Publishing National Security Secrets: The Case for "Benign Indeterminacy"

William H. Freivogel*

INTRODUCTION

Unpopular wars inevitably lead to sharp conflicts between Presidents and the press over the control of secret information. National security secrets find their way into print because government officials assigned to carry out questionable policies leak secret documents to reporters. The government responds to publication with threats of civil legal action and criminal prosecution. The Vietnam War produced the *Pentagon Papers* case, in which the government unsuccessfully sought to stop publication of a classified history of the war. More recently, national security cases have led to jail for some reporters, threats of jail for others, and warnings of criminal prosecution for still others.[1] These cases, taken together, threaten to criminalize newsgathering of national security secrets.

During times of national security stress, journalists find that their professional activities sometimes require them to employ techniques that may be extra-legal and extra-constitutional – that is, not clearly protected either by law or by the Constitution. By reporting on national security secrets and protecting the sources who leak them, the press provides citizens with information that is often essential to judging the wisdom and legality of government policy. When Congress is controlled by the party of the President and is not providing robust checks on executive power, the press's extra-legal and extra-constitutional reporting of questionable but secret government activity provides an especially important check on presidential overreaching. Under these circumstances, the press is arguably the most effective constitutional check on executive abuse, even if the Founding Fathers did not plan it that way.

Journalists like to believe that they enjoy protection for these essential newsgathering functions. In fact, they enjoy far less protection than they realize. Neither Congress nor the Supreme Court has provided journalists with explicit legal or constitutional protection for these important methods of newsgathering. Meanwhile, White House and other national security officials routinely exaggerate the dangers of publishing secret information. Over the decades, government officials have presented scant proof of harm

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* Director, School of Journalism, and University Professor, Southern Illinois University Carbondale; Visiting Professor, Paul Simon Public Policy Institute. This article is based on a paper presented at the January 2007 meeting of the Association of American Law Schools in Washington D.C.

1. *Reporters and Federal Subpoenas*, Special Report, Reporters Committee for Freedom of the Press, June 21, 2006. More recent information about subpoena cases is available from the Reporters Committee at http://www.rcfp.org.

from such activities. In a perfect First Amendment world, with a Supreme Court composed of nine Justice Brennans, activities as important as newsgathering and dissemination might have more legal and constitutional protection, but given the legal landscape, the limbo of the status quo is preferable to legal certainties that could be even less favorable to newsgathering.

In their seminal work on the espionage statutes,[2] Harold Edgar and Benno Schmidt wrote that the nation had lived in a state of "benign indeterminacy about the rules of law governing defense secrets" since World War I.[3] In addition, they concluded that sections of the Espionage Act, if read literally, could apply to the publication of secrets, although the poorly drafted law could fall to modern-day First Amendment doctrine.[4] Edgar and Schmidt wrote soon after the *Pentagon Papers* case, but the intervening three decades have done little to alter this state of benign indeterminacy. The possibility of a prosecution under the Espionage Act remains alive partly because of unfortunate dicta in Justice White's concurring opinion (joined by Justice Stewart) in *Pentagon Papers*, stating that he "would have no difficulty in sustaining convictions" under that statute.[5] The recent Espionage Act prosecution of lobbyists for the American Israel Public Affairs Committee (AIPAC) for their information-gathering activities heightened concern that the Espionage Act could be used against reporters' information gathering, even though the prosecution was eventually dropped.[6]

Nevertheless, reporters have generally fared well during the long era of uncertainty. No reporter has been prosecuted for disclosing national security secrets in the 200-year history of the nation. When reporters are jailed for refusing to reveal their sources, the incarceration is usually brief and pro forma. A study by the Reporters Committee for Freedom of the Press found that seventeen journalists were jailed between 1984 and 1998 for refusing to reveal their sources. None of the seventeen was jailed for more than a month; nine did not serve even a day.[7] More recently, a few

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2. Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973); *see* 18 U.S.C. §§793, 794 (2006).

3. Edgar & Schmidt, *supra* note 2, at 936.

4. *Id.* at 1031-1058.

5. New York Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 737 (1971) (White, J., concurring).

6. The criminal charges against Steven J. Rosen and Keith Weissman were filed in 2005, and after very complicated pretrial proceedings the government finally abandoned its case on May 1, 2009. *See* Neil A. Lewis & David Johnston, *U.S. Moves To End Secrets Case Against Israel Lobbyists*, N.Y. TIMES, May 2, 2009, at A11; Jerry Markon, *U.S. Drops Case Against Ex-Lobbyists; Former AIPAC Employees Faced Espionage Charges*, WASH. POST, May 2, 2009, at A1; Walter Pincus, *A Look at the Dropping of Espionage Charges*, WASH. POST, May 5, 2009, at A19.

7. Stephen Bates, *The Reporter's Privilege, Then and Now,* The Joan Shorenstein Center, Research Paper R-23, at 12 (2000), *available at* http://www.hks.harvard.edu/

journalists have spent longer periods in jail, notably Judith Miller of *The New York Times*, who served eighty-five days, and Josh Wolf, a freelance blogger who served seven and one-half months.

This article argues that the press – and by extension the public – is better served by a continuation of the state of uncertainty than by bright-line rules. Recent attempts by the press to argue in favor of an extravagant reporter's privilege have backfired, partly because of unfavorable facts and partly because media lawyers have overstated the law.[8]

As a result, it is apparent that when judges are forced to draw bright lines they are unlikely to do so in ways that fully protect the important newsgathering methods that journalists believe they are duty-bound to employ. Journalists will be faced with a few situations in which they make ethical decisions to protect unnamed sources and to print national security secrets, even when those actions may not be protected by the law. In these situations, editors, reporters, and publishers need to do a better job than in the past of explaining their ethical decisions. They need to face the fact that they are engaging in an act of civil disobedience for which they must accept the legal consequences.

I. A COMMUNICATIONS GAP

There is a yawning communications gap between journalists and national security officials when it comes to printing national security secrets. Journalists believe that the First Amendment clothes them with a constitutional entitlement to print national security secrets and to stay out of jail while protecting the confidential sources who leaked the secrets. They believe that this same First Amendment body armor exempts them from prosecution that other citizens might face under the Espionage Act. Journalists say that jailing them chills the publication of information that the public has a right to know. To journalists, the relationship between reporter and source is every bit as sacrosanct as the relationships between lawyer and client, priest and confessor, and psychiatrist and patient. Journalists believe that their disclosure of national security secrets is synonymous with the public interest – even patriotic – and provides the public with information that is the meat and potatoes in the stew of democracy. They believe that journalists, not intelligence officials or judges, should decide when to publish national security secrets and that government officials cannot be trusted to decide what information should

presspol/publications/papers/research_papers/r23_bates.pdf, *citing A Practical Guide to the Reporter's Privilege in the Fifty States and D.C.*, which was published in the summer of 1998 as a supplement to NEWS MEDIA & THE LAW.

8. *See, e.g., In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005); New York Times Co. v. Gonzales, 459 F.3d 160 (2d Cir.), *stay denied*, 549 U.S. 1049 (2006); Lee v. Dep't of Justice, 327 F. Supp. 2d 26 (D.D.C. 2004).

be kept secret because they are genetically prone to overclassify and to use classification to hide embarrassing information about wrongdoing.

Meanwhile, government officials, especially during the secrecy-prone Bush administration, argue the opposite. They contend that there is no legal privilege that reporters can invoke to protect their confidential sources and note that journalists are not licensed like the doctors and lawyers who can claim testimonial privileges. Government officials say that the First Amendment does not place journalists above the law. Journalists, they argue, should be treated like other citizens when it comes to testifying about crimes they witness. Moreover, they assert that reporters may be subject to prosecution under the Espionage Act, even if they thought their disclosures were patriotic rather than treasonous, even if the reporting was so important that it won a Pulitzer Prize, and even though there never has been a reporter prosecuted under the Act. Government officials argue that there is no evidence that jailing journalists chills First Amendment rights because there is no First Amendment right to publish classified information. They believe that the protection of secrets is synonymous with the public interest, and that disclosure risks American lives. They believe that trained intelligence agents, not untrained reporters, should decide when it is safe to tell the American people about secret programs. And they say that the reporter-source relationship does not have the deep roots of the lawyer-client or the priest-confessor relationship, nor does it need any help from the Constitution to survive.

Both sets of claims are extravagant. The courts do not recognize a First Amendment right of journalists to protect confidential sources, and there is little evidence that the publication of national security secrets has been chilled by jailing a few noted journalists and threatening to prosecute others. To the contrary, two important stories reporting national security secrets – disclosure by *The New York Times* of warrantless domestic wiretapping and *The Washington Post*'s exposure of secret CIA prisons in Eastern Europe – occurred in the wake of *Times* journalist Judith Miller's eighty-five days in jail. (Journalists also will confess privately that there are few things better for a reporter's career than being put in jail for protecting a source.) Although journalists claim to be doing the people's business, they seek a protected status that no citizen is entitled to. By asserting that the public should leave it up to the press to decide when to publish national security secrets, journalists are laying claim to the right to make a decision for which they have no special expertise or training.

As for the claims of administration officials, there is scant evidence that national security has been harmed in any significant way by the disclosure of government secrets. The eleven secrets that the government ultimately relied upon in its unsuccessful attempt to stop the publication of the

Pentagon Papers[9] were more compelling than the vague generalities offered by the Bush administration in its criticism of the NSA wiretapping and CIA prison stories. Yet there never has been evidence that either the Pentagon Papers or the recent disclosures cost American lives or hurt U.S. security. What is demonstrated by history as far back as the Pentagon Papers and before is that the government engages in a vast amount of overclassification, which hid damaging information about the mishandling of the Vietnam War and about extensive tapping of telephone conversations without warrants. The Administration's threat to apply the Espionage Act to recent disclosures of national security secrets flew in the face of the legislative history of the law, which shows that Congress sought to keep the President from censoring the press.[10]

II. THE FIRST AMENDMENT: A POROUS SHIELD FOR REPORTERS?

When the press reports a sensitive national security secret, the government may well consider three possible responses, each of which involves a distinct legal analysis and different political consequences. The government might seek to obtain an injunction against publication, as the Nixon administration did in the case of the Pentagon Papers. A second option is to prosecute journalists and their sources for violating the Espionage Act, which provides criminal penalties. The third option is to subpoena the reporter to appear before a grand jury and force him or her to disclose the source of the information. The prior restraint option is almost certain to fail because of the heavy burden of proof that *Pentagon Papers* places on the government – a showing that "direct, immediate, and irreparable damage" will result.[11] Any government attempt to stop the presses also has the potential to be a political liability in times of high-volume dissent. The Bush administration's decision not to attempt to enjoin publication of the stories about NSA and the CIA prisons suggests that this option is highly unlikely to be employed in the future. An Espionage Act prosecution also seems unlikely because no reporter has been prosecuted under the law, and the political consequences would be substantial. That means that the lever the government is most likely to employ is a grand jury investigation to force a journalist to disclose the source in order to avoid going to jail. In this arena, the journalist's protection is limited and uncertain, and the political consequences for prosecutors are minimal,

9. Brief for the United States (Secret Portion), *Pentagon Papers* [hereinafter *Pentagon Papers* Sealed Brief]. With a few redactions, the brief is reprinted in an Appendix to John Cary Sims, *Triangulating the Boundaries of Pentagon Papers*, 2 WM. & MARY BILL RTS. J. 341, 440-453 (1993). For a description of the process by which Solicitor General Erwin N. Griswold culled the final eleven items from the more expansive claims made by the government earlier in the litigation, see *id.* at 372-373, 375-378.

10. Edgar & Schmidt, *supra* note 2, at 937.

11. *Pentagon Papers*, 403 U.S. at 730 (Stewart, J., concurring).

judging from past cases. Neither the Judith Miller jailing nor that of Josh Wolf resulted in heavy public pressure to free the journalists.

A. Little First Amendment Protection for a Reporter's Privilege

To most journalists, the obligation to protect the identity of a confidential source is more than a contractual one growing out of the promise extended by the reporter. It is also more than an ethical obligation. For them, protecting the identity of a source is an almost-sacred obligation. Reporters learn quickly in places such as the nation's capital that public officials almost never say anything interesting and newsworthy unless they are speaking under assurances of confidentiality. Certainly, sources of national security secrets never reveal important information unless they are promised anonymity.

Despite the threatening words of the statutes and the unfavorable court decisions, journalists continue to operate under the belief that their publication of national security secrets is protected by the First Amendment. At times, this view is embraced with such enthusiasm that Howard Simons and Joseph Califano observed that journalists "believe the First Amendment places them in a constitutionally elite class."[12]

In the three decades following the 1972 *Branzburg v. Hayes*[13] decision, journalists and their lawyers successfully turned their five-to-four loss into a victory through clever lawyering. Media lawyers essentially argued that even though Justice Lewis Powell had joined the majority in rejecting a reporter's privilege, his concurring opinion should be read together with the dissent to create a limited constitutional privilege. Ironically, the Court's decision not to recognize a constitutional basis for the reporter-source privilege resulted in reporters getting more protection than they had before the defeat. At the time of *Branzburg,* seventeen states had shield laws; since *Branzburg* another fourteen states have passed laws, and seventeen other states provide some judicial protection.[14] Three decades after *Branzburg*, First Amendment lawyers had been so successful in persuading states to adopt shield laws or their judicial equivalents that they had convinced themselves that the decision had actually created a qualified privilege for a journalist to withhold the name of a confidential source.

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12. Howard Simons & Joseph A. Califano, Jr., *Introductory Essay: The Jurists and the Journalists, in* THE MEDIA AND THE LAW 1, 1 (Howard Simons & Joseph A. Califano, Jr. eds., 1976).

13. 408 U.S. 665 (1972).

14. Nathan Swinton, *Privileging a Privilege: Should the Reporter's Privilege Enjoy the Same Respect as the Attorney-Client Privilege?*, 19 GEO. J. LEGAL ETHICS 979, 990 (2006).

B. Branzburg and the Judith Miller Case

More recently, however, judges have actually read *Branzburg* and have refused to recognize this reporter's privilege. As *New York Times* attorney George Freeman put it, "*Branzburg* has been reread and interpreted differently than the 25 years before."[15] The press and media lawyers have improvidently contributed to the run of bad decisions by relying on test cases with unfavorable facts. A prime example is the Judith Miller case, which involved a flawed heroine. Instead of exercising caution when the Valerie Plame leak surfaced, leading newspapers, including *The New York Times,* called for a criminal investigation of the leak. The *Times* departed from its long-standing editorial opposition to leak investigations, giving this rationale: "As members of a profession that relies heavily on the willingness of government officials to defy their bosses and give the public vital information, we oppose 'leak investigations' in principle. But that does not mean there can never be a circumstance in which leaks are wrong – the disclosure of troop movements in wartime is a clear example."[16]

This explanation is not convincing. Just about everyone – lawyer, journalist, judge – agrees that the press must not disclose troop movements that would endanger soldiers' lives. Alexander Bickel, attorney for the *Times* in *Pentagon Papers*, conceded to Justice Stewart that there could be a prior restraint of publication if the court were convinced that the disclosure of the Papers would result in 100 American prisoners being executed. Bickel said, "I am afraid my inclinations of humanity overcome the somewhat more abstract devotion to the First Amendment."[17] But the leak of the name of CIA officer Valerie Plame hardly posed that kind of risk. Valerie Plame was safe in Washington, D.C., rather than on a battlefield or working covertly overseas. The suspected leaker in the Plame case also was a less sympathetic character than in the conventional case. In most leak cases, the leaker is a whistleblower disclosing potential government wrongdoing. In the Plame case, the leak was from a potential government wrongdoer in the President's or the Vice President's office possibly attempting to punish a whistleblower – Plame's husband, Joseph Wilson – who had challenged government wrongdoing. On top of that, Judith Miller had herself been complicit in the very wrongdoing at issue – distorting evidence of weapons of mass destruction in Iraq. Miller had written stories about nonexistent weapons of mass destruction in the run-up

15. George Freeman, Remarks at Communications Law 2006 Conference (Nov. 10, 2006).

16. Editorial, *Investigating Leaks,* N.Y. TIMES, Oct. 2, 2003, at A30.

17. Oral Argument, New York Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713 (1971), *in* 71 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 213, 240 (Philip B. Kurland & Gerhand Casper eds., 1975). For the identification of Justice Stewart as the Justice posing the questions to which Bickel was responding, see Sims, *supra* note 9, at 348 n.20, 403-404.

to the war. She and the other reporters involved in the case were the only witnesses to the alleged crime under investigation – disclosure of the name of a covert source. Even the proposed national shield law, inspired in part by the Miller case, would require testimony under these circumstances. For example, the version that passed the House in 2007 would deny the law's protections in some criminal investigations where "the testimony or document sought is critical to the investigation or prosecution."[18] Had it been in effect during the events in her case, the proposed shield law would not have been sufficient to keep Miller out of jail.

Despite Judith Miller's flaws as a heroine and the other unfavorable facts of the case, the press and media lawyers eagerly embraced her. A detached observer has to wonder if psychological motivations of the actors interfered with a cool legal analysis. Miller may have hoped to rehabilitate her sagging reputation by playing the role of heroine. *Times* attorney Floyd Abrams may have wished for another dramatic *Pentagon Papers*-style win in the Supreme Court, and Arthur Sulzberger, Jr. may have wanted to match his father's triumph as a standard-bearer of the First Amendment. Finally, one has to wonder whether a press establishment that had been burned by the Administration's misinformation on weapons of mass destruction was eager to see perpetrators of the manipulation, such as the Vice President's aide L. "Scooter" Libby, pay for their mistakes. What too few reporters appreciated was that in criminalizing Libby's leak they were essentially criminalizing newsgathering.

Whatever the motivations, the results were disastrous for the press. The United States Court of Appeals for the District of Columbia Circuit rejected the argument that *Branzburg* should be read to create a limited First Amendment privilege of reporters to shield confidential sources. The *Times* had argued that the district court judge was acting "flatly contrary to the great weight of authority" in holding that there was no First Amendment privilege for a news reporter, but Judge Sentelle's opinion for the majority responded: "Appellants are wrong."[19] The *Times* had echoed the arguments repeatedly made by media lawyers after *Branzburg* that Justice Powell's concurring opinion had recognized some instances in which journalists could go to court to contest subpoenas to testify.[20] The court pointed out that Justice Powell had joined the majority opinion in *Branzburg* and had limited a journalist's recourse to the courts to instances of bad faith on the part of prosecutors.[21] Clearly, there would be few cases where reporters could show such bad faith. Judge Tatel recognized a limited common law privilege of a reporter to protect a confidential source.[22] This privilege

18. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. §2(a)(2)(A)(ii).
19. *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 968 (D.C. Cir. 2005).
20. Branzburg v. Hayes, 408 U.S. 665 (1972).
21. *Grand Jury Subpoena, Judith Miller*, 397 F.3d at 972.
22. *Id.* at 986, 995-1001 (Tatel, J., concurring in the judgment).

would require the courts to balance the importance of disclosing the information with the importance of keeping it from being disclosed.[23] Judge Tatel wrote that judges "must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value."[24] Judge Tatel concluded that on balance the common law privilege did not protect Miller.[25]

Well after Judith Miller had departed from the *Times,* James Goodale, the *Times* lawyer of *Pentagon Papers* fame, was continuing to claim that Miller's eighty-five-day stint in jail was a great service on behalf of the First Amendment right to protect confidential sources.[26] Actually, the case revealed the weakness of the First Amendment argument. More broadly, the Plame investigation had the effect of criminalizing newsgathering. Miller had spent time in jail, even if she was not there for committing a crime. In addition, Scooter Libby was convicted of lying about the details of his conversations with reporters. Many reporters may secretly have enjoyed seeing Libby prosecuted and convicted for a dirty trick on Plame and Wilson, but there was nothing to cheer about from the vantage point of protecting the essential relationship between reporter and confidential source.

The Judith Miller affair was not the only one in which the press hurt its own cause. Judge Richard Posner's devastating opinion on the reporter's privilege in *McKevitt v. Pallasch*[27] came in a case that never should have made it to the appeals court because the reporters' arguments were so weak. Abdon Pallasch and Robert C. Herguth of the *Chicago Sun-Times* and Flynn McRoberts of the *Chicago Tribune* were ordered in July 2003 to turn over tapes of conversations with an FBI informant, David Rupert. Rupert was an American truck driver who had been a spy for the FBI in its investigation of the Real IRA, an Irish terrorist group. The tapes of conversations between the reporters and Rupert were subpoenaed by lawyers for Michael McKevitt, an accused terrorist leader. McKevitt's lawyers wanted the tapes to prepare for cross-examining Rupert during McKevitt's trial in Ireland. The reporters sought to quash the subpoena, citing *Branzburg*. A federal district court judge ordered the tapes produced. The journalists appealed, and asked the Seventh Circuit to stay the production order. The court refused and the tapes were produced. Attorneys for the journalists hoped that would end the case, but Judge

23. *Id.* at 998.
24. *Id.*
25. *Id.* at 1002-1003.
26. Jessica Meyers, *The Confidentiality Crisis,* AM., JOURNALISM REV., Apr./May 2006.
27. 339 F.3d 530 (7th Cir. 2003).

Posner, while noting that the production of the tapes mooted any appeal,[28] issued an opinion explaining the panel's decision.

Judge Posner used the occasion to express his skepticism about the existence of a reporter's privilege rooted in the First Amendment. "A large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope," he wrote. "Some of the cases that recognize the privilege . . . essentially ignore *Branzburg*, . . . some treat the 'majority' opinion in *Branzburg* as actually just a plurality opinion, . . . some audaciously declare that *Branzburg* actually created a reporter's privilege."[29] In that short statement, Judge Posner managed to undercut decisions recognizing a reporter's privilege in the Second, Third, Fifth, and Ninth Circuits.[30] This Seventh Circuit decision was discouraging not just because the press lost or because the opinion was written by an especially influential judge. The case was fought on legal terrain that did not need to be disputed in the first place. The identity of the source was known, not confidential; the reporters, not the source, sought to withhold information; the reporters' motive was not to protect sources of information, but to protect their scoop for the commercial advantage of a book they were planning to write.[31]

This is not to say that the press and its lawyers should simply surrender notes and names of confidential sources to inquiring government lawyers. Since the setback for reporters in the Judith Miller case, the number of subpoenas to reporters for confidential source information has mushroomed. Eve Burton, general counsel for the Hearst Corporation, says that her company received eighty newsgathering subpoenas for its broadcast stations, newspapers, and magazines from mid-2005 until the end of 2006.[32] In the years before the Miller decision, Hearst received so few newsgathering subpoenas that it did not keep track.[33]

For a time, the press mounted a smart challenge to the leak investigation in the BALCO (Bay Area Laboratory Co-Operative) steroids case. A court order appealed to the Ninth Circuit would have sent two *San Francisco Chronicle* reporters to jail for up to eighteen months and fined the newspaper $1,000 a day as long as the reporters and paper refused to reveal the source of grand jury information that led to stories about the Barry Bonds-Jason Giambi steroids scandal. The facts of that case were much more favorable to the press than those in the Miller or McKevitt cases. The *Chronicle* stories revealed wrongdoing by figures of great public note, which led to a congressional investigation and to reforms in

28. *Id.* at 531.
29. *Id.* at 532.
30. *Id.*
31. *Id.* at 533.
32. David Carr, *Subpoenas and the Press,* N.Y. TIMES, Nov. 27, 2006, at C1.
33. *Id.*

baseball. In addition, the leak of grand jury transcripts occurred after the indictments, not during the investigative stage. This is not to say that the government has no interest in protecting grand jury transcripts after indictment or that those investigated but not charged have no interest in protecting their good names. Yet the government interest in secrecy would seem less after an indictment than before.

In the *Chronicle* case, an amicus brief filed by the nation's news organizations avoided First Amendment doctrine and instead made the case for a common law reporter's privilege.[34] The brief argued that "reason and experience" demonstrate that "protecting confidential newsgathering from state interference dates back to our nation's founding."[35] The brief cited the famous Peter Zenger case from the colonial period as the first in which a journalist protected confidential sources under the threat of going to jail. In addition, instead of arguing that the *Branzburg* case guarantees a First Amendment right to protect sources, the brief argued that the passage of shield laws in reaction to *Branzburg* reflects the development of a common law privilege. The brief based this argument on *Jaffee v. Redmond*,[36] in which the Supreme Court recognized a common law privilege for psychotherapists to protect the confidences of patients. Earlier cases had limited the development of common law to decisions by state courts, but in *Jaffee* the Court wrote that adoption of state statutes could also be considered as part of the development of a common law privilege.[37] Under the line of reasoning in the brief, the post-*Branzburg* court decisions recognizing a reporter's privilege would not be misreadings of *Branzburg* but instead evidence – along with state shield laws – of the development of a common law privilege. The news organizations did not argue that this privilege is absolute; rather, they contended that it requires a judge to engage in a balancing like that suggested by Judge Tatel in the *Miller* case.

This well-conceived legal argument was torpedoed, however, by the admission by one of the defense lawyers that he had leaked the grand jury transcripts in a devious effort to help his client by blaming prosecutors for misconduct.[38] The information leaked was accurate, but the motives of the leaker were deceitful. Self-appointed guardians of journalistic ethics began arguing that the newspaper reporters should have challenged their sources aggressively.[39] Were they right? Judith Miller's flawed stories about weapons of mass destruction showed the need for reporters to sometimes be

34. Brief Amicus Curiae of ABC, Inc., et al., at 10-19, *In re* Grand Jury Subpoena to Lance Williams and Mark Fainaru-Wada (N.D. Cal. No. CR-06-90225 Misc. JSW).

35. *Id.* at 3.

36. 518 U.S. 1 (1996).

37. *Id.* at 13.

38. *See* William H. Freivogel, *"All the President's Men" or "The Sopranos"? Reporters Need To Learn from Both*, ST. LOUIS POST-DISPATCH, Mar. 26, 2007, at C9.

39. *Id.*

skeptical about the information received from their sources. But is it unethical for a reporter to accept accurate transcripts from a dishonest defense lawyer engaging in a crime? Arguably it is not. The public good of the steroids disclosure trumps the dishonest lawyer's illegal attempt to free a small fish from the investigation.

One way to strengthen protection for journalists reporting national security secrets would be to extend to the reporter's privilege cases the tough legal standard that the Supreme Court applied to prior restraints in the *Pentagon Papers* case. Justice Stewart's opinion required that the government show that disclosure would "surely result in direct, immediate, and irreparable damage to our Nation or its people."[40] Early versions of the proposed federal shield law considered in the 110th Congress – the Free Flow of Information Act of 2007[41] – provided that in certain instances a reporter could be required to disclose a confidential source when "necessary to prevent imminent and actual harm to national security." But the House-passed version had a weaker standard. It would have pierced the shield in some situations where a leak "has caused or will cause significant and articulable harm to the national security"[42] and "the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information."[43] This balancing test would not necessarily have protected the *New York Times* reporters who wrote the NSA story or the *Washington Post* reporter who wrote the CIA prisons story. Nor would Judith Miller have been protected in the Plame case. In criminal cases such as the Plame investigation, the bill provided for disclosures where "the testimony or document sought is critical to the investigation or prosecution."[44] Judith Miller's conversations with Scooter Libby were highly relevant to the criminal investigation of Libby. In other words, as fervently as the press may wish for passage of the national shield bill, legislation may not provide protection in the most important and controversial situations.

There also could be unintended consequences from passage of a shield law. A blogger who does not work for a news organization would not even have been protected by the law, since in order to be a "covered person" one must "regularly" gather news "for a substantial portion of the person's livelihood or for substantial financial gain."[45] For that reason, it would not have helped someone such as Josh Wolf, who spent seven and one-half months in jail for refusing to turn over outtakes of a video he posted on his

40. New York Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

41. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong.

42. *Id.* §2(a)(3)(D)(ii).

43. *Id.* §2(a)(4).

44. *Id.* §2(a)(2)(A)(ii).

45. *Id.* §4(2).

blog showing an anarchist rally at which a police officer was injured. The shield bill pending in the Senate in the 110th Congress did not have the livelihood provision, but the Free Flow of Information Act of 2009, which passed the House of Representatives on March 31, 2009, continues to limit coverage to professional journalists.[46] Any national shield law that defines who is and who is not a journalist would border on the licensing of reporters, a dangerous path. The same congressional hand that extended protections to journalists could also take them away.

One of the more persuasive arguments against a federal shield law was delivered by special prosecutor Patrick J. Fitzgerald after the Libby trial was over.[47] Fitzgerald said that not even the head of the FBI or the Justice Department could offer a source the kind of protection that reporters offer their sources.

> If tomorrow someone walked into a building in Washington and said "I will tell you with 100 percent certainty where Osama bin Laden is now and will be tomorrow in case you would like to pay him a visit. . . . However, my only condition is that you promise . . . you will not reveal where the information came from." I don't know [if] there is an official in Washington – maybe the President – . . . who could make an absolute promise.

So when "hundreds of thousands of journalists" want an absolute privilege, "that is putting hundreds of thousands of people in a position with more authority than the FBI director, which sounds to me to be odd." Fitzgerald noted that journalists had said that they would protect their sources even in those instances where a new federal shield law did not provide the protection. "It is a remarkable event that someone can go before Congress and say 'give us a law which we don't intend to follow,'" Fitzgerald said.[48]

C. The Threat of the Espionage Act

Edgar and Schmidt demonstrated that the Espionage Act passed by the World War I Congress could potentially be used to prosecute journalists for divulging national defense secrets, with subsections 793(d) and (e) posing the greatest threat to reporters and newspapers.[49] The provisions make it a crime for those "lawfully having possession of"[50] or "having unauthorized

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46. *Compare* Free Flow of Information Act of 2007, S. 2025, 110th Cong. §10(2)(A)(i), *with* Free Flow of Information Act of 2009, H.R. 985, 111th Cong. §4(2).

47. Patrick J. Fitzgerald, *A Corrupt Politician's Worst Nightmare*, Address Before Paul Simon Public Policy Institute, Southern Illinois University Carbondale (Mar. 27, 2008).

48. *Id.*

49. Edgar & Schmidt, *supra* note 2, at 998.

50. 18 U.S.C. §793(d) (2006).

possession of"[51] information relating to the national defense to willfully communicate or retain it. As Edgar and Schmidt put it:

> If these statutes mean what they seem to say and are constitutional, public speech in this country since World War II has been rife with criminality. The source who leaks defense information to the press commits an offense; the reporter who holds onto defense material commits an offense; and the retired official who uses defense material in his memoirs commits an offense.[52]

Put another way, the front pages of *The New York Times, The Washington Post,* and *Los Angeles Times* arguably contain information several times a week the dissemination of which violates a literal reading of the Espionage Act.

Edgar and Schmidt concluded that "the legislative record is reasonably clear that a broad literal reading was not intended"[53] in light of Congress's decision to cut out proposed provisions that would have permitted the Wilson administration to administer a system of press censorship. Nevertheless, comment in the congressional debate suggests that members of Congress were aware of the implications of the broad language. In the brief debate on this portion of the law, Senator Cummins pointed out that all citizens would be required to provide government officials with any defense information they had collected; otherwise they would be guilty of retaining it in violation of the law.[54] Senator Cummins was trying to persuade the Senate to strike the retention offense for its breadth. To make his point he posed the hypothetical of an Iowa man who knew how many bushels of wheat or corn had been raised in that state. Senator Cummins argued that it was wrong to force the surrender of such information to any authorized official who demanded it. Other senators agreed with Senator Cummins's broad interpretation of the language but refused to eliminate it from the statute.[55]

No reporter or news organization has been prosecuted under the Espionage Act in almost a century since its passage. Nor has any person not a government official been convicted of violating the law through publication. But that history is no reason for news organizations to be complacent in light of the AIPAC prosecution and a press statement by then-Attorney General Gonzales. In discussing the possibility that *New York Times* journalists could be prosecuted for disclosing the secret NSA

51. 18 U.S.C. §793(e) (2006).
52. Edgar & Schmidt, *supra* note 2, at 1000.
53. *Id.*
54. *Id.* at 1010.
55. *Id.* at 1011.

wiretapping program, he confirmed that an investigation was underway,[56] and suggested that such a prosecution might be proper. He said, "There are some statutes on the book which, if you read the language carefully, would seem to indicate that that is a possibility."[57]

The effort to prosecute two former lobbyists for AIPAC magnifies the worries. If they had been convicted, Steven J. Rosen and Keith Weissman would have been the first people who were not government officials found guilty under the law for activities not involving espionage in the classic sense. They were alleged to have received classified information from a Pentagon official and transmitted it to journalists, among others.[58] If lobbyists can be convicted for receiving and disclosing national defense secrets, then why wouldn't journalists practicing their First Amendment rights be as vulnerable?

The AIPAC prosecution implicated another case lingering from a prior political era – the lawsuit by Rep. John A. Boehner (R-Oh.) against Rep. James McDermott (D-Wash.) for leaking to the press a tape of a conversation about an ethics investigation of former House Speaker Newt Gingrich. A couple from Florida had taped the cell phone conversation, which included statements by Rep. Boehner. The couple turned the tape over to Rep. McDermott, who was on the ethics committee. Rep. McDermott contacted reporters for *The New York Times* and *The Atlanta Journal-Constitution* and allowed them to hear the tape, excerpts of which were published in both papers.[59] A three-judge panel of the United States Court of Appeals for the District of Columbia Circuit twice decided that Rep. McDermott violated 18 U.S.C. §2511(1)(c) by disclosing a conversation illegally intercepted by the couple. The first decision[60] was vacated[61] by the Supreme Court in light of *Bartnicki v. Vopper*.[62] *Bartnicki* involved the same wiretapping statute as *Boehner.* The Supreme Court ruled that the First Amendment protects a person who has disclosed information lawfully received from a person who obtained the information illegally.[63] In *Boehner II,* the D.C. Circuit distinguished *Bartnicki* and pointed out that Rep. McDermott knew the identity of the people who illegally obtained the tape, whereas the recipient in *Bartnicki* did not know

56. Walter Pincus, *Prosecution of Journalists Is Possible in NSA Leaks*, WASH. POST. May 22, 2006, at A4.

57. *Id.*

58. United States v. Rosen, 557 F.3d 192, 194 (4th Cir. 2009).

59. Boehner v. McDermott (*Boehner II*), 441 F.3d 1010, 1012-1013 (D.C. Cir. 2006).

60. Boehner v. McDermott (*Boehner I*), 191 F.3d 463 (D.C. Cir. 1999).

61. 532 U.S. 1050 (2001).

62. 532 U.S. 514 (2001).

63. *Id.* at 535 ("a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern").

the person's identity.[64] Judge Sentelle dissented, arguing that the majority's distinction was without legal or constitutional significance.[65]

The government relied heavily on the majority opinion in *Boehner II* in defending its AIPAC prosecution against Rosen and Weissman's claim that *Bartnicki* provided First Amendment protection for their legal receipt of the information. How the Supreme Court eventually resolves this issue has a big potential impact on any Espionage Act prosecutions against news organizations. In some instances, journalists know that information or documents they are receiving are secret and that their source is violating the law in providing the documents. Under the view of the *Boehner II* majority and the government in the AIPAC prosecution, a journalist would be legally culpable and without First Amendment protection if he or she had reason to believe that information was illegally obtained or was illegally disclosed. Fortunately, however, the later en banc decision of the D.C. Circuit in the case seems to have removed the threat of *Boehner II.* The court held against McDermott, but on much narrower grounds. It ruled[66] that *United States v. Aguilar*[67] limited McDermott's First Amendment protection. There, the Court found that "Government officials in sensitive confidential positions may have special duties of nondisclosure."[68] The federal judge was found to have a special duty not to disclose a secret wiretap, even after it had expired. The decision depriving Rep. McDermott of First Amendment protection because of his special duties as a member of Congress on the ethics committee might not hurt journalists, who have no such duties.

Journalists might have more difficulty distinguishing themselves from Rosen and Weissman, the AIPAC lobbyists. Judge Ellis, in an opinion respectful of First Amendment values, pointed to the dicta in the *Pentagon Papers* case as indicating that the Espionage Act could be used to prosecute newspapers.[69] Judge Ellis decided in a pretrial opinion that the Espionage Act could be saved from vagueness and overbreadth challenges by imposing judicial glosses that include a specific intent requirement and narrow the meaning of "information relating to the national defense."[70] He summarized his narrowing of the statute in this passage:

> To prove that the information is related to the national defense, the government must prove: (1) that the information relates to the nation's military activities, intelligence gathering or foreign policy,

64. *Boehner II*, 441 F.3d at 1015-1017.
65. *Id*. at 1020.
66. Boehner v. McDermott (*Boehner III*), 484 F.3d 573 (D.C. Cir. 2007) (en banc).
67. 515 U.S. 593 (1995).
68. *Id.* at 606.
69. United States v. Rosen, 445 F. Supp. 2d 602, 638 (E.D. Va. 2006).
70. *Id.* at 627.

> (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. To prove that the information was transmitted to one not entitled to receive it, the government must prove that a validly promulgated executive branch regulation or order restricted the disclosure of information to a certain set of identifiable people, and that the defendant delivered the information to a person outside this set. In addition, the government must also prove that the person alleged to have violated these provisions knew the nature of the information, knew that the person with whom they were communicating was not entitled to the information, and 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.[71]

Judge Ellis had to use strong judicial medicine to interpret the Espionage Act in a manner that allowed the AIPAC prosecution to go forward. Would that judicial prescription save the law for a prosecution against a news organization? The Espionage Act was written at the dawn of modern First Amendment doctrine. At the time the law was written, the Supreme Court had never declared a law to be unconstitutional because it violated the First Amendment. The government's position in the AIPAC case was blind to the remarkable development of First Amendment doctrine since passage of the Espionage Act. The government argued that the First Amendment was not even implicated in the AIPAC case, relying on *Schenck v. United States.*[72] *Schenck* is a thoroughly discredited if unanimous decision in which the Court upheld the conviction of pamphleteers opposing the draft. For the government to base its argument on such an antiquated holding called its legal approach into serious question, and after a series of unfavorable pretrial rulings the government eventually dropped the charges against Rosen and Weissman altogether.[73]

Decades of First Amendment developments, together with ninety years of history during which the Espionage Act has not been used against a newspaper or journalist, combine to form a powerful historical argument against any such prosecution.

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71. *Id.* at 643.

72. Government's Supplemental Response to Defendants' Motion To Dismiss the Superseding Indictment, United States v. Rosen, 445 F. Supp. 2d 602, 608 (E.D. Va. 2006) (citing Schenck v. United States, 249 U.S. 47 (1919)).

73. *See supra* note 6.

III. CRYING WOLF ON NATIONAL SECURITY

While journalists have elevated their place in the constitutional constellation, government officials have exaggerated the damage to national security caused by the publication of national security secrets. The eleven secrets identified in Solicitor General Griswold's secret brief to the Supreme Court as the most dangerous appeared on their face to be so sensitive that they might derail U.S. peace talks and prolong the Vietnam War, with increased American casualties.[74] The brief claimed that publication would disclose:

1. Diplomatic attempts to end the war through negotiations with the North Vietnamese, disclosure of which could derail peace negotiations and delay peace.[75]
2. Comments offensive to U.S. allies in the war, particularly South Korea, Thailand, and Australia.[76]
3. The names and activities of CIA agents "still active in Southeast Asia" as well as references to the activities of the National Security Agency.[77]
4. Contingency plans of the Southeast Asia Treaty Organization (SEATO).[78]
5. U.S. estimates on how the Soviet Union would react to the Vietnam War.[79]
6. The judgment of a U.S. intelligence board on the Soviet capability to supply weapons to the North, the disclosure of which could lead to "serious consequences."[80]
7. The U.S. consideration of a nuclear response against China if the Chinese attacked Thailand.[81]
8. A 1968 cable to Washington by then-ambassador Llewellyn C. Thompson making predictions on a likely Soviet response to mining Haiphong harbor or possibly invading North Vietnam,

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74. *Pentagon Papers* Sealed Brief, *supra* note 9; *see Pentagon Papers* Oral Argument, *supra* note 17, 71 LANDMARK BRIEFS at 219 ("And I said, 'Look, tell me what are the worst. Tell me what are the things that really make trouble.' And they told me – and I made longhand notes of what they told me – and from that I prepared the closed brief.") (Solicitor General Griswold).

75. *Pentagon Papers* Sealed Brief, *supra* note 9, at 4-5.

76. *Id.*

77. *Id.* at 5.

78. *Id.* at 6.

79. *Id.* at 6.

80. *Id.* at 7.

81. *Id.*

Laos, or Cambodia.[82]

9. Discussions of possible South Vietnamese military action in Laos.[83]
10. The successes that the United States had in communications intelligence, revealing U.S. capabilities to the enemy.[84]
11. Confidential diplomatic communications that would endanger the lives of prisoners of war. "The longer prisoners are held, the more will die," the government said.[85]

These eleven secrets considered to be the most dangerous items within the Pentagon Papers volumes involve sensitive subjects in which the government has a strong interest – diplomatic initiatives, intelligence activities, intelligence estimates and capabilities, and military contingency plans. The government claimed that disclosure of the Pentagon Papers could endanger the lives of intelligence agents and prolong the war, with the resulting death of thousands more soldiers and many prisoners of war. In many ways, these fears seem more tangible than the claims that the Bush administration made about the consequences of press disclosures of NSA wiretaps and secret CIA prisons. But the verdict of history is that the disclosure of the papers was in the public interest and did not harm national security. Griswold himself later said: "I have never seen any trace of a threat to the national security from the publication."[86]

The Bush administration's claims about the damage of publishing secrets did not involve the same kind of detail offered by the United States in *Pentagon Papers*. President Bush made a widely reported warning to *New York Times* editors on December 5, 2005, that they would have "blood on their hands" if they published the NSA secret wiretapping story.[87] Happily, that prediction has not come true. The Bush administration never offered proof of any significant damage to national security from publication of national security secrets during the war on terror. At a meeting in 2007, Kenneth L. Wainstein, Assistant Attorney General for the National Security Division, spoke of experiences he had in criminal cases in which leaks damaged a Justice Department investigation, but Wainstein's main examples involved only one recent national security case.[88]

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82. *Id.* at 7-8; *see* Sims, *supra* note 9, at 385-386.

83. *Pentagon Papers* Sealed Brief, *supra* note 9, at 8.

84. *Id.* at 8-9.

85. *Id.* at 10.

86. Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

87. Philip Taubman, *Why We Publish Secrets,* Address Before Paul Simon Public Policy Institute, Southern Illinois University Carbondale (Sept. 25, 2006).

88. Kenneth L. Wainstein, Program of the National Security Law Section, Association of American Law Schools Annual Meeting (Jan. 4, 2007).

Wainstein's examples included two old, well-publicized cases – the *Chicago Tribune*'s 1942 disclosure that the United States had broken the Japanese code and the disclosure in the 1970s of CIA agents' names by former CIA employee Philip Agee. The one recent example given by Wainstein described the stories and telephone calls by *Times* reporters Judith Miller and Philip Shenon in 2001 that tipped off two Islamic charities that their assets might be frozen by the government.[89] No claim was made that lives were jeopardized.

This is not to say that press disclosures of government secrets are never potentially damaging. The *Chicago Tribune* story about the Japanese code could have had serious repercussions, but the Japanese apparently missed it.[90] Historically, the press has refused to publish information about breaking codes, CIA agents' identities, troop movements, or other military plans that could risk American lives. The widely reported *New York Times* decisions not to disclose the Bay of Pigs invasion or the American discovery of missiles in Cuba during the Cuban missile crisis are two examples of the discretion exercised by the press.

IV. AN ETHICAL APPROACH

If the law fails to provide tidy answers to questions surrounding the press's right to print national security secrets, might an ethics approach provide a more fulfilling framework? For decades journalists were eager to hold other professions to ethical standards but eschewed developing their own ethical principles for fear of being held to them in courts of law. The development of ethical standards for newsrooms is essentially a post-*Pentagon Papers* development.

Journalism ethicists often use a device called the "Potter Box," named after Harvard theologian Ralph Potter, for making ethical decisions. It is called a box because it breaks the question into four separate parts, each represented by one quadrant of a square. One quadrant is for the facts. A second is for values – from human values such as compassion, fairness, equality, and freedom of expression to journalistic values about providing information that helps readers understand the world. A third quadrant is for principles. Some of these principles relate directly to journalism, such as truth-telling and the watchdog function of the press. Other principles are more universal, such as Kant's Categorical Imperative, the Golden Mean, and the Golden Rule. The fourth quadrant is loyalties – to citizens, readers, advertisers, civic leaders, and so forth. As with other decisionmaking

89. *Id.*

90. DAVID KAHN, THE CODEBREAKERS: THE STORY OF SECRET WRITING 603 (1967). Kahn reports that the *Tribune* story did not refer to Japanese codes or to American communications intelligence, but that "the Navy feared that the Japanese would realize that its details could have come only from a reading of their coded messages." *Id.*

devices, the result of a Potter Box analysis depends on how one lays out the facts and how one weighs competing principles, values, and loyalties.

If the Golden Mean, the Golden Rule, or the Categorical Imperative trump journalistic values, then the Potter Box would suggest that editors should withhold publication. The middle ground of the Golden Mean would not be to publish; the "do unto others" instruction of the Golden Rule would suggest that newspapers should not print government secrets because they would not want the government to disclose reporters' secrets. The Categorical Imperative does not comfortably support a universal rule that the press should print national security secrets.

But journalistic principles favoring disclosure may hold sway over the more formalistic principles, and then the Potter Box may generate the conclusion that it is ethical to publish. The ethical codes of leading journalistic organizations such as the Associated Press Managing Editors, the American Society of News Editors (ASNE), and the Society of Professional Journalists emphasize truth-telling, independence, and watchdog journalism. "The public's right to know about matters of importance is paramount," according to the Associated Press Managing Editors. "The newspaper has a special responsibility as surrogate of its readers to be a vigilant watchdog of their legitimate public interests. . . . Truth is its guiding principle."[91] The Society of Professional Journalists has major headings in its Code of Ethics that exhort its members to "Seek Truth and Report It" and to "Act Independently."[92] ASNE says, "The American press was made free . . . to bring an independent scrutiny to bear on the forces of power in the society, including the conduct of official power at all levels of government. Freedom of the press . . . . must be defended against encroachment or assault from any quarter, public or private."[93] Granted, these ethics codes include values about responsibility, minimizing harm, and public accountability. But the principles which support disclosure are considered paramount.

An attempt to apply both journalistic and universal principles might result in the kind of action that the *Times* and *Post* followed in the NSA and CIA stories – to delay publication or to withhold details that could be damaging to U.S. security. To the Bush administration, these solutions were hardly a Golden Mean, but they did reflect an effort to minimize harm while performing the press's primary function of public disclosure and debate.

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91. Associated Press Managing Editors, Statement of Ethical Principles, *available at* http://www.asne.org/articleview/tabid/58/smid/370/articleid/263/reftab/132/t/associated%20press%20managing%20editors/default.aspx.

92. Society of Professional Journalists, Code of Ethics, *available at* http://www.spj.org/ethicscode.asp.

93. ASNE's Statement of Principles, arts. I, II (heading omitted), *available at* http:/www.asne.org/articleview/tabid/58/smid/370/articleid/325/reftab/132/t/asne%20statement%20of%20principles/default.aspx.

Editors, reporters, and journalism deans often do a poor job of explaining decisions to print national security secrets. When a panel of reporters at a dinner of the Media Law Resource Center was asked why they printed secrets about NSA wiretapping, Abu Ghraib torture, and CIA black prisons, one blurted out, "Because we got it."[94] Blunt, glib answers of that kind are not exactly the thoughtful kind of explanation that the press owes when it decides to print government secrets.

Editors and journalism deans sometimes do no better than reporters. The views of five top academicians[95] were summarized in a letter published in *The Washington Post* under the headline, "When in Doubt, Publish."[96] "It is the business – and the responsibility – of the press to reveal secrets,"[97] the piece began. The academicians went on to construct a more nuanced argument. Still, in the end, their decision boiled down to this formulation: "We believe that in the case of a close case, the press should publish when editors are convinced that more damage will be done to our democratic society by keeping information away from the American people than by leveling with them."[98]

The editors of *The New York Times* and *Los Angeles Times* published a written explanation of their decision in 2006 to publish details of the Bush administration's program to monitor international banking transactions.[99] They noted that the Administration itself had tried to obtain favorable publicity for the program several months before it was disclosed. They also pointed out that they always give the government time to make its case that publication could risk lives. The *Times*'s NSA surveillance story was held more than a year, Keller said, until *Times* editors became convinced that the program might be illegal. *The Washington Post's* CIA prison stories also made accommodations with the government by cutting out mention of the names of the countries that allowed the prisons within their borders.[100] Baquet and Keller closed by reasserting their independence and right to make these decisions on their own – without government intervention.

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94. *Reporting on National Security Under Threat of Indictment*, Media Law Resource Center Annual Dinner (Nov. 9, 2006).

95. Geoffrey Cowan, Dean, Annenberg School for Communication, University of Southern California; Alex S. Jones, Director, Shorenstein Center, Harvard University; John Lavine, Dean, Medill School of Journalism, Northwestern University; Nicholas Lemann, Dean, Graduate School of Journalism, Columbia University; Orville Schell, Dean, Graduate School of Journalism, University of California at Berkeley.

96. Geoffrey Cowan, Alex S. Jones, John Lavine, Nicholas Lemann & Orville Schell, *When in Doubt, Publish*, WASH. POST, July 9, 2006, at B2. It is not clear whether the headline came from the authors or was added by the *Post*.

97. *Id.*

98. *Id.*

99. Dean Baquet & Bill Keller, *When Do We Publish a Secret?,* N.Y. TIMES, July 1, 2006, at A15.

100. *Id.*

As a former journalist, I understand this gut feeling that the press's default position should be to publish. But the academicians' formulation raises questions that journalists have not done well answering. If journalists are not specially qualified to evaluate national security information and do not have security clearances, what makes them qualified to make the national security judgment that is part of the calculus of determining if society will be better off if the secret is disclosed? If the decision to publish rests on the editors' judgment of the legality of the government action, as Keller said the *Times*'s NSA story did, is the ultimate decision one to be made by lawyers rather than editors? Finally, how do reporters and editors defend themselves against the accusation that they hold themselves above the law when they decide what is legal and what is not and when they refuse to provide information to the courts about the sources of illegal leaks?

Edgar and Schmidt pointed out after *Pentagon Papers* that the aggressive stance of the press in that case represented a new assertiveness and "demonstrated that much of the press was no longer willing to be merely an occasionally critical associate devoted to common aims, but intended to become an adversary."[101] They wrote that this new role was a "necessary counterweight to the increasing concentration of the power of the government in the hands of the Executive Branch."[102] Justice Stewart's opinion in *Pentagon Papers* made a similar point:

> In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.
>
> 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

101. Edgar & Schmidt, *supra* note 2, at 1077.
102. *Id.* at 1078.

> basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.[103]

These words have even more force three decades later, after the Bush-Cheney administration asserted executive power to its limit and beyond, while the Administration's party controlled Congress and the opposition was easily cowed by Administration attacks on alleged weakness in the war on terror. The national security secrets disclosed by the *Times* and by the *Post* relate directly to that abuse of executive power. Under the circumstances that existed during the first six years of the Bush administration, it was the checks from unelected judges and journalists that provided the main counterbalance to runaway executive authority.

CONCLUSION

James Goodale, the former *Times* lawyer involved in the *Pentagon Papers* case, told a conference of journalists and lawyers in 2006 that they should "fight like tigers" to protect their First Amendment freedoms.[104] In light of the hostile legal environment, the uncertain protection offered by the proposed Free Flow of Information Act, and the continuing threat posed by the Espionage Act, the press might be better off using guerrilla legal tactics rather than fighting the set-piece war to win a legal precedent that is beyond reach. Reporters can make sure they don't type sensitive notes on company computers, that they destroy notes as soon as possible, and that they remember not to write down sources' names. Media companies can bundle phone systems to mask calls to individual reporters. And when reporters are jailed, their employers can use their ink and kilowatts on behalf of the reporters' freedom. As unappealing as journalists may seem at times, nearly six in ten Americans believe that journalists should protect confidential sources even when under a court order to disclose them.[105] In light of this reservoir of understanding from the public, it would be difficult to bring a government prosecution of a journalist for violation of the Espionage Act.

Professor Alexander Bickel, who argued the *Pentagon Papers* case before the Supreme Court on behalf of *The New York Times*, wrote afterwards that the press was less free after the case than before because "law can never make us as secure as we are when we do not need it. Those freedoms which are neither challenged nor defined are the most secure."[106]

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103. New York Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 727-728 (1971) (Stewart, J., concurring) (footnotes omitted).

104. Meyers, *supra* note 26.

105. *The State of the New Media 2006*, Annual Report, Project for Excellence in Journalism.

106. Alexander M. Bickel, *"The Uninhibited, Robust, and Wide-Open" First Amendment: From "Sullivan" to the Pentagon Papers,* 54 COMMENTARY 60, 61 (1972).

Professor Bickel called this absence of clear boundaries between freedom and secrecy a "disorderly situation" but suggested that, like democracy, this disorder was better than the likely alternative.[107] Edgar and Schmidt called this situation one of "benign indeterminacy." It just may be that press freedom flourishes better in this disorderly state of indeterminacy than it would in a courtroom filled with ringing rhetoric about the First Amendment.

In rare instances, it may not be possible to square the circle, and a journalist will have to go to jail. Just as the courts did not accept all of the Reverend Martin Luther King, Jr.'s tactics as legal, it may not be possible to make every important tactic of a reporter legal. Some may say this amounts to journalists arrogantly putting themselves above the law. But as long as a journalist is willing to submit to the consequences, that criticism loses its sting. In the end, there may be instances in which the journalist's highest calling and the command of journalistic ethics require a journalist to disclose national security secrets crucial to public debate even if that means violating the law or going to jail.

107. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 80 (1975).