish leaked information. There are few constitutional hurdles to prosecuting government employees who violate their legal obligations and disclose sensitive material. In addition, as the Judith Miller case showed, the federal government can seek to force reporters to disclose their sources. Such avenues should be exhausted before the government even begins to consider the prosecution of journalists who have committed no crime beyond publishing government secrets.

The Bush Administration and sympathetic commentators are understandably upset with the press' willingness to disclose classified information about counter-terror programs the administration believes must remain secret to remain effective. Even assuming these reports have compromised the nation's anti-terror efforts, attempting to prosecute the press would be an asymmetrical response. Journalistic investigation and oversight of government activities, even those related to national defense, is an essential safeguard against governmental abuse. The principle of press freedom should not be sacrificed lightly.

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Inconvenient Truths About Leaks

Bryan Cunningham

It should have surprised no one when straight-arrow career prosecutor Patrick Fitzgerald in June cleared Karl Rove of criminal charges in the Valerie Plame “leak” investigation. This was a foregone conclusion not because Fitzgerald is a Bush crony. He’s not, as demonstrated not only by his long, non-partisan prosecutorial career, but by his indictment of “Scooter” Libby. The result wasn’t pre-determined because of what we knew at the beginning either. Though Rove’s factual innocence of leak charges now seems clear both from Fitzgerald’s actions and public statements by columnist Robert Novak and others, the facts never mattered much. The end of Fitzgerald’s “leak investigation” (which now appears *not* to have been about “leaks” at all from almost the beginning) was predetermined because, as a body politic, *America simply does not care about leaks*. An academic debate over the pros and cons of aggressive leaks law enforcement should be informed by the fundamental, if inconvenient, truth that, thanks to ongoing, intense lobbying, there isn’t much US leaks law to enforce, and even less incentive to enforce it.

Consider first the statute most pertinent to the Plame investigation. The Intelligence Identifies Protection Act of 1982, 50 U.S.C. § 421, *et seq.* (“IIPA”)—passed despite vigorous lobbying at the time by the *New York Times* and other media and civil liberties groups—purports to criminalize the intentional disclosure of the identity of covert US intelligence agents. Thanks to such lobbying efforts,

however, IIPA is so riddled with loopholes that a successful prosecution is almost unimaginable.

The IIPA makes it a crime for anyone “having or having had *authorized access* to classified information that identifies a covert agent,” to “*intentionally disclose[] any information identifying such covert agent . . . knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent’s intelligence relationship to the United States.*”

To violate this statute, a leaker must not just know that an agent’s identity is classified, but also that the government *is taking*—present tense—measures to conceal it. Proving anyone had such knowledge and intent, let alone senior officials in other agencies multiple paygrades above an officer like Ms. Plame will be, in most cases, nearly impossible. It gets worse, because if “the United States has publicly acknowledged *or revealed* the intelligence relationship to the United States,” of the covert agent, the leaker has a complete IIPA defense. A skilled defense attorney would have had a field day with, among other things, press reports that Ms. Plame’s cover was blown to the Soviets years ago by Aldrich Ames, and, separately, in a paperwork mix-up, revealed to Cuban intelligence. If those barriers to prosecution weren’t enough, Congress slipped into the definition of “covert agent” that the person’s identity not only must be classified, but she must be serving overseas currently, or at least within the last five years. Little wonder, then, that DOJ consistently is loathe to take on identities cases.

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Announcing the Opening of the McCormick Tribune Freedom Museum!

The McCormick Tribune Freedom Museum opened its doors on April 11, 2006. Located in Chicago on the first two floors of the historic Tribune Tower (445 Michigan Avenue), the Museum is an interactive, dynamic, and artistically compelling venue for examining our nation’s commitment to freedom in general and First Amendment values in particular. More information is available at: <http://www.freedommuseum.us/>.

Inconvenient Truth About Leaks...

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Prosecuting a journalist under IIPA is even more difficult because the government must prove that “outing” the covert agent was part of “a pattern of activities intended to identify and expose covert agents *and* with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.” The “pattern” requirement, at a minimum, gives journalists multiple “freebies” to blow covert agents’ covers. DOJ’s failure to prosecute in connection with *The Nation* magazine’s deliberate, systematic 1995 “outing” of the past *nine* CIA Guatemala station chiefs (clearly a “pattern”) demonstrates the fecklessness of IIPA which, in any event, carries only a maximum three-year jail term. Thus, the Plame case result was entirely predictable and just the result intended when the IIPA was gutted prior to passage. Similarly, the espionage act and most of the few other US “leaks” laws carry built-in impediments to prosecution.

Inconveniently for those demanding vigorous prosecution over the Plame “leak” (tellingly silent now that Iraq war opponent Richard Armitage has admitted being the inadvertent leaker), but who think the leakers behind the *New York Times*’ revelation to our enemies of the NSA’s Terrorist Surveillance Program (“TSP”) are national heroes, the TSP publication is one of the few recent leaks that actually would be relatively straightforward to prosecute. The statute protecting communication intelligence (“COMINT”), 18 U.S.C. § 798, is far easier to violate than the IIPA, and it explicitly criminalizes both leaking *and publishing*.

Titled “Disclosure of classified information,” § 798 prescribes up to ten-years’ imprisonment for anyone who “knowingly and willfully” communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, *or publishes* classified information, among other things, “concerning the communication intelligence activities of the United States or any foreign government.

“Communication intelligence” sweepingly covers “all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients.” It is difficult to argue that the leakers of the TSP, and those who published the leaks have *not* violated that provision. And yet there is little chance the TSP leakers will (even if identified) ever be prosecuted, and still less that any journalist will be. Why?

First, as anyone who has ever tried to get leaks investigated and prosecuted will attest, it is virtually impossible to convince DOJ to seriously pursue such cases. Second, the Intelligence Community itself often prefers to accept quietly even significant damage to national security rather than risk increasing the damage by having to disclose further secrets at a criminal trial or even to reinforce publicly just how damaging a leak has been. Third, no president would lightly incur the certain result of a real prosecution of leakers or the press: the immediate, universal, and lasting wrath of the national media.

Finally, leaks unfortunately are now Washington’s life blood. On the demand side, publication of classified information—the more sensitive the better—has become the short route to a Pulitzer prize. On the supply side, few elected officials, at either end of Pennsylvania Avenue and in either political party, actually *want* leaks stopped, at least not their own.

Not satisfied with the current weakness of our leaks laws, some are attempting further to deter leak prosecutions (and encourage leaks) by generating the myth of “moral equivalence” between unauthorized, often uninformed, and sometimes illegal leaks by anonymous bureaucrats and official government decisions to declassify and release information. There is none.

Presidents, and other specified government officials, have the *legal authority* to decide when to protect and when to disclose classified information. Those who leak on their own do not, and this is a sensible

arrangement. Designated officials have both the constitutional and legal *responsibility* to protect or disclose information to safeguard our national security *and* the big-picture knowledge to determine when such disclosures will benefit national security and when they won't. Unauthorized leakers by definition lack the former, and usually the latter as well. More importantly, presidents (including such selective declassifiers as John Kennedy, Bill Clinton, and George W. Bush) are politically accountable for their decisions. Within days of 9/11, President Bush vowed to use every tool within his constitutional authority to defeat terrorists. He has vigorously (some would say too vigorously) kept this promise. Though I, and the media, might have made different choices, no one elected us. Our democracy demands a robust referendum on such choices, and we had one: the 2004 election. Leakers and journalists' attempts to kill duly authorized classified programs by revealing them to our enemies, are profoundly *anti*-democratic.

One final inconvenient truth: leaks do not make us safer. According to published reports, the full arsenal of counterterrorism methods—including secret wiretaps and covert access to financial records—helped to thwart the “8/10” attempted bombings of ten aircraft bound from Great Britain to the United States. How were these tools so successfully deployed? Britain’s “Official Secrets Act” for one thing, which provides at least some deterrence against leaks devastating to national security. Notice we haven’t read about the UK’s secret wiretaps or financial tracking. This should, but probably won’t, give pause to the *New York Times* before again arrogating to themselves the power to expose successful—while secret—counterterrorism programs. The thousands of souls on US-bound aircraft that didn’t take off on 8/10 probably have a different view than the *Times* of what is in “the public interest.” Meanwhile, each of us should ask ourselves, comparing 9/11 to 8/10: Given the laws and behavior of the press on either side of the Atlantic, would we rather fly the skies of Britain or America?

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Editor’s Note: Readers may also be interested in the currently-pending prosecution of Steven Rosen and Keith Weissman, former employees of the American Israel Public Affairs Committee. *See United States v. Rosen*, No. 05-cr-225 (E.D. Va.). Rosen and Weissman are charged with (i) communicating national defense information to persons not entitled to receive it, in violation of 18 U.S.C. § 793(d); (ii) conspiring to violate § 793(d); and (iii) conspiring to communicate classified information to an agent of a foreign government in violation of 50 U.S.C. § 783. Because the indictment turns at least in part on the alleged re-transmission of information obtained by the defendants from government sources, the case understandably has proven to be of great interest to journalists and others who at times are the recipients of leaked classified information. In an opinion filed on August 9, 2006, Judge Ellis rejected a pretrial motion that among other things challenged the constitutionality of § 793(d), explaining that the statute is constitutional when construed to require the government to prove “(1) that the information relates to the nation’s military activities, intelligence gathering or foreign policy, (2) that the information is closely held by the government, *in that it does not exist in the public domain*, and (3) that the information is such that its disclosure could cause injury to the nation’s security. . . . In addition, the government must also prove that the person alleged to have violated these provisions [A] knew the nature of information, [B] knew that the person with whom they were communicating was not entitled to the information, and [C] knew that such communication was illegal, but proceeded nonetheless. Finally, with respect *only to intangible information*, the government must prove that the defendant had a reason to believe that the disclosure of the information could harm the United States or aid a foreign *nation*, which the Supreme Court has interpreted as a requirement of bad faith.” (slip op at 68; emphasis added). The 68-page opinion is posted here: <http://www.fas.org/sgp/jud/rosen080906.pdf>.

In Case You Missed It ...

Staying current in the field of national security law is never easy. Every week there are significant new opinions, statutes, indictments, reports, articles, and any number of other developments. Many of these items prompt coverage in the major media outlets, but some fly beneath the radar. In an effort to assist practitioners and scholars in keeping up to date with these events – and in particular to provide ready access to primary sources in electronic format – Professor Robert Chesney of Wake Forest University School of Law maintains a listserv for professionals and academics working in this area. “In Case You Missed It...,” featuring selected posts from that listserv, will be a recurring item on the back page of the National Security Law Report. Those interested in subscribing to the listserv may do so by contacting Professor Chesney at rchesney@law.wfu.edu.

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- New field manual governing interrogation techniques and related matters: FM 2.22-3 (“Human Intelligence Collector Operations”), replacing 1992’s FM 34-52: <http://www.army.mil/references/FM2-22.3.pdf>
 - Details of the CIA’s “High Value Terrorist Detainee Program,” as formally disclosed recently in a speech by President Bush, are posted here: <http://www.dni.gov/announcements/content/TheHighValueDetaineeProgram.pdf>
 - Biographies of the 14 CIA detainees transferred to GTMO in September are posted here: <http://www.dni.gov/announcements/content/DetaineeBiographies.pdf>
 - National Strategy for Combatting Terrorism: <http://www.whitehouse.gov/nsc/nsct/2006/>
 - *Hamdan v. Rumsfeld* (D.C. Cir.). Both the government and Hamdan have filed motions with the D.C. Circuit suggesting how (and where) Hamdan’s petition should be handled going forward. In brief, the government argues for a limited conception of what claims Hamdan has left to assert, and contends that any such remaining claims are to be resolved in the D.C. Circuit. Hamdan argues for a broader understanding of his remaining claims, and for resolution of them in the first instance by the district court. Note, however, that the court likely will withhold its decision at least until it sees the final result of the current debate over new legislation relating to military commissions and other aspects of detention at GTMO. The government’s motion is posted here: <http://www.scotusblog.com/movabletype/archives/USG%20motion%20on%20Hamdan%20further.pdf>

Hamdan’s motion is posted here: <http://www.scotusblog.com/movabletype/archives/Hamdan%208-30%20filing.pdf>
 - *Qassim v. Bush* (D.C. Cir.) A panel of the DC Circuit (Henderson, Rogers, Griffith) has dismissed as moot the habeas petition on behalf of a group of Uighurs who had been held at GTMO but then were released and transferred to Albania. The short, unpublished opinion explaining that determination is posted here: <http://www.scotusblog.com/movabletype/archives/8-14%20qassim%20order.pdf>
 - *United States v. Hassoun* (S.D. Fla.) The district court in *Hassoun* – the case to which Jose Padilla was added as a co-defendant upon his transfer from military custody – has dismissed the lead charge against the defendants (under 18 U.S.C. 956(a)), reasoning that the count was not distinct from a separate charge alleging a conspiracy to provide material support in violation of 18 U.S.C. 2339A. Posted here: <http://www.miami.com/multimedia/miami/news/0821padilla.pdf>
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