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Government Secrecy vs. Freedom of the Press

"A popular Government, without popular information, or a means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both."

— James Madison

BY GEOFFREY R. STONE

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Executive summary

The tension between government secrecy and freedom of the press — so apparent today — is hardly new. One might even say that the very existence of such a tension is itself a mark of democracy — for where there is no tension there are fewer opportunities to strengthen national security and invigorate press freedom. Just how best to put that tension in the service of both ideals is the general subject of this report.

The words "sedition" and "espionage" connote disloyalty to one's country — the first by words or actions intended to harm or overthrow a nation, the second by spying or assisting spies to disseminate secret information in a way injurious to the national defense. Laws such as the Sedition Act of 1798,[1] the Espionage Act of 1917,[2] and the Sedition Act of 1918 [3] thus raise an important question: To what extent can a free press fully and adequately inform the citizenry of the conduct of war — its course and costs — without actually jeopardizing military safety and national security? Or, phrased another way, how much of a watchdog role can the press play in wartime before its actions place our security at real risk?

"It is easy, by giving way to passion, intolerance, and suspicions in wartime," observed Justice Robert Jackson, "to reduce our liberties to a shadow, often in answer to exaggerated claims of security."[4] Then again, Justice Jackson also thought that caution should be taken lest our "constitutional Bill of Rights" become a "suicide pact."[5] These two takes on freedom point to the great difficulty in reconciling security, which is not counterfeit, with liberty, which is not destructive. That task is especially challenging when the wartime powers of the government clash with the wartime duties of a free and responsible press.

For Thomas I. Emerson, the renowned First Amendment scholar, sedition laws and the like are, "in the final analysis, a relic of government by monarchy. They are designed to destroy political opposition."[6] By that measure, nothing short of "overt action" harmful to national security may be punished. When such laws extend beyond that realm, he argued, "they cannot be reconciled with constitutional government."[7]

By comparison, several months before Congress passed the Sedition Act of 1918, *The Washington Post* editorialized that the proposed law, with its severe civil fines and criminal penalties, "will give the government full power to deal effectively with persons who are not in sympathy with the United States, and it is to be hoped that [when] it is written upon the statute books the Department of Justice will proceed with its enforcement." Any "superfluous concern for the right of free speech,"[8] the editors added, should not be allowed

to stand in the way of vigorous enforcement of the act.

Zechariah Chafee, another free-speech scholar, looked at the matter through this lens: "The Espionage Act should not be construed to reverse [our] national policy of liberty of the press and silence hostile criticism, unless Congress had given the clearest expression of such an intention in the statute. Congress had no such intention in the Act of 1917."[9] Chafee likewise maintained that the First Amendment, as ultimately interpreted by the Supreme Court, also restricted the government's power to employ espionage and sedition laws to abridge freedom of expression.[10]

If a line is to be drawn, where and why should it be drawn? That basic question was put to a group of scholars, lawyers and journalists in a workshop held at the First Amendment Center on July 20, 2006. The participants in that five-hour workshop, which focused primarily on the Espionage Act and the press, were Floyd Abrams, Scott Armstrong, Sandra S. Baron, Susan Buckley, Shelby Coffey, Ronald K.L. Collins, Robert Corn-Revere, Lucy Dalglish, Harold S.H. Edgar, Lee Levine, Mark H. Lynch, Paul K. McMasters, Jeffrey H. Smith, Geoffrey R. Stone and Stephen I. Vladeck.

Stone agreed to prepare a working paper for the group and invited comments and criticisms. The goal was not to reach any consensus and incorporate such into the final report, but rather to critically discuss the subject and to present a variety of thoughts and options for him to consider. Hence, this report reflects the informed conclusions of Stone alone.

In preparation for the workshop, Vladeck wrote a paper about the relevant statutory framework touching upon government secrecy and the press. That paper, too, was critically discussed and is published here in revised form to supplement Stone's contribution. Here, again, it reflects the informed conclusions of its author alone. Additionally, the First Amendment Center's staff and research assistants prepared a timeline and an extended bibliography.

One of the purposes of the First Amendment is to prompt self-governing citizens to participate in informed discourse about the conduct of their government. In that spirit, our hope is that this report will enrich discussions among elected officials, judges, lawyers, educators, editors, reporters and, of course, civic-minded Americans.

Stone's thoughtful essay and the materials accompanying it remind us of something simple yet important: Those who surrender true liberty to a false security defend nothing worth preserving, while those who abandon real security to an illusory liberty protect nothing worth safeguarding.

ENDNOTES

1 Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

2 Act of June 15, 1917, ch. 30, 40 Stat. 217 (18 U.S.C.§§ 793 et seq.).

3 Act of May 16, 1918, ch. 75, 40 Stat. 553 (repealed 1921).

4 Robert H. Jackson, "Wartime Security and Liberty under Law," 1 *Buffalo Law Review* 103, 116 (1951).

5 *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

6 Thomas I. Emerson, *The System of Freedom of Expression* (New York, N.Y.: Random House, 1970), p. 160.

7 Ibid.

8 Editorial, "To Suppress Disloyalists," *The Washington Post*, p. 6.

9 Zechariah Chafee, Jr., *Free Speech in the United States* (Cambridge, MA: Harvard University Press, 1948), p. 44 (referring in part to Judge Learned Hand's opinion in *Masses Publishing Co. v. Patten*, 244 Fed 535 (S.D.N.Y., 1917)).

10 See Chafee, ibid., at pp. 108-140.

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"A popular Government, without popular information, or a means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both."[1]

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Since Sept. 11, 2001, the United States has investigated, threatened to prosecute, and prosecuted public employees, journalists and the press for the dissemination of classified information relating to the national security. The government's response to *The New York Times*'s revelation of President George W. Bush's secret directive to the National Security Agency to engage in warrantless electronic surveillance illustrates the tension between the government and the press.

Sen. Jim Bunning, R-Ky., and Rep. Peter King, R-N.Y., accused the *Times* of "treason," and Republicans in the House of Representatives passed a resolution condemning the press for putting "the lives of Americans in danger." Attorney General Alberto Gonzales went so far as to suggest that the *Times* might be prosecuted for violating a provision of federal law making it a crime to disclose "information relating to the national defense" with "reason to believe" that the information "could be used to the injury of the United States."[2] The federal government has never before prosecuted the press for publishing confidential government information.

It is difficult to assess the precise cause of this tension. Perhaps the media are pressing more aggressively to pierce the government's shield of secrecy. Perhaps the government is pressing more aggressively to expand its shield of secrecy. Perhaps both factors are at work. In this essay, I explore not why this is happening, but whether the measures taken and suggested by the executive branch to prevent and punish the public disclosure of classified information are consistent with the First Amendment.[3]

I address three questions: (1) In what circumstances may the government discharge and/or criminally punish a public employee for disclosing classified information relating to the national security to a journalist for the purpose of publication?[4] (2) In what circumstances may the government criminally punish the press for publishing such

information? (3) In what circumstances may the government criminally punish a journalist for receiving or soliciting such information from a government employee for the purpose of publication? The issues are as difficult as they are important, and the governing law is unformed and often obscure. I shall try to bring some clarity to these questions.[5]

I. GOVERNMENT EMPLOYEES

We begin with individuals who are not government employees. In what circumstances may such persons be held legally accountable for revealing information to a journalist for the purpose of publication? Answering this question will enable us to establish a baseline definition of First Amendment rights. We will then inquire whether the rights of government employees are any different.[6]

A. Freedom to share information

In general, an ordinary individual (that is, an individual who is not a government employee) has a broad First Amendment right to reveal information to a journalist for the purpose of publication. There are a few limitations, however.

First, the Supreme Court has long recognized that there are "certain well defined and narrowly limited classes of speech," such as false statements of fact, obscenity and threats, that "are no essential part of any exposition of ideas and are of such slight social 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."[7] Because such categories of speech have "low" First Amendment value, they may be restricted without satisfying the usual demands of the First Amendment.[8]

For example, if X makes a knowingly false and defamatory statement about Y to a journalist, with the understanding that the journalist will publish the information, X might be liable to Y for the tort of defamation. Or, if X reveals to a reporter that Y was raped, with the expectation that the reporter will publish the information, X might be liable to Y for invasion of privacy. The public disclosure of Y's identity, unlike the fact of the rape, might be thought to be of such slight value to public debate that it can be prohibited in order to protect Y's privacy.[9]

Second, private individuals sometimes voluntarily contract with other private

individuals to limit their speech. Violation of such a private agreement might be actionable as a breach of contract. For example, if X takes a job as a salesman and agrees as a condition of employment not to disclose his employer's customer list to competitors, he might be liable for breach of contract if he reveals the list to a reporter for a trade journal with the expectation that the journal will publish the list. Or, if Y accepts employment as a chemist and agrees not to disclose her company's trade secrets, she might be liable for breach of contract if she reveals the information to a journalist with the understanding that he will publish it. In these circumstances, the individual has voluntarily agreed to limit what otherwise would be a First Amendment right. Such privately negotiated waivers of constitutional rights are usually enforceable.[10]

Third, there might be situations, however rare, in which an individual discloses previously non-public information to a journalist in circumstances in which publication of the information would be so dangerous to society that the individual might be punished for disclosing it to the journalist. For example, suppose a scientist discovers how to produce the ebola virus from ordinary household materials. The harm caused by the public dissemination of that information might be so likely, imminent and grave that the scientist could be punished for facilitating its publication.[11]

These examples illustrate the few circumstances in which an individual might be held legally responsible for disclosing information to a journalist for the purpose of publication. In general, however, the First Amendment accords individuals very broad freedom to share information with reporters for the purpose of publication.

B. Limitations on public employees' speech

To what extent is a government employee in a similar position? When we ask about the First Amendment rights of public employees, we must focus on the second of the three situations examined above. It is the waiver-of-rights issue that poses the critical question. Although the first and third situations are relevant in the public employee context, it is the waiver issue that is at the core of the matter.

At first blush, it might seem that, whatever might be the case with private employers, the government cannot constitutionally insist that individuals surrender their First Amendment rights as a condition of public employment. Surely, it would be unconstitutional, for example, for the government to require individuals to agree as a condition of employment that they will never criticize the president, practice the Muslim faith, or assert their constitutional right to be free from unreasonable searches and seizures. It would be no answer for the government to point out that the individuals had voluntarily

agreed not to criticize the president, practice their faith, or assert their Fourth Amendment rights, for even if individuals consent to surrender their constitutional rights in order to obtain a government job, the government cannot constitutionally condition employment on the waiver of those rights. As the Supreme Court has long held, "unconstitutional conditions" on public employment violate the Constitution. The government cannot legitimately use its leverage over jobs, welfare benefits, driver's licenses, tax deductions, zoning waivers, and the like to extract waivers of constitutional rights.[12]

The government might respond that because private employers can constitutionally extract concessions from their employees as a condition of employment, including waivers of what would otherwise be constitutional rights, the government should be able to do the same. There are three answers to this argument. First, the Constitution does not bind private employers. It binds only the government. Second, the government's scale and power are so vast that it can have a much more pervasive impact on individual freedom than private employers. Third, because government is not profit-driven, it is much more likely than private employers to sacrifice economic efficiency in order to achieve other, especially political, goals. The government, for example, is much more likely than private employers to refuse to hire people who do not support the party in power, thus leveraging government power for political advantage.[13]

This does not mean, however, that the government may never require individuals to waive their constitutional rights as a condition of public employment. There are at least two circumstances, relevant to the issue under consideration, in which the government may restrict the First Amendment rights of its employees. First, as the Supreme Court noted in *Pickering v. Board of Education*, the government

> *… has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees …* [14]

The government has a legitimate interest in running efficiently, and some restrictions of employee speech might be reasonably necessary to achieve that efficiency. The Hatch Act, for instance, prohibits public employees from taking an active part in political campaigns. The goal is to insulate public employees from undue political pressure and

improper influence. To enable public employees to perform their jobs properly, the government may require them to waive what would otherwise be the First Amendment right to participate in partisan political activities.[15]

Another illustration might involve a police officer who uses racist language in a street encounter. In such circumstances, the police department might reasonably conclude that the officer can no longer perform her job effectively or that her continued employment would seriously undermine the department's credibility with the community. As *Pickering* observed, it may be appropriate in such circumstances to "balance" the competing interests.

Similarly, a government employee's disclosure of confidential information to a journalist for the purpose of publication might jeopardize the government's ability to function effectively. For example, if an IRS employee gives a reporter X's confidential tax records, this might seriously impair the public's confidence in the tax system and thus undermine the government's capacity to function efficiently.[16]

A second reason why the government may sometimes restrict what otherwise would be the First Amendment rights of public employees is that the employee learns the information only by virtue of his government employment. Arguably, it is one thing for the government to prohibit its employees from speaking in ways other citizens can speak, but something else entirely for it to prohibit them from speaking in ways other citizens cannot speak. If a public employee gains access to confidential information only because of his public employment, then prohibiting him from disclosing that information to anyone outside the government might be said not to restrict his First Amendment rights at all, because he had no right to know the information in the first place.[17]

There is little clear law on this question. In *Snepp v. United States*,[18] however, the Supreme Court held that a former employee of the CIA could constitutionally be held to his agreement not to publish "any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment, [without] specific prior approval by the Agency." The Court did not suggest that every government employee can be required to abide by such a rule. Rather, it emphasized that a "former intelligence agent's publication of … material relating to intelligence activities can be detrimental to vital national interests."[19]

In light of *Snepp* and *Pickering*, it seems reasonable to assume that a public employee who discloses classified information relating to the national security to a journalist for the purpose of publication has violated his position of trust and ordinarily may be discharged and/or criminally punished without violating the First Amendment.

It is important to note that this conclusion is specific to public employees. It does not

govern those who are not public employees. Unlike public employees, who have agreed to abide by constitutionally permissible restrictions of their speech, journalists and publishers have not agreed to waive their rights. The analogy is to the private employee who agrees not to disclose his employer's customer lists. Although he might be liable for breach of contract, the journalist to whom he discloses the list and the trade journal that publishes it are not answerable to the employer.[20]

Moreover, as the Court recognized in *Pickering*, the government has greater (though not unlimited) need to restrict the speech of its employees than to restrict the speech of individuals generally. This is so because the government's interests in regulating the speech of its employees are different from its interests in regulating speech generally. The government cannot constitutionally punish individuals for making racist comments, but it can discipline a police officer who makes such comments on the job.

The distinction between public employees and other individuals is critical in the context of confidential information. Information the government wants to keep secret may be of great value to the public. The public disclosure of an individual's tax return may undermine the public's confidence in the tax system, but it may also reveal important information about a political candidate's finances. The conclusion that the government has a legitimate reason to prohibit its employees from disclosing such information does not reflect a judgment that the government's interest in confidentiality outweighs the public's interest in disclosure. Indeed, information about a political candidate's finances might be of fundamental significance to public debate. It would plainly be unconstitutional for the government to prohibit the dissemination of such information if it did not come from the government's own files.

In theory, of course, it would be possible for courts to decide in each instance whether an unauthorized disclosure of confidential information by a public employee is protected by the First Amendment because the value of the information to the public outweighs the government's need for secrecy. But such an approach would put courts in an extremely awkward position and would in effect convert the First Amendment into a constitutional Freedom of Information Act. The Supreme Court has sensibly eschewed that approach and granted the government considerable deference in deciding whether and when public employees may disclose confidential government information.[21]

C. Disclosure of classified information

Such disclosures are not always punishable, however. In applying *Pickering* and *Snepp*, courts do not give the government *carte blanche* to insist on secrecy. The government's restrictions must be reasonable.

Returning to the problem of confidential information relating to the national security, we begin with classified information. The existing classification system authorizes public employees to classify any information the unauthorized disclosure of which could reasonably be expected to harm the national security. Access to such information is restricted to individuals with an appropriate security clearance. It is unlawful for a government employee to disclose such information to any person who is not authorized to know it.[22]

The classification system is a highly imperfect guide to the need for confidentiality. The concept "reasonably be expected to harm the national security" is inherently vague and plastic. It is impossible to know from this standard how likely, imminent or grave the potential harm must actually be. Moreover, the classification process is poorly designed and sloppily implemented. Predictably, the government tends to over-classify information. An employee charged with the task of classifying information inevitably will err on the side of over- rather than under-classification. No employee wants to be responsible for under-classification. In addition, we know from experience that public officials have often abused the classification system to hide from public scrutiny their own misjudgments, incompetence and venality.[23]

Despite these very real concerns, there is good reason to have clear, simple and easily administered rules to guide public employees. Hence, a government employee ordinarily can be disciplined, discharged or prosecuted for knowingly disclosing classified information to a journalist for the purpose of publication.[24]

D. Requirements for punishing disclosure

Are there any circumstances in which a public employee has a First Amendment right to disclose classified information to a journalist for the purpose of publication? Courts have recognized two conditions that must be satisfied in order for the government to punish a public employee for the disclosure of classified information. First, the government must prove that the disclosure would be "potentially damaging to the United States."[25] Although this judgment is implicit in the very fact of classification, the fact of classification is not conclusive. Because the classification process is imperfect, independent proof of at least potential harm to the national security is required.

Second, the government must prove that it has attempted to keep the information secret and that the information was in fact secret before the employee's disclosure. As Judge Learned Hand noted more than 60 years ago, "it is obviously lawful" for a public employee to reveal information that the government has not withheld from the public.[26] The government must prove that the information was "closely held" and "not available to the general public" prior to the disclosure.[27]

Thus, to punish a public employee for disclosing classified information to a reporter for the purpose of publication, the government must prove that the information was not already in the public domain, and that the disclosure is potentially damaging to the national security.

This is a far cry from requiring the government to prove that the employee knew the disclosure would create a clear and present danger of grave harm to the nation. The gap between these two standards represents the difference between the rights of ordinary individuals and the rights of public employees. It is what the public employee surrenders as a condition of his employment; it is the effect of *Pickering* balancing; and it is a measure of the deference we grant the government in the management of its "internal" affairs.[28]

Under this approach, that the classification of a particular document might have been erroneous is not sufficient justification for a public employee to breach his contract with the government. A public employee does not have a First Amendment right to second-guess the classification system. As long as the conditions of potential harm and secrecy are satisfied, the employee has no constitutional right to disclose classified information and then assert in his defense that the information was insufficiently dangerous or too valuable to public debate to justify secrecy. A central goal of the classification system is to avoid such *ad hoc* judgments, and courts generally should not be in the business of second-guessing the classifiers.[29]

There is a fundamental disadvantage in this approach. As we have seen, the disclosure of confidential information may be both potentially harmful to the national security and quite valuable to public debate. Consider, for example, information relating to (a) secret understandings with other nations, (b) evaluations of new weapons systems, (c) plans for shooting down hijacked airplanes, (d) evaluations of the adequacy of private industry's protection of nuclear power plants and (e) government policies on the use of torture. One might reasonably conclude that some or all of this information should be available to the public to enable informed public deliberation. But the approach to public employees outlined above empowers the government to forbid the disclosure of such information.

In this sense, granting a high level of deference to the government to determine what information to withhold from the public significantly overprotects government secrecy at the expense of official accountability and informed public debate. There is no reason to believe that government officers will reach the "right" result in striking this balance. Not only do they have powerful incentives to over-classify, but the classification standard itself considers only one side of the balance — whether disclosure might harm the national security. It does not even take into account the other side of the balance — whether disclosure might enhance democratic governance.

The law as it stands accepts this approach largely for the sake of simplicity. But we should be under no illusions about the impact. This standard gives inordinate weight to secrecy at the expense of informed public opinion.

E. Disclosure of unlawful government activity

There is at least one situation, however, in which a government employee must have a First Amendment right to disclose classified information, even if the disclosure might harm the national security. This arises when the disclosure reveals unlawful government conduct.

Applying the *Pickering* standard, the government has no legitimate interest in keeping secret its own illegality, and the public has a compelling interest in the disclosure of such information. Even if the government ordinarily can punish a public employee for disclosing classified information, that presumption disappears when the disclosure reveals the government's own wrongdoing. The government is, after all, accountable to the public. In a self-governing society, citizens need to know when their representatives violate the law.[30]

Even in this situation, however, the government will argue that public employees should never disclose classified information — even if the disclosure reveals unlawful government conduct. After all, even a well-intentioned "whistleblower" might be wrong in his assessment of a program's legality, and by disclosing the information he might seriously damage the national security. The government will maintain that, at least in dealing with classified information, government employees must err on the side of protecting the national security and that such "leakers" must be punished, even if the program is unlawful. Only in this way, the government will argue, can it effectively deter future leakers from playing craps with the national security.

From a constitutional perspective, this is unexplored terrain. In my judgment, the government employee must prevail on this issue. In terms of deterrence, it should suffice for the government to punish those who disclose classified programs that are not unlawful. When the program is in fact unlawful, the public's need to know outweighs the government's interest in secrecy. As we have seen, public employees cannot be punished for disclosing classified information that is already public or whose disclosure does not pose a threat to the national security. Public employees who disclose government illegality should have similar protection.

An intermediate position would allow the government to punish public employees who disclose even unlawful programs if (a) the employee knew that the government regards the program's secrecy as critical to the national security, and (b) there are reasonable procedures in place through which the employee can question the legality of the program, without

going to the press, and he fails to use those procedures.[31] If such procedures exist and the government employee complies with them, he should not be punishable for then disclosing an unlawful program.

A related question is whether a public employee can be punished for disclosing a classified program she reasonably but wrongly believed to be unlawful. A familiar analogy resolves this situation. If an individual reasonably believes that a criminal law restricting speech violates the First Amendment, she may violate the law and raise the constitutional issue as a defense. If she was right in believing the law unconstitutional, she cannot be punished. But if she was wrong, she can be convicted, because the First Amendment does not recognize as a defense that the defendant reasonably believed the law to be invalid. This same principle should apply to public employees who disclose classified information.

To summarize: A public employee who knowingly discloses classified information to a journalist for the purpose of publication may be disciplined, discharged, and/or criminally punished if the information was not already in the public domain and its disclosure has the potential to harm the national security, unless the disclosure reveals unlawful government action and the employee has complied with reasonable whistleblower procedures governing the disclosure of such information.[32]

II. THE PRESS

In what circumstances may the government criminally punish the press for publishing classified information? In the entire history of the United States, the government has never prosecuted the press for publishing confidential information relating to the national security. Of course, this does not mean such a prosecution is impossible. It may be that the press has exercised great restraint and has never published confidential information in circumstances in which a prosecution would be constitutionally permissible. Or, it may be that the government has exercised great restraint and has never prosecuted the press even though such prosecutions would have been constitutionally permissible. We cannot know the answer until we define the circumstances in which such a prosecution would be consistent with the First Amendment.[33]

A. The Pentagon Papers controversy

Because there has never been such a prosecution, the Supreme Court has never had occasion to rule on such a case. The closest it has come to such a situation was *New York Times v. United States*,[34] the Pentagon Papers case.

In 1967, Secretary of Defense Robert McNamara commissioned a top-secret study of the Vietnam War. The study, which filled 47 volumes, reviewed in great detail the formulation of U.S. policy toward Indochina, including military operations and secret diplomatic negotiations. In the spring of 1970, Daniel Ellsberg, a former Defense Department official, gave a copy of the Pentagon Papers to *The New York Times*. On June 13, the *Times* began publishing excerpts from the papers. The next day, Attorney General John Mitchell sent a telegram to the publisher of the *Times* stating that its publication of this material was "prohibited" by federal law and that further publication would "cause irreparable injury to the defense interests of the United States." He therefore requested that the *Times* "publish no further information of this character and advise" him that it had "made arrangements for the return of these documents to the Department of Defense."

Two hours later, the *Times* transmitted a response, which it released publicly: "The *Times* must respectfully decline the request of the Attorney General, believing that it is in the interest of the people of this country to be informed of the material contained in this series of articles." The *Times* added that if the government sought to enjoin any further publication of the material, it would contest the government's position, but would "abide by the final decision of the court."[35]

Events escalated quickly. On June 15, the United States filed a complaint for injunction against the *Times*. The federal district court promptly granted the government's request for a temporary restraining order on the ground that "any temporary harm that may result from not publishing during the pendency of the application for a preliminary injunction is far outweighed by the irreparable harm that could be done to the interests of the United States government if it should ultimately prevail" in the case.[36] This was the first time in the history of the United States that a federal judge had restrained a newspaper from publishing information relevant to public debate.

Over the next few days, the matter rapidly worked its way up to the Supreme Court. On June 30, the Court announced its decision. Reflecting the unprecedented nature of the case, each justice wrote an opinion. Six justices held that the government had not met its "heavy burden of showing justification" for a prior restraint on the press. The Court therefore ruled that the *Times* was free to resume publication of the Pentagon Papers.

Justice Potter Stewart's opinion best captures the view of the Court: "We are asked … to prevent the publication … of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people."[37]

B. Different standards for the press than for public employees

A fundamental question posed by the Pentagon Papers controversy is who should decide whether classified information should be made public. In the first instance, it would seem that our elected officials, who are charged with the responsibility of protecting the national security, must have the authority to decide such matters. But we know that our elected officials may sometimes have mixed motives for keeping secrets. They may be concerned not only with protecting the national security, but also with covering up their own mistakes, misjudgments and wrongdoing. To give them the final say would risk depriving the American people of critical information about the conduct of their elected officials.

In the Pentagon Papers case, the Supreme Court held that although elected officials have broad authority to keep classified information secret, once that information gets into the hands of the press the government has only very limited authority to prevent its further dissemination. This may seem an awkward, even incoherent, state of affairs. If the government can constitutionally prohibit public employees from disclosing classified information to the press in the first place, why can't it enjoin the press from publishing that information if a government employee unlawfully discloses it?

But one could just as easily flip the question. If the press has a First Amendment right to publish classified information unless publication will "surely result in direct, immediate, and irreparable damage to our Nation or its people," why should the government be allowed to prohibit its employees from revealing such information to the press merely because it poses a potential danger to the national security? If we view the issue from the perspective of either the public's right to know or the government's interest in secrecy, it would seem logically that the same rule should apply to both public employees and the press. The very different standards governing public employees, on the one hand, and the press, on the other, presents a puzzle.

There are good reasons for this state of affairs. As we have seen, the government has broad authority to prohibit public employees from disclosing classified information to the press. This rule is based not on a careful balancing of the government's need for secrecy versus the public's need for information, but on a combination of the employee's consent to this limitation on his freedoms and the government's reasonable desire for a clear, easily administrable rule for public employees. For the sake of efficiency and simplicity, the law governing public employees substantially overprotects the government's legitimate interest in secrecy. But the employee's consent and the need for a simple rule for public employees have nothing to do with the rights of the press or the needs of the public. Under ordinary First Amendment standards, the press has broad freedom to publish information of value to public debate unless, at the very least, the government can prove that the publication poses a clear and present danger of serious harm.[38]

As the Yale constitutional scholar Alexander Bickel once observed, this may seem a "disorderly situation." But it works. If we grant the government too much power to punish the press, we risk too great a sacrifice of public deliberation; if we give the government too little power to control confidentiality "at the source," we risk too great a sacrifice of secrecy.[39] The solution, which has stood us in good stead for more than two centuries, is to reconcile the irreconcilable values of secrecy and accountability by guaranteeing both a strong authority of the government to prohibit leaks and an expansive right of the press to publish them.[40] This solution may seem awkward in theory and unruly in practice, but it makes perfect sense and has stood the test of time.[41]

C. Prior restraint vs. criminal prosecution

Three questions remain: (1) Does the same constitutional standard govern criminal prosecutions and prior restraints? (2) What disclosures might satisfy the Pentagon Papers standard? (3) What about information that satisfies the Pentagon Papers standard and contributes to public debate?

In *New York Times v. United States*, the Court emphasized that it was dealing with a prior restraint, a type of speech restriction that bears a particularly "heavy presumption against its constitutional validity." This raises the question whether the test stated in the Pentagon Papers case governs criminal prosecutions as well as prior restrains. The inquiry is important, because Justices White and Stewart intimated in *New York Times* that this was an open question.[42]

The concept of prior restraint is deeply embedded in the history of the First Amendment. Historically, censorship took the form of licensing. No one could publish without first obtaining a license from the government. Anyone who published without obtaining a license could be punished, even if he could prove that he would have been issued a license. The failure to comply with the system was itself a crime.

Injunctions operate in much the same way. If a publication is enjoined, and a publisher violates the injunction, he can be punished for violating the injunction, even if the injunction was improperly granted. In this sense, licensing requirements and injunctions are different from ordinary criminal laws. A speaker who is prosecuted for violating a criminal law can assert the defense that the law is unconstitutional. Licensing schemes and injunctions, on the other hand, cannot be challenged in this manner. They are ordinarily governed by the "collateral bar rule," which provides that they can be challenged only by appealing the issuance of the injunction or the denial of the license. As a consequence, injunctions and licensing requirements are arguably more likely than criminal statutes to induce compliance with their terms, at least for the time it takes to appeal.[43]

On the other hand, the penalties for violating a licensing requirement or an injunction are usually much less severe than those for violating a criminal law, and a system of prior restraint actually has the virtue of enabling the speaker to know in advance whether his speech is subject to punishment. As a consequence, the logic of the prior-restraint doctrine has often been questioned. As the Harvard law professor Paul Freund observed more than 50 years ago, "it will hardly do to place 'prior restraint' in a special category for condemnation."[44]

Whatever one thinks of the prior-restraint doctrine, its primary significance involves issues like obscenity and libel. When the government regulates low-value speech, it ordinarily may do so on the basis of a relatively undemanding standard. In that setting, the demanding test applied to prior restraints has real bite.[45] But in dealing with expression that lies at the very heart of the First Amendment — speech about the conduct of government itself — the distinction between prior restraint and criminal prosecution carries much less weight.

The Supreme Court has made clear that the government ordinarily may not criminally punish speech about public affairs because of its content unless, at the very least, it creates a clear and present danger of serious harm. Although the precise words may differ from one case to another, the basic elements of the test are the same. Thus, as a practical matter, the standard used in *New York Times v. United States* is essentially the same as the standard the Court would use in a criminal prosecution of the press for publishing information about the activities of government.[46] Indeed, in the 35 years since the Pentagon Papers case, the Supreme Court has not once upheld a content-based criminal prosecution of truthful speech relating to the activities of government that did not involve some special circumstance, such as public employment. That, in itself, speaks volumes. In sum, then, I conclude that the test articulated in *New York Times v. United States* is essentially the standard the Court would have applied in a criminal prosecution of the *Times* for publishing the Pentagon Papers. And even if that was not obvious in 1971, it is certainly clear today.[47]

D. Criminal punishment for the publication of classified information

What is an example of information the publication of which could be criminally punished? The traditional example was "the sailing dates of transports" or the "location of troops" in wartime.[48] In some circumstances, the publication of such information could instantly alert the enemy and endanger American lives. There might be little the government could do to protect our sailors and soldiers from attack. Other examples might be disclosure of the identities of covert CIA operatives[49] and disclosure that the government has secretly broken the enemy's code, thus alerting the enemy to change its

cipher. In such situations, the harm from publication might be thought sufficiently likely, imminent and serious to justify punishing the disclosure.

An important feature of these illustrations often passes unnoticed. What makes these examples so compelling is not only the nature and magnitude of the harm, but also the implicit assumption that the information does not meaningfully contribute to public debate. In most circumstances, there is no apparent value in having the public know the secret "sailing dates of transports" or the secret "location of troops" when there is no time for political action. Later, of course, such information may be critical in evaluating the effectiveness of our military leaders, but at the very moment the troops are set to attack it is unclear how publication of their location could meaningfully contribute to public discourse. The same may be said about the public disclosure that we have broken an enemy's code. My point is not that these illustrations involve low-value speech in the conventional sense of that term, but that they involve information that does not seem particularly newsworthy, and that this factor plays a significant role in making the illustrations persuasive.

The failure to notice this feature of these examples can lead to a serious failure of analysis. Indeed, just such a failure was implicit in the memorable hypothetical Justice Holmes first used to elucidate the clear and present danger test — the false cry of fire in a crowded theater.[50] Why can the false cry of fire be restricted? Because it creates a clear and present danger of a mad dash to the exits. Therefore, Holmes reasoned, the test for restricting speech is whether it creates a clear and present danger of serious harm. But the reasoning is spurious. Suppose the cry of fire is true? In that case, we would not punish the speech — even though it still causes a mad dash to the exits — because the value of the speech outweighs the harm it creates. Thus, at least two factors must be considered in analyzing this situation — the harm caused by the speech and the value of the speech.

Similarly, the reason for protecting the publication of the Pentagon Papers was not only that the disclosure would not "surely result in direct, immediate, and irreparable damage" to the nation, but also that the Pentagon Papers had serious value to informed public discourse. Suppose a newspaper accurately reports that American troops in Iraq recently murdered 20 insurgents in cold blood? As a result of this publication, insurgents quite predictably kidnap and murder 20 Americans. Can the newspaper constitutionally be punished for disclosing the initial massacre? I would argue "no." Even if there was a clear and present danger that the retaliation would follow, the information is simply too important to the American people to punish its disclosure.

What this suggests is that to justify the criminal punishment of the press for publishing classified information, the government must prove that the publisher knew (a) it was publishing classified information, (b) the publication of which would result in likely, imminent, and serious harm to the national security, and (c) the publication of which

would not meaningfully contribute to public debate. In practical effect, this has been the law of the United States for more than half a century.[51]

III. JOURNALISTS

In what circumstances may the government criminally punish a journalist for receiving or soliciting classified documents or information from a government employee for the purpose of publication? This is a novel question. No journalist has ever been prosecuted under such a theory.

A. The reporter and the criminal law

The best place to begin is with ordinary criminal-law principles. Such principles do not trump the Constitution, but they provide a touchstone for analysis. We can divide the most likely scenarios into three categories.

First, a journalist would violate ordinary criminal-law principles if he knowingly coerces, bribes or defrauds a public employee into disclosing classified information, if the employee could constitutionally be punished for disclosing that information.[52]

Second, a journalist would violate ordinary criminal-law principles if he knowingly encourages, incites, persuades or solicits a public employee to disclose classified information, if the employee could constitutionally be punished for disclosing that information.[53]

Third, a journalist would violate ordinary criminal-law principles if he knowingly receives from a public employee (or, indeed, from any source) classified information that could not lawfully be disclosed by a public employee.[54]

B. The First Amendment vs. criminal law

Thus, a journalist who obtains classified information by bribery, solicitation, or passive receipt may be guilty of a crime, unless the First Amendment affords him its protection. Even though an act ordinarily is unlawful, it is not unlawful if it is protected by the First Amendment. This is an elemental principle of First Amendment law.

For example, the government can make it unlawful for any person to obstruct the draft. An individual who physically blocks access to a selective-service office can be punished for

doing so. But an individual who distributes leaflets criticizing the draft as immoral cannot constitutionally be punished for obstructing the draft, even though his ideas might persuade some people to refuse induction. The criminal-law principle is the same, but the pamphleteer is protected by the First Amendment.[55]

Similarly, the government can make it a crime for any person to incite a breach of the peace. An individual who throws a chair in a bar can be punished for inciting a brawl. But an individual whose public speech triggers a fight ordinarily is protected by the First Amendment.[56] And although the government can punish an individual who blocks traffic by double-parking, it cannot constitutionally prohibit a group from marching down Main Street to protest city policy.[57] Put simply, that the government can make certain conduct unlawful does not mean it can punish that conduct when it is protected by the First Amendment.

C. The problem of incidental impact

Of course, a critical question is what it means to say that the conduct is "protected by the First Amendment." This is more complicated than one might expect. There are many ways in which laws limit speech. First, a law may expressly restrict the communication of particular points of view, ideas or items of information. For example, "No one may publicly criticize the war" or "No one may publish classified information." Because such laws may seriously distort the content of public debate and are often enacted for constitutionally questionable reasons, they are presumptively unconstitutional.[58]

Second, a law may expressly restrict communication, but not on the basis of content. For example, "No one may distribute leaflets in a public park" or "No one may erect a billboard near a public highway." Because such laws regulate speech, but not on the basis of content, they are analyzed through a process of balancing, in which the court determines whether the government interest outweighs the impact on speech.[59]

Third, a law may restrict what is essentially non-communicative conduct, but in a way that has an incidental impact on speech. For example, "No one may appear naked in public," as applied to an individual who marches naked on Main Street to protest anti-obscenity laws, or "No one may engage in wiretapping," as applied to a reporter who wiretaps a congressman in the hope of hearing him accept a bribe. Because such laws do not expressly restrict speech, they are presumptively constitutional. A court will invalidate such laws only if the incidental effect on speech is substantial and substantially outweighs the government's interest in enforcing the law.[60]

In considering whether a law violates the First Amendment, it is necessary to

determine which of these models applies. A law expressly prohibiting the press from publishing classified information clearly regulates content. Such a law would therefore be tested by the highest degree of First Amendment scrutiny.

But what of the laws we are dealing with here? In the first instance, we must look to the terms of the legislation.[61] If the government prosecutes a journalist for violating a law making it unlawful to encourage a public employee to disclose classified information for the purpose of publication, the law would seem to fall squarely within the first category. It regulates expression on the basis of content. Viewed in this light, the journalist presumably would be protected by the First Amendment to the same extent as the newspaper that publishes the information.

But it is not so simple. Suppose the journalist is prosecuted under a general law prohibiting any person to solicit the commission of a felony. This statute would apply to solicitation to commit murder, rape, arson, burglary and fraud, as well as unlawfully to disclose classified information. It is not expressly directed at communicative crimes.[62] Hence, this would seem to fall into the third category. Like laws prohibiting public nudity and wiretapping, laws prohibiting solicitation to commit felonies have only an incidental effect on expression. Such a law is presumptively constitutional.

There are several ways out of this quandary. The simplest is for the government to prosecute those who bribe or solicit public employees to disclose classified information only under general laws prohibiting bribery and solicitation, rather than under laws expressly targeting communicative crimes. The laws currently on the books are all over the lot in this respect. Because my interest in this essay is in the First Amendment rather than the statutory issues, I will assume we are dealing with prosecutions under general laws prohibiting bribery, solicitation and the receipt of stolen property, which makes the problem more challenging.[63]

Let us assume, then, that a journalist is prosecuted for soliciting a public employee to reveal classified national security information, for which disclosure the employee could constitutionally be punished. Let us assume further that the journalist is prosecuted under a general criminal statute prohibiting any person to solicit another to commit a crime. As we have seen, if this law has only an incidental effect on speech, it will likely be constitutional, even as applied to a journalist.

But why should this be so? The answer is simple. Almost every law can have an incidental effect on speech. A law against public nudity (think of nude sun-bathing) would prohibit public nudity by a person whose bare bottom is intended as a form of political protest. A law against speeding makes it more difficult for individuals to get to a demonstration or lecture on time. A law against open fires in public prohibits flag-burning;

a sales tax reduces the amount of money you have to support your favorite political causes; and a law against wiretapping makes it more difficult for reporters to gather news.[64]

The rationale of the incidental-effects doctrine is largely one of practicality. Because almost every law can have some effect on speech, and because individuals would readily claim they were engaged in speech (even if they weren't) if that claim could make out a defense to a criminal charge ("I committed the robbery so I could give money to a political candidate"), an approach that required courts seriously to consider the incidental effects of laws on speech-related activities in every case would be a judicial nightmare.

Moreover, in almost all of these instances the individual has many other ways to achieve his goals. Instead of walking down Main Street naked, the protester can carry a sign criticizing anti-obscenity laws. Instead of speeding to get to the lecture, the lecture-goer could have left on time. Instead of burning a flag in public, the war opponent can shred his flag and thus avoid the prohibition on open fires. In short, the actual impact of most laws having incidental effects on free expression is usually slight.

For these reasons, the Supreme Court has reasonably held that laws having only an incidental effect on free expression are presumptively constitutional and may be invalidated only in the very unusual situation in which they have a substantial impact on free expression.[65] This suggests that general laws prohibiting bribery and solicitation are not unconstitutional merely because they have an incidental effect on journalists who would like to bribe or solicit public employees to disclose classified information for the purpose of publication.

D. Is the impact incidental as applied to reporters?

Once again, however, it is not so simple. The incidental impact of these laws on the freedom of the press may be sufficiently serious to justify their invalidation. Certainly, some of the information that would be disclosed to the public as a result of unlawful disclosures would be of considerable value to the public. But the same would be true of unlawful journalistic wiretaps and burglaries. In some circumstances, journalists would be better able to discover valuable information if they could wiretap the offices of senators and burgle the homes of corporate executives. But I doubt we are about to hold wiretapping, trespass, and burglary laws unconstitutional as applied to journalists (though such a claim is not absurd). Because the seriousness of the incidental impact of laws against wiretapping and burglary is not much different from the seriousness of the incidental impact of laws against bribery and solicitation, the incidental impact of bribery and solicitation laws on freedom of the press would not seem sufficiently substantial to justify invalidating those laws as applied to journalists.

But we may not be dealing here with the conventional incidental-impact situation. In the usual incidental-impact scenario, the underlying crime is not inherently expressive. Speeding, being naked in public, wiretapping, burglary, making an open fire and paying taxes are not inherently expressive acts. If the First Amendment is implicated in those situations, it is only because laws regulating those acts occasionally have an effect on expressive behavior. The effect on speech, in other words, is merely "incidental."

But in the public-disclosure situation, the issue is more complex, because it involves two levels of conduct — the solicitation and the disclosure. Although a general law prohibiting solicitation to commit crimes has only an incidental effect on journalists who solicit public employees to disclose classified information, the crime solicited is itself a communicative act, and it is the communication that causes the harm. This is a subtle but important distinction.

In the burglary situation, for example, it is the invasion of the homeowner's property and privacy that causes the harm. It makes no difference to the criminal law whether the burglar is interested in stealing money, jewels, or information. That a journalist commits burglary in order to gather news rather than steal cash is irrelevant to the reason for prohibiting burglary. But if a journalist is punished for soliciting classified information from a public employee, the underlying act (the disclosure) is unlawful precisely because it involves expression. It is, indeed, the communication of the information that causes the harm that the government seeks to prevent. Thus, unlike the burglary situation, the bribery and solicitation situations are only quasi-incidental-impact problems.

All this may seem needlessly abstruse and complex. But this is sometimes the nature of legal reasoning. General principles are useful to distinguish among different types of cases, but the principles are almost always imprecise at the margins. There are gradations. Sometimes it is best to ignore the gradations for the sake of simplicity, sometimes it is best to take the gradations into account. In this context, we are at the margin between laws that have only an incidental effect on expression and laws that regulate the content of expression. It would be simplistic to pretend that this is a routine case of mere incidental effect.[66]

Perhaps most important, it is essential to recall how we came to the conclusion that the government can constitutionally prohibit public employees from disclosing classified information to reporters for the purpose of publication. As we saw in Part 1, that issue poses a potentially serious conflict between the First Amendment and the government's interests in efficiency and security. We allow the government to prohibit its employees from revealing information to the public not because the danger of disclosure necessarily outweighs the value of disclosure, but because public employees have consented to such a limitation of their rights and because it is useful for the government to have a clear and

simple rule for its employees. Although that approach may be justified for internal management purposes, it substantially undervalues the potential importance of the disclosures to informed public debate.

Thus, as we saw in Part II, the government may not hold the press to the same standard it applies to its employees. Although the standard for public employees makes sense when understood as part of a larger and more complex set of judgments designed to balance the competing interests, it would be a serious error to regard this as the "proper" standard for resolving the issue as a whole. For the same reason that the standard for government employees does not govern the press, it also should not govern the newsgathering activities of journalists.

In effect, newsgathering is an intermediate case. To resolve it, we must draw on two competing analogies: the government's authority to regulate the speech of its employees and the press's authority to publish information of value to the public.

E. Criminal punishment in three situations

At this point, it is necessary to return to the three ways (set forth in Part II-A) in which journalists might obtain classified information from public employees: (1) bribery, coercion or fraud; (2) solicitation, persuasion or incitement; and (3) passive receipt. In the real world, of course, the lines blur, for the relationships between journalists and their sources are subtle and complex. Nonetheless, unless we embrace an all-or-nothing approach for the sake of simplicity, distinctions must be made.

Situations (3) and (1) are the easiest. Situation (3) is illustrated by the Pentagon Papers case, in which Daniel Ellsberg sent the papers unsolicited to Neil Sheehan of *The New York Times*. This situation is also illustrated by *Bartnicki v. Vopper*,[67] in which Vopper, a radio commentator, received in the mail from an anonymous source a tape recording of an unlawfully intercepted telephone conversation, which Vopper then played on the air. In both cases, the journalists passively received the information, though both knew or should have known that the information had been obtained and disclosed to them unlawfully.

Under traditional criminal law principles, both Sheehan and Vopper knowingly received "stolen" property. Nonetheless, because the information in both cases involved matters of public concern, both Sheehan and Vopper were protected by the First Amendment. As the Court explained in *Bartnicki*, when a journalist receives information "from a source who has obtained it unlawfully," the journalist may not be punished for the receipt or publication of the information, "absent a need of the highest order."[68]

In rejecting the argument that the government can punish journalists in order to deter those who unlawfully intercept conversations, the Court in *Bartnicki* reasoned that if "the sanctions that presently attach to [the unlawful acts] do not provide sufficient deterrence," then "perhaps those sanctions should be made more severe," but "it would be quite remarkable to hold" that a law-abiding journalist can constitutionally can be punished merely for receiving and publishing that information "in order to deter conduct by a non-law abiding third party."[69]

Thus, in the passive-receipt situation, where the journalist has not bribed or solicited the public employee to violate the law, neither the journalist nor the publisher can be criminally punished for receiving or possessing unlawfully disclosed information, the publication of which could not constitutionally be punished.

Situation (1) seems equally straightforward. The government has a legitimate interest in expecting its employees to obey the law. For a journalist to bribe, coerce or defraud a public employee unlawfully to disclose classified national security information, seems analogous to the wiretapping and burglary examples. Like wiretapping and burglary, bribery, coercion and fraud are well-established crimes, far removed from the traditional processes of newsgathering. Although it might be "useful" for reporters to bribe and extort classified information from public employees, and although such conduct would sometimes result in the disclosure of valuable information, the government's legitimate interest in not having its employees bribed, coerced or defrauded seems sufficiently weighty to justify the prohibition of such conduct.

Situation (2) is the trickiest. Like bribery, coercion and fraud, solicitation is ordinarily unlawful. But that is also true of receiving stolen property and, as we have seen, that an act is ordinarily unlawful is not conclusive in the face of the First Amendment. Although it would be easy to envision a legal regime in which journalists were prohibited from encouraging public employees to reveal classified information, such a regime would disregard the need to strike a proper balance between government secrecy and an informed public.

Just as we grant the government "too much" authority to protect secrecy at its source, so, too, must we grant the press "too much" authority to probe that secrecy. To make it a crime for journalists to attempt to persuade public employees to disclose classified information that might contribute to public debate would place too much weight on the secrecy side of the scale. The standard that defines the government's power to punish its employees for disclosing classified information ("potential harm to the national security") was not designed to determine the balance between government secrecy and freedom of the press.

Indeed, building upon the Court's reasoning in *Bartnicki*, it would seem that the

appropriate government response to such solicitations is not to prosecute journalists, but to increase the penalties for government employees who violate the law. Moreover, an effort to apply the crime of solicitation to the myriad interactions between journalists and their sources would prove just as messy as an effort to regulate more precisely the relationship between the government and its employees. It is often difficult to define when a conversation passes the line between a discussion of policy and a solicitation to crime. The enforcement of solicitation law in this setting would be uncertain, confusing and treacherous. It would interject the government into the very heart of the journalist-source relationship and could have a serious chilling effect on journalist-source exchanges.

One way to address these concerns (indeed, probably a constitutional requirement), would be to limit the crime of solicitation in this context to express incitement of unlawful conduct (e.g., "give me the classified document, the disclosure of which is unlawful"). But as First Amendment history and doctrine teach, even a requirement of express incitement is an inadequate safeguard. The Court has held (at least in the context of public speech) that even express incitement of unlawful conduct cannot constitutionally be proscribed, unless it creates a likely and imminent danger of serious harm.[70]

The most sensible course is to hold that the government cannot constitutionally punish journalists for encouraging public employees unlawfully to disclose classified information, unless the journalist (a) expressly incites the employee unlawfully to disclose classified information, (b) knows that publication of this information would likely cause imminent and serious harm to the national security and (c) knows that publication of the information would not meaningfully contribute to public debate.

It is important to keep in mind that the government is not powerless in this situation. As in *Bartnicki*, the government's primary means for protecting its legitimate interests is by punishing its employees for disclosing classified information. The United States has made it through more than 200 years without ever finding it necessary to prosecute a journalist for soliciting a public employee to disclose confidential national-security information. This is not because such solicitations have never occurred, but because employees have usually complied with the law and, when they haven't, the press has either acted responsibly or the resulting harm has not been thought sufficiently serious to justify such an intrusion into the freedom of the press.[71] It is complex, to be sure. But it works.

F. Who is a journalist?

This still leaves unresolved at least one vexing question. Who is a journalist? Surely, reporters for *The Washington Post* or CNN qualify. But what about a professor writing a book, a blogger, the editor of a school newspaper, a lobbyist or a spy?[72] The idea of courts

deciding as a matter of constitutional interpretation who is and is not a member of the "press" for First Amendment purposes is daunting, at best.

Indeed, the Supreme Court acknowledged as much in *Branzburg v. Hayes*,[73] in which the Court declined to recognize a robust First Amendment-based journalist-source privilege, in part because recognition of such a privilege would make it "necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer … just as much as of the large metropolitan publisher."[74]

This sort of problem arises whenever anyone challenges a law because of its incidental effect on speech. This is one reason why the Court is reluctant to invalidate laws on that basis. Despite this difficulty, however, the Court has invalidated laws on this premise when the law's impact on free expression is sufficiently severe. In *NAACP v. Alabama*,[75] for example, the Court held that Alabama could not constitutionally require the NAACP to disclose its membership lists. The Court explained that the disclosure of such information in Alabama at the height of the civil rights movement might "induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs."[76] The Court therefore held the law unconstitutional as applied to the NAACP, opening the door to similar challenges to other laws by other individuals and organizations.[77]

Similarly, in *Boy Scouts of America v. Dale*,[78] the Court invalidated a state antidiscrimination law as applied to the Boy Scouts. The Court held that for the state to require the Boy Scouts to allow gay scoutmasters would seriously impair the group's right of "expressive association." This decision, too, opened the door to challenges by other groups to other laws and regulations. Although the question "who is the press?" is not identical to the questions "what organizations are like the NAACP?" or "what organizations are like the Boy Scouts?," the nature of the inquiries is the same.

In effect, we have three alternatives. First, rather than decide who is a member of the press, we could conclude that the best course is to protect anyone who solicits classified information from public employees. This would extend First Amendment protection to some individuals who are not engaged in First Amendment activity. The primary justification for this approach would be that it avoids the need to decide who is a member of the "press." This is not as peculiar as it might seem, for in this context, unlike most incidental restriction situations, a very high percentage of those who engage in the activity (soliciting classified information from public employees) are likely to be journalists. Thus, the over-inclusiveness of this approach would be relatively small.

Second, we could treat journalists as if they are not journalists. That is, to avoid having

to decide who is a member of the "press," we could hold that even members of the press can be punished for the receipt or solicitation of classified information. In light of the analysis up to this point, however, this approach seems too drastic. Ironically, it would undermine the freedom of the press in order to avoid deciding who is entitled to the freedom of the press.

Though ironic, this judgment would not be unprecedented. To the contrary, as already noted, this was part of the Court's reasoning in *Branzburg* with respect to the journalist-source privilege. But *Branzburg* is distinguishable. In *Branzburg*, the Court concluded that a journalist-source privilege was unnecessary. Whatever the merits of that conclusion, the idea that the government can criminally punish reporters merely for receiving or requesting classified information (even though the press has a First Amendment right to publish that information), in order to avoid deciding who is a journalist, seems perverse.

Third, we could bite the bullet and decide, as a matter of First Amendment interpretation, who is and is not a member of the "press." This might not be quite as difficult as it seems, or at least as difficult as the Court thought at the time of *Branzburg*. In the years since that decision, 49 states and the District of Columbia have adopted some form of journalist-source privilege, all of which require courts to answer the question, "Who is a journalist?"[79] Courts therefore have plenty of experience with this issue. Of course, deciding this as a constitutional matter is different from deciding it as a matter of constitutional interpretation.[80] The most straightforward definition would be a functional one. That is, a member of the "press" for these purposes is a person who seeks the information for the purpose of disseminating it to the public. This inquiry seems both manageable and preferable to the alternatives.[81]

But what about spies? What is to prevent an enemy spy from creating a blog, soliciting classified information from public employees, and then insulating herself from criminal punishment by publishing the classified information on her blog, rather than transmitting it secretly to the enemy? One answer, of course, is that in many instances this tactic would significantly dilute the value of the spy's work. Often, espionage is most valuable when the nation spied upon does not know its secrets are not secret.

But there is a more fundamental answer. This sort of issue arises throughout First Amendment law. Is a person who criticizes the war in Iraq attempting to weaken our national resolve in order to aid the enemy, or is he participating constructively in public debate? Is he a traitor, or a patriot? The words he uses and the "harm" he causes may be precisely the same, regardless of his motive. In the evolution of First Amendment jurisprudence, we learned long ago that inquiries into subjective intent and personal motivation are usually fruitless — and often dangerous — in the context of free speech. In deciding whether an individual may be punished for her speech, it is necessary to focus on

what she says and on the danger she creates, rather than on her motives. Even a traitor or a spy can meaningfully contribute to public debate, despite her bad motivations.[82]

IV. CONCLUSION

As this essay suggests, it is not easy to reconcile the nation's important interest in security with its equally important interest in preserving a free and responsible press and an informed citizenry. In summary, my conclusions are as follows:

- The government can constitutionally discipline, discharge and/or criminally punish a public employee who knowingly discloses classified information to a journalist for the purpose of publication if the information was not already in the public domain and its disclosure has the potential to harm the national security, unless the disclosure reveals unlawful government action and the employee has complied with reasonable whistleblower procedures governing the disclosure of such information.
- The government can constitutionally punish the press for publishing classified information if the publisher knew that (a) it was publishing classified information, (b) the publication of which would likely result in imminent and serious harm to the national security and (c) the publication would not meaningfully contribute to public debate.
- The government can constitutionally punish a journalist for bribing, coercing or defrauding a public employee into disclosing classified information if the employee could constitutionally be punished for disclosing the information.
- The government can constitutionally punish a journalist for receiving or soliciting the disclosure of classified information from a public employee if the journalist (a) expressly incited the employee to disclose classified information, (b) knowing that publication of the information would result in likely, imminent and serious harm to the national security and (c) knowing that publication of the information would not meaningfully contribute to public debate.

It is surely tempting to err on the side of government secrecy. But as the Declaration of Independence stated, a free society must rest on "the consent of the governed." There is no meaningful consent when "those who are governed do not know to what they are consenting."[83]

ENDNOTES

1 Gaill Hunt, ed., *9 Writings of James Madison 103* (Putnam's 1910).

2 18 U.S.C. § 793(e). See also 18 U.S.C. § 798. After the *Times* disclosed the NSA spy program, Senator Pat Roberts of Kansas suggested that he might propose legislation expressly making it unlawful for non-government employees to communicate classified information. See Walter Pincus, "Senator May Seek Tougher Law on Leaks," *Washington Post* A1 (Feb 17, 2006). The government also threatened to prosecute *The Washington Post* for its disclosure of the government's secret detention camps for enemy combatants in Eastern Europe. See Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *Washington Post* A1 (Nov 2, 2005). For a defense of the Bush administration's position, see Gabriel Schoenfeld, "Has the *New York Times* Violated the Espionage Act?," *Commentary* (Mar 2006). *The New York Times* and *The Washington Post* both won the Pulitzer Prize for journalism for publishing these stories.

3 For purposes of this essay, I attempt to work within the principles and doctrines of existing Supreme Court decisions. This is therefore more of a "lawyerly" than "academic" analysis, although it inevitably reflects elements of both perspectives.

4 Although I refer throughout the essay to "classified" information, the basic principles I discuss would apply as well to information that is confidential but not classified. The fact of classification should be relevant to the analysis, but not dispositive of it. In other words, some confidential but not classified information might be so central to the national security that the government has a sufficient reason to protect it from public disclosure. There is also a problem when a journalist learns information orally, without receiving a copy of a source document. In that situation, the journalist will not see the classification on the document, which might lead to factual questions about the journalist's knowledge at the time he received the information.

5 I am not considering in this essay a fourth issue relating to this general set of questions: whether and to what extent the First Amendment protects a journalist's privilege. On this question, see *Branzburg v. Hayes*, 408 U.S. 665 (1972); In re Grand Jury Subpoena, Judith Miller, —- F.3d —- (D.C. Cir. 2004); In re Special Counsel Investigation, 332 F. Supp.2d 26, 31 (D.D.C. 2004); *McKevitt v. Pallasch*, —- F.3d —- (7th Cir. 2003); *LaRouche v. Nat'l Broad Co.*, 780 F.2d 1134, 1139 (4th Cir 1986); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Zerilli v. Smith*, 656 F.2d 705, 711-12 (D.C. Cir. 1981); *Bruno v. Stillman, Inc. v. Globe Newspaper Co.*, 633 F. 2d 583, 594-95 (1st Cir. 1980); *United States v. Criden*, 633 F.2d 346, 357 (3d Cir.1980); *Miller v. Transamerican Press, Inc.*, 621 F. 2d 721, 725 (5th Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975); *Baker v. F & F Investment*, 470 F.2d 778, 784 (2d Cir. 1082); Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 Hofstra L. Rev.39 (2005).

6 Although this section focuses on government employees, a similar analysis would apply to government contractors who are granted access to national security information. See *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996) (private contractors have same First Amendment rights as public employees); *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996) (same).

7 *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

8 See *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (false statements of fact); *Central Hudson Gas v. Public Service Comm'n of New York*, 447 U.S. 557 (1980) (commercial advertising); *Virginia v. Black*, 538 U.S. 343 (2003) (threats).

9 This is a more speculative example than defamation, because the Supreme Court has never upheld either a criminal prosecution or civil liability for invasion of privacy by publication. See *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) (broadcaster cannot be held liable in damages for publishing a rape victim's name where the name was lawfully obtained by examining a copy of the indictment); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (reporter cannot be prohibited from disclosing the name of a juvenile offender where the name was obtained at court proceedings that were open to the public); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (newspaper cannot be punished for publishing the name and photograph of a juvenile offender where the newspaper had learned the suspect's

name from several witnesses to the shooting and from police and prosecutors at the scene).

[10] See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (confidential source can sue reporter for promissory estoppel for disclosing his identity in violation reporter's promise not to do so).

[11] A somewhat analogous situation was arguably presented in *United States v.* The Progressive, 467 F. Supp. 990 (W.D. Wis. 1979) (granting an injunction against publication of an article in a magazine allegedly providing information about how to make a nuclear bomb).

[12] See, e.g., *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) ("even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons," it may not do so "on a basis that infringes his constitutionally protected interests — especially his interest in freedom of speech").

[13] Cass Sunstein has put the point well:

> Citizens may often find it in their interest to give up rights of free speech in exchange for benefits from government. … But if government is permitted to obtain enforceable waivers, the aggregate effect may be considerable, and the deliberative processes of the public will be skewed. … Waivers of first amendment rights thus affect people other than government employees, and effects on third parties are a classic reason to proscribe waivers. The analogy [is] to government purchases of voting rights, which are impermissible even if voters willingly assent.
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> Cass R. Sunstein, "Government Control of Information," 74 *Cal. L. Rev.* 889, 915 (1986).

[14] 391 U.S. 563, 568 (1968).

[15] See *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973); United *States Workers v. Mitchell*, 330 U.S. 75 (1947).

[16] See also *Connick v. Meyers*, 461 U.S. 138 (1983) (*Pickering* does not apply to public employee speech relating only to matters of personal interest); *Rankin v. McPherson*, 483 U.S. 378 (1987) (*Pickering* applies to speech relating to matters of public concern).

[17] See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (upholding a protective order prohibiting a newspaper from publishing confidential information it obtained through discovery because the newspaper gained access to the information only "by virtue of the trial court's discovery processes"). See also Robert C. Post, "The Management of Speech: Discretion and Rights," 1984 *Supreme Court Review 169*.

[18] 444 U.S. 507 (1980).

[19] *Id.*, at 511. See also *Haig v. Agee*, 453 U.S. 280 (1981) (upholding the Secretary of State's revocation of a former CIA employee's passport for exposing the identities of covert CIA agents).

[20] See also *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 (1991) (the extrajudicial "speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press," because lawyers are voluntary participants in the legal system); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (government may not punish the press for publishing confidential information, even though it may prohibit public employees from disclosing that information); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) (government may not restrain the press from publishing information about a criminal defendant, even though it may prohibit public employees from disclosing such information to the press).

[21] For an excellent critique of this conclusion, see Adam M. Samaha, "Government State Secrets, Constitutional Law, and Platforms for Judicial Intervention," 53 *U.C.L.A. L. Rev. 909*, 948-976 (2006) (suggesting that the Freedom of Information Act can provide a useful "platform" for recognizing and enforcing a broader constitutional right of access to government secrets).

[22] See Executive Order No. 13,292, 68 Fed. Reg. 15,315 (March 25, 2003), *amending* Executive Order No. 12,958, 60 Fed. Reg. 19,825 (April 17, 1995). There are three designations. "Top Secret" refers to information the unauthorized disclosure of which could reasonably be expected to cause exceptionally grave damage to the national security. "Secret" refers to information the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security. "Confidential" applies to information the authorized disclosure of which could reasonably be expected to cause damage of the national security. See *id.* at 15,326.

[23] See, e.g., *United States v. Morison,* 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring) ("[t]here exists a tendency, even in a constitutional democracy, for government to withhold reports of disquieting developments and to manage news in a fashion most favorable to itself"); *Halperin v. Kissinger,* 606 F.2d 1192, 1204 n.77 (D. C. Cir. 1979) (noting "the well-documented practice of classifying as confidential much relatively innocuous or noncritical information"). See also, Harold Edgar & Benno Schmidt, Jr., "Curtiss-Wright Comes Home: Executive Power and National Security Secrecy," *21 Harv. C.R.-C.L. L. Rev.* 349, 354 (1986) (the "[e]xecutive in inherently self-interested in expanding the scope of matters deemed 'secret'; the more that is secret, the more than falls under executive control"). By the mid-1990s, 1,336 government employees were authorized to classify information "top secret," and more than two million public employees and one million government contractors had "derivative classification" authority. See *Report of the Commission on Protecting and Reducing Government Secrecy* xxxix, Sen.Doc. 105-2, 103rd Cong. (Government Printing Office 1997) (Chairman's Statement).

[24] What if a public employee discloses to a journalist information relating to the national security that is not classified? One approach would be to hold that non-classification is dispositive. But such an approach would not work when what is being disclosed is information that is not itself in tangible form and therefore cannot be marked as "classified." An alternative approach is to allow the government to punish the disclosure by a public employee of non-classified information if the employee knew both that the government regarded the information as confidential and that the unauthorized disclosure of the information could be expected to cause damage to the national security. See *United States v. Rosen,* Case No. 1:05cr225 (E.D. Va., August 9, 2006).

[25] *United States v. Morison,* 844 F.2d 1057, 1071-1072 (4th Cir. 1988); *United States v. Rosen,* Case No. 1:05cr225 p. 25 (E.D. Va. August 9, 2006).

[26] *United States v. Heine,* 151 F.2d 813, 817 (2d Cir. 1945). *Cf. Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975); The Florida Star *v. B. J. F.,* 491 U.S. 524 (1989).

[27] *United States v. Morison,* 844 F. 2d 1057, 1071-72 (4th Cir. 1988); *United States v. Rosen,* at 23-24. See *United States v. Truong Din Hung,* 629 F.2d 908, 918 n.9 (4th Cir. 1980); United States v. Allen, 31 M.J. 572, 627-28 (N.C.M.R. 1987).

[28] For examples of cases dealing with public employees in the context of classified information, see *United States v. Morison,* 844 F.2d 1057 (4th Cir. 1988); *United States v. Zettl,* 835 F.2d 1059 (4th Cir. 1987); *United States v. Kampiles,* 609 F.2d 1233 (7th Cir. 1980); *United States v. Marchetti,* 466 F.2d 1309 (4th Cir. 1972).

[29] This is similar to the tax return situation. An IRS employee does not have a constitutional right to leak an otherwise confidential tax return because the confidentiality of that return is not sufficiently "important" to warrant confidentiality.

[30] Indeed, federal law forbids classification for the purpose of concealing "violations of law, inefficiency, or administrative error." Executive Order No. 13,292, § 1.7(a)(1), 68 Fed. Reg. 15315 (Mar. 25, 2003).

[31] The Intelligence Community Whistleblower Protection Act of 1998 sets forth a limited mechanism to enable whistleblowers dealing with classified information to raise their concerns with agency officials or members of congressional oversight committees. The act covers whistleblowers who want to report (1) a serious abuse or violation of law; (2) a false statement to, or willful withholding of information from, Congress; or (3) a reprisal in response to an employee's reporting of an urgent matter.

[32] On August 2, 2006, Sen. Christopher Bond introduced legislation to clarify the circumstances in which public employees or others who are officially entrusted with access to classified information may be criminally prosecuted for unauthorized disclosure of such information. The proposed legislation would make it unlawful for such persons knowingly to disclose classified information to any person who is not authorized to receive it. The proposal defines "classified information" as information or material that has been "properly classified." This law would clear apply to disclosures to members of the press. Whether this law would be constitutional depends on the interpretation of "properly classified." The proposal would, in my view, be constitutional if "properly classified" is construed as excluding the classification of information already in the public domain, information whose disclosure does not have the potential to harm the national security, and information that reveals unlawful

government action. Congress enacted similar legislation in 2000, but President Bill Clinton vetoed it as unconstitutional under the First Amendment. See http://www.fas.org/sgp/news/2006/08/bond080206.html; http://www.fas.org/irp/congress/2006_cr/s3774.html.

[33] Perhaps the closest the government ever came to such a prosecution involved a disclosure by the *Chicago Tribune* in 1942 that might have alerted the Japanese to the fact that the United States had broken their secret codes. See Lloyd Wendt, *Chicago Tribune: The Rise of a Great American Newspaper* 627-636 (Rand McNally & Co. 1979).

[34] 403 U.S. 713 (1971).

[35] See Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Espionage Act of 1798 to the War on Terrorism* 500-505 (W.W. Norton 2004).

[36] *United States v. New York Times Co.,* 328 F. Supp. 324, 325 (S.D. N.Y. 1971).

[37] *Id.,* at 727, 728, 730 (Stewart concurring). The government filed criminal charges against Ellsberg for leaking the Pentagon Papers, but the prosecution was abandoned as a result of prosecutorial misconduct. See Melville B. Nimmer, "National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case," 26 *Stan. L. Rev.* 311 (1974).

[38] See *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) (even express advocacy of unlawful conduct can be proscribed only if the advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Kingsley International Pictures Corp. v. Regents of New York,* 360 U.S. 684, 689 (1959) (even "advocacy of conduct proscribed by law" in not "'a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on'"); *Bridges v. California,* 314 U.S. 252, 273 (1941) (in order to punish expression, "the substantive evil must be extremely serious and the degree of imminence extremely high"); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978) (requiring not only clear and present danger, but also that the magnitude of the danger be serious). See also Kent Greenawalt, "'Clear and Present Danger' and Criminal Speech," in Lee C. Bollinger & Geoffrey R. Stone, *Eternally Vigilant: Free Speech in the Modern Era* 97, 119 (University of Chicago 2002). (to punish speech, the evil must be :imminent, likely, and grave); Bernard Schwartz, "*Holmes v. Hand:* Clear and Present Danger or Advocacy of Unlawful Action?," 1994 *Sup. Ct. Rev.* 209, 240-241 ("the immediate law violation must be likely to occur").

[39] Alexander Bickel, *The Morality of Consent* 79-82 (Yale University Press 1975).

[40] This approach is not unique to the national security context. The Court has applied it to a broad range of issues involving the publication of confidential government information. See, *e.g.,* Florida Star *v. BJ.F.,* 491 U.S. 524 (1989) (publication of rape victim's name); *Smith v. Daily Mail Publishing Co.,*443 U.S. 97 (1979) (publishing name of juvenile offender); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978) (publication of confidential matters before judicial review board); *Oklahoma Publishing Co. v. District Court,* 430 U.S. 308 (1977) (publishing name of juvenile offender); *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976) (publication of information about criminal defendant before trial); *Cox Broadcasting v. Cohn,* 420 U.S. 469 (1975) (publication of rape victim's name). In all of these decisions, the Court invoked the principle that although the government could prohibit public employees from disclosing the information in the first place, it could not thereafter enjoin or punish the media for further disseminating the information once it fell into the public domain.

[41] A slightly different variant of this problem involves not unlawful disclosures by public employees, but some other underlying illegality. In *Barnicki v. Vopper,* 532 U.S. 514 for example, Vopper, a radio talk show host was prosecuted for broadcasting a recording of a private telephone conversation. The recording had been made by a third-person in violation of federal law. The third person had sent the tape to Vopper. Although the recording was unlawful, the Court held that Vopper could not constitutionally be held liable for damages for broadcasting it. The only decision in which the Supreme Court has held that a publisher could constitutionally be punished for distributing speech because the speech was produced or made available to the press as a result of an unlawful act involved child pornography. See *New York v. Ferber,* 458 U.S. 747 (1982). But the child pornography issue is readily distinguishable from all the other situations, including the disclosure of classified information by public employees, because the images presented in child

pornography can easily be generated without engaging in actual child sexual abuse. See *Ashcroft v. The Free Speech Coalition,* 535 U.S. 234 (2002) (government cannot constitutionally punish the exhibition of images of children engaged in sex if they are produced by computer simulation or the use of body-double, rather than by actual child sexual abuses). In the classified information situation, the information made available to the public would not exist but for the underlying disclosure.

[42] See 403 U.S., at 730 (Stewart, J. concurring); *id.,* at 737 (White, J., concurring).

[43] See Stephen Barnett, "The Puzzle of Prior Restraint," 29 *Stan. L. Rev.* 539 551-553 (1977).

[44] Paul Freund, "The Supreme Court and Civil Liberties," 4 *Vand. L. Rev.* 533, 539 (1951). See Martin Redish, "The Proper Role of the Prior Restraint Doctrine in First Amendment Theory", 70 *Va. L. Rev.* 53 (1984); Mayton, "Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine," 67 *Cornell L. Rev.* 245 (1982); Stephen Barnett, "The Puzzle of Prior Restraint," 29 *Stan. L. Rev.* 539 (1977); Vincent Blasi, "Toward a Theory of Prior Restraint: The Central Linkage," 66 *Minn. L. Rev.* 11 (1981).

[45] See, *e.g., Freedman v. Maryland,* 380 U.S. 51 (1965) (obscenity); *Near v. Minnesota,* 283 U.S. 697 (1931) (libel).

[46] See David A. Strauss, "Freedom of Speech and the Common-Law Constitution," in Lee C. Bollinger & Geoffrey R. Stone, *Eternally Vigilant: Free Speech in the Modern Era* 57-59 (University of Chicago Press 2002) ("it is difficult to believe that the Court would have allowed newspaper editors to be punished, criminally, after they published the [Pentagon] Papers").

[47] See *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978); *Worrell Newspapers v. Westhafer,* 739 F.2d 1219, 1223 (7th Cir. 1984), aff'd 469 U.S. 1200 (1985).

[48] *Near v. Minnesota,* 283 U.S. 697, 716 (1931).

[49] See *Haig v. Agee,* 453 U.S. 280 (1981) (upholding the Secretary of State's revocation of a former CIA employee's passport for exposing the identities of covert CIA agents around the world).

[50] *Schenck v. United States,* 249 U.S. 47, 52 (1919).

[51] Requirement (c) may seem novel, but it is embedded in both First Amendment principle and First Amendment doctrine. Without some such requirement, no balance takes place and the First Amendment side of the equation is simply ignored. Without (c), the test would blithely assume that the harm of publication outweighs the value of publication. I should emphasize that (c) is not a requirement in considering the constitutionality of regulations of low value speech, content-neutral regulations, content-based regulations that are not directed at particular ideas, items of information, or viewpoints, or even regulations directed at particular ideas, items of information, or viewpoints in special environments (such as public employment, schools, and government subsidy programs). But when the government attempts generally to restrict speech at the very core of the First Amendment, requirement (c) plays an important role in the analysis. The best illustration of the relevance of requirement (c) is in the evolution of the Court's doctrine in the area of speech causing unlawful conduct, where the Court requires both express incitement and clear and present danger. See Geoffrey R. Stone, "Dialogue," in Lee C. Bollinger & Geoffrey R. Stone, *Eternally Vigilant: Free Speech in the Modern Era* 4-6 (University of Chicago Press 2002); Bernard Schwartz, "*Holmes v. Hand*: Clear and Present Danger or Advocacy of Unlawful Action?," 1994 *Sup. Ct. Rev.* 209, 240-241; Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," 27 *Stan. L. Rev.* 719, 754, 755 (1975).

[52] Getting an employee drunk would also fall into this category.

[53] This category includes the crimes of conspiracy and attempt. On the crime of solicitation, see Wayne R. LaFave, CRIMINAL LAW § 11.1 (West Pub. Co. 4th ed. 2002); Model Penal Code § 5.02; Kent Greenawalt, "Clear and Present Danger and Criminal Speech," in Lee C. Bollinger & Geoffrey R. Stone, *Eternally Vigilant: Free Speech in the Modern Era* 113-119 (University of Chicago 2002).

[54] This is merely an application of the traditional crime of receiving stolen property. There are subtleties in the meaning of "stolen" as applied to information, as distinct from documents, but the basic principle of the

traditional criminal law concept would clearly apply to information as well as objects in situations like the one under consideration. It is a defense to the crime that the recipient intends to return the property (or information) to its lawful owner without in any way using it. Thus, a reporter who receives such a document and immediately returns it to the government and never discloses it or its contents to anyone else would not be guilty of a crime. On the crime of receipt of stolen property, see LaFave, CRIMINAL LAW at § 20.2 (cited in note 53); Model Penal Code § 223.6.

[55] In the early years of First Amendment doctrine, the Supreme Court upheld convictions in such circumstances. See *Schenck v. United States,* 249 U.S. 47 (1919); *Debs v. United States,* 249 U.S. 211 (1919). Over time, however, the Court embraced a much more speech-protective approach. See *Brandenburg v. Ohio,* 395 U.S. 444 (1969). See generally Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," 27 *Stan. L. Rev.* 719 (1975); Herman Schwartz, "*Holmes v. Hand:* Clear and Present Danger or Advocacy of Unlawful Action?," 1994 *Sup. Ct. Rev.* 209; Frank Strong, "Fifty Years of 'Clear and Present Danger': From Schenck to Brandenburg — and Beyond," 1969 *Sup. Ct. Rev.* 41.

[56] See *Brandenburg v. Ohio,* 395 U.S. 444 (1969). Whether there are any circumstances in which the speaker can be punished for causing a riot is unclear. In *Feiner v. New York,* 340 U.S. 315 (1951), the Court upheld such a conviction where the speaker "undertook incitement to riot." Subsequent decisions have been much more protective of speakers, however. See, e.g., *Edwards v. South Carolina,* 372 U.S. 229 (1963) (reversing convictions); *Cox v. Louisiana,* 379 U.S. 536 (1965) (reversing convictions).

[57] Of course, the city may make reasonable time, place, and manner regulations. See *Cox v. New Hampshire,* 312 U.S. 569 (1941); *Schneider v. State,* 308 U.S. 147 (1939). See generally, Geoffrey R. Stone, "Fora Americana: Speech in Public Places," 1974 *Sup. Ct. Rev.* 233.

[58] As we saw in Part I, in the public employment situation such regulations may not be presumptively unconstitutional. On content-based restrictions of speech, see Elena Kagan, "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," 63 *U. Chi. L. Rev.* 413, 494-508 (1996); Susan Williams, "Content Discrimination and the First Amendment," 139 *U. Pa. L. Rev.* 615 (1991); Geoffrey R. Stone, "Content Regulation and the First Amendment," 25 *Wm. & Mary L. Rev.* 189 (1983); Paul Stephan, "The First Amendment and Content Discrimination," 68 *Va. L. Rev.* 203 (1982). As noted, laws regulating low value speech on the basis of content involve a separate analysis under the First Amendment.

[59] See Geoffrey R. Stone, "Content-Neutral Restrictions," 54 *U. Chi. L. Rev.* 46 (1987).

[60] On "incidental" restrictions, see Jed Rubenfeld, "The First Amendment's Purpose," 53 *Stan. L. Rev.* 767, 769 (2001) (arguing that "there is no such thing as a free speech immunity based on the claim that someone wants to break an otherwise constitutional law for First Amendment purposes"); Elena Kagan, "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," 63 *U. Chi. L. Rev.* 413, 494-508 (1996) (arguing that the distinction between direct and incidental restrictions in First Amendment analysis can be explained largely in terms of the concern with avoiding possible improper governmental motivation); Michael Dorf, "Incidental Burdens on Fundamental Rights," 109 *Harv. L. Rev.* 1175 (1996) (arguing that although "sound reasons can be advanced for taking direct burdens more seriously than incidental burdens," this does not mean 'that incidental burdens should never count as constitutional infringements"); Geoffrey R. Stone, "Content-Neutral Restrictions," 54 *U. Chi. L. Rev.* 46, 114 (1987) (arguing that although "the general presumption is that incidental restrictions do not raise a question of First Amendment review," courts will invalidate such restrictions if they have "a highly disproportionate impact "or particular viewpoints or "significantly limit the opportunities for free expression").

For illustrative decisions upholding laws having an incidental impact on speech, see *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991) (nude dancing); *Arcara v. Cloud Books,* 478 U.S. 697 (1986) (closing building used for prostitution, as applied to "adult" bookstore); *United States v. O'Brien,* 391 U.S. 367 (1968) (draft-card burning). In a few decisions, the Court has held incidental restrictions unconstitutional. See *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000) (antidiscrimination law); *Brown v. Socialist Workers '74 Campaign Committee,* 459 U.S. 87 (1982) (disclosure of campaign contributions); *NAACP v.*

Alabama, 357 U.S. 449 (1958) (disclosure of NAACP membership lists).

[61] The most comprehensive source on the relevant laws is Harold Edgar & Benno Schmidt, Jr., "The Espionage Statutes and Publication of Defense Information," 73 *Colum. L. Rev.* 929 (1973).

[62] Of course, solicitation, like bribery and conspiracy, involves the use of words. But, at least in the context of private (as opposed to public) speech, such language is assumed to have the quality of an "act" and does not itself raise a serious First Amendment issue. See Frederick Schauer, "'Private' Speech and the 'Private' Forum: *Givhan v. Western Line School District,*" 1979 *Sup. Ct. Rev.* 217.

[63] For examples of the relevant laws, see 18 U.S.C. §§ 793 et seq.; 50 U.S.C. § 421 et seq.

[64] See *Cohen v. Cowles Media Co.,* 501 U.S. 663 (1991) (no First Amendment press exemption from breach of contract law); *Zurcher v.* Stanford Daily, 436 U.S. 547 (1978) (no First Amendment press exemption from newsroom searches); *Branzburg v. Hayes,* 408 U.S. 665 (1972) (no First Amendment-based journalist-source privilege); *Associated Press v. NLRB,* 301 U.S. 103 (1937) (no First Amendment press exemption to NLRA).

[65] For examples of decisions invalidating laws on this basis, see *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000) (antidiscrimination law); *Brown v. Socialist Workers '74 Campaign Committee,* 459 U.S. 87 (1982) (disclosure of campaign contributions); *NAACP v. Alabama,* 357 U.S. 449 (1958) (disclosure of NAACP membership lists).

[66] Another example of this sort of problem involves prosecutions of speakers under breach of the peace statutes. Such laws ordinarily do not specify any particular content for restriction. Rather, they prohibit any conduct that causes (or knowingly or intentionally causes) a breach of the peace. It matters not under the statute whether the conduct is speech or non-speech or whether the speech carries any particular message. Viewed from this perspective, such laws might be thought to have only an incidental effect on expression. In fact, however, the Supreme Court has always treated such laws as content-based restrictions of speech whenever the conduct prosecuted is speech and the breach of the peace was caused by the content of the speech. Put differently, a law is analyzed as content-based, regardless of how it is drafted, whenever its application turns on the communicative impact of speech. See, *e.g., Edwards v. South Carolina,* 372 U.S. 229 (1963); *Terminiello v. Chicago,* 337 U.S. 1 (1949); *Cantwell v. Connecticut,* 310 U.S. 296 (1940). See also John Hart Ely, *Democracy and Distrust* 111 (Harvard 1980) (a law is content-based when it turns in application "on how people will react to what the speaker is saying"); Jed Rubenfeld, "The First Amendment's Purpose," 53 *Stan. L. Rev.* 767, 777 (2001); Geoffrey R. Stone, "Content Regulation and the First Amendment," 25 *Wm. & Mary L. Rev.* 189, 207-217 (1983).

[67] 532 U.S. 514 (2001).

[68] 532 U.S., at 528.

[69] *Id.* at 530. In *Boehner v. McDermott,* 441 F.3d 1010 (D.C. Cir 2006), the court of appeals held that Bartnicki could be distinguished in a case in which a member of Congress, McDermott, received an envelope containing a tape recording of an unlawfully intercepted telephone conversation involving other members of Congress. After opening the envelope and listening to the tape, McDermott shared the tape with reporters, who proceeding to report on its contents. The Court distinguished Bartnicki on the ground that in this case McDermott knew the tape had been unlawfully made before he opened the envelope and knew the identity of the person who provided him with the tape. In dissent, Judge Sentelle, who clearly has the better of the argument, correctly explained that these distinctions are without significance under the law. The D.C. Circuit has agreed to hear the case *en banc*.

[70] See *Brandenburg v. Ohio,* 395 U.S. 444 (1969) (even express advocacy of violence cannot be proscribed consistent with the First Amendment unless it constitutes "incitement to imminent lawless action" and action is likely to occur imminently).

[71] Another possibility is that public officials are loathe to prosecute the press because they are reluctant to trigger widespread press criticism.

[72] *United States v. Rosen,* — F.Supp. — (E.D. Va. August 9, 2006), involved a prosecution of two lobbyists, employed by the American Israel Public Affairs Committee. The defendants allegedly obtained classified information from an employee of the Department of Defense, which they then allegedly transmitted to members of the media, foreign policy

analysts, and officials of a foreign government. The public employee pled guilty of violating 18 U.S.C. §§ 793(d) and (g), 50 U.S.C. §783 and 18 U.S.C. § 371. The defendants were charged with violating to 18 U.S.C. § 793(g), which prohibits any person to conspire to transmit classified information to any person not entitled to receive it. The district court rejected the defendants' motion to dismiss the indictment on the ground that it violates the First Amendment.

The district court properly recognized that collecting and publishing information about the national security "is at the core of the First Amendment's guarantees," that "the mere invocation of 'national security' or 'government secrecy' does not foreclose a First Amendment inquiry," and that the First Amendment provides less protection to public employees than to those who do not "have access to the information by virtue of their official position." The district court then went off-track, however, in holding that New York Times *v. United States* is limited to prior restraints and, astonishingly, that lobbyists (and presumably even journalists) may constitutionally be punished for knowingly disseminating information that is "potentially harmful" to the national security. See *United States v. Rosen* at 40, 41, 48, 59 (pages of typed opinion). The district court cited no precedents to support this conclusion, which flies in the face of at least fifty years of Supreme Court jurisprudence. The district court correctly treated 18 U.S.C. § 793(g) as a content-based restriction of potentially important speech, but. In effect, the district court seems to have then simply ignored its own admonition that the First Amendment treats non-public employees quite differently than public employees. In practical effect, the court applied the standard it had carefully enunciated for the former to the latter. In this respect, the decision seems clearly erroneous. Even if *New York Times* is limited to prior restraints, the standard in this context at the very least must embody an element of "clear and present danger."

[73] 408 U.S. 665 (1972).

[74] *Id.* at 704.

[75] 357 U.S. 449 (1958).

[76] *Id.* at 463.

[77] See, *e.g., Brown v. Socialist Workers'74 Campaign Committee,* 459 U.S. 87 (1982) (invalidating the provisions of a state campaign reporting law as applied to the Socialist Workers Party, "a minor political party which historically has been the object of harassment").

[78] 530 U.S. 640 (2000).

[79] See Geoffrey R. Stone, "Why We Need a Federal Reporter's Privilege," 34 *Hofstra L. Rev.* 39, 42 n.12 (2005).

[80] See *id.,* at 47-48. Similar issues arise with respect to the priest-penitent privilege. Deciding who is protected by the priest-penitent privilege raises potentially thorny First Amendment concerns, but courts have done it for centuries. See Ronald J. Colombo, "Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege," 73 *N.Y.U. L. Rev.* 225 (1998). In that context, courts have usually taken a functional approach to the inquiry. See, e.g., *In re Grand Jury Investigation,* 918 F.2d 374, 377 (3d Cir. 1990); *In re Verplank,* 329 F. Supp. 433 (C.D. Cal. 1971); *Eckmann, v. Board of Education of Hawthorn School District No. 17,* 106 F.R.D. 70 (E.D. Mo. 1985).

[81] See *In re Madden,* 151 F.3d 125, 130 (3d Cir. 1998); *von Bulow v. von Bulow,* 811 F.2d 136, 143-144 (2d Cir. 1987).

[82] See Stone, *Perilous Times* 217-220 (cited in note 35). On the other hand, there are many circumstances in which the law regulates individuals who are "agents" of a foreign power. The criminal punishment of such individuals for soliciting classified information from public employees with the intent of harming the United States might well be a permissible accommodation to the legitimate needs of the nation. Certainly, the mere pretext of being a journalist need not insulate such individuals from prosecution. See Edgar and Schmidt, "Curtiss-Wright Comes Home" at 407 (cited in note 23) ("publication and espionage should not be encompassed within a single prohibition, except in those rare instances where the type of information at issue is extremely sensitive and of little value to informed public debate").

[83] David Wise & Thomas B. Ross, *The Invisible Government* 6 (Random House 1964).

by Stephen I. Vladeck

The statutory framework

The United States has never had its own version of the United Kingdom's "Official Secrets Act" — the name given to a comprehensive series of acts of Parliament dating back to 1911 that, in broad terms, prohibit the retention and/or dissemination of numerous forms of sensitive governmental information, including by the press.[1] Instead, the U.S. Congress has traditionally focused its attention on more discrete targets, punishing the dissemination of very specific types of sensitive governmental information (in many cases, by specific classes of individuals). As such, the statutory framework governing the complicated balance between governmental secrecy and the freedom of the press in the United States is little more than a disorganized amalgamation of unconnected statutes. Some of the provisions overlap each other and border on redundancy. Others are difficult to parse, and cannot possibly prohibit what their plain language appears to suggest. Still others, when read together, seem to promote mutually inconsistent policy goals.

And yet, whereas the statutory framework is not necessarily coherent, recent cases, in particular the case involving American Israel Public Affairs Committee (AIPAC) in the U.S. District Court for the Eastern District of Virginia,[2] testify to the importance of understanding its different components in their entireties. The lack of clarity notwithstanding, there are numerous statutes under which the press may find itself liable for the gathering and reporting of stories implicating governmental secrecy, especially as courts increasingly embrace theories of third-party inchoate liability, as in the AIPAC case.

I. The Espionage Act

From the Sedition Act of 1798,[3] which expired in 1801, through the outbreak of World War I, there was virtually no federal legislation prohibiting seditious expression, including the dissemination and/or publication of information harmful to the national defense.[4] Contemporaneously with the United States' entry into the war, however, Congress enacted the Espionage Act of 1917,[5] which, except for the amendments discussed below, remains on

the books largely in its original form today at 18 U.S.C. §§ 793 *et seq*. Written primarily by then-Assistant Attorney General Charles Warren, the Act included a number of seemingly overlapping and often ambiguous provisions.

A. The knowledge requirement

Section 793(a), which derives from section 1(a) of the Espionage Act, prohibits obtaining information concerning a series of national defense installations — places — "with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation." Similarly, § 793(b) prohibits individuals with similar intent "or reason to believe" from copying, taking, making, or obtaining "any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of *anything* connected with the national defense" (emphasis added). Although an early legal challenge argued the requirement that the information at issue be "connected with the national defense" was unconstitutionally vague, the Supreme Court read a scienter requirement into the statute (and thus upheld it) in *Gorin v. United States* in 1941.[6]

Because of the Supreme Court's decision in *Gorin* (which also held that the Act likely could not prohibit the collection of public information[7]), §§ 793(a) and 793(b) are unlikely candidates for potential press liability under the Espionage Act. The mere gathering and/or publication of the information specified in the two provisions would only sustain charges under the Act if the reporter at issue had "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." Thus, the scienter requirement read into these provisions in *Gorin* renders potential press liability under §§ 793(a) and 793(b) somewhat unlikely.

B. Application to those with unauthorized access to information

Section 793(c) is, in important ways, far broader. The ancestor of section 1(c) of the Espionage Act, the provision creates criminal liability for any individual who "receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever" various material related to the national defense, so long as the individual "know[s] or ha[s] reason to believe, at the time he receives or obtains [the information] … that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of [the Espionage Act]." Thus, whereas §§ 793(a) and 793(b) prohibit the collection of secret information relating to the national defense, § 793(c) prohibits the receipt of such information, or even attempts at receipt thereof, so long as the recipient

does or should have knowledge that the source, in obtaining the information, violated some other provision of the Espionage Act.

In addition, whereas §§ 793(d) and 793(f) prohibit the dissemination of national security information that is in the lawful possession of the individual who disseminates it (§ 793(d) prohibits willful communication; § 793(f) prohibits negligence), § 793(e) — which, like §§ 793(d) and 793(f), derives from section 1(d) of the Espionage Act[8] — prohibits the same by an individual who has unauthorized possession of the information at issue.

Thus, in sweeping language, section 793(e) prohibits individuals from willfully communicating — or attempting to communicate — to any person not entitled to receive it "any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation." Section 793(e) goes one important step further, however, for it also prohibits the retention of such information and the concomitant failure to deliver such information "to the officer or employee of the United States entitled to receive it."

Section 793(e) therefore appears to have a far more relaxed intent requirement than §§ 793(a) and 793(b). The provision does not require specific intent so long as the communication or retention of classified information is willful. From the perspective of the press, then, § 793(e) is easily one of the most significant provisions in the debate over governmental secrecy versus freedom of the press, and has received the most attention in judicial and scholarly discussions of the Act and its potential constitutional infirmities, most famously in the various opinions in the Pentagon Papers case.[9] Perhaps most succinctly, it was recently described as "pretty much one of the scariest statutes around,"[10] at least largely because of the lack of a specific intent requirement.

Concerns over the scope of § 793(e) may be bolstered by the Eastern District of Virginia's recent decision in the AIPAC case,[11] sustaining, for perhaps the first time, the liability of third parties (albeit not the press) for conspiring to violate §§ 793(d) and 793(e), and, in the defendant's case, for aiding and abetting a violation of § 793(d). As Judge Ellis concluded, "The conclusion here is that the balance struck by § 793 between these competing interests is constitutionally permissible because (1) it limits the breadth of the term 'related to the national defense' to matters closely held by the government for the legitimate reason that their disclosure could threaten our collective security; and (2) it imposes rigorous scienter requirements as a condition for finding criminal liability."[12]

C. Provisions that prohibit publication

A number of judges and scholars have argued against the applicability of § 793(e) to the press in the absence of an express reference to the "publication" of such secret national security information. By comparison, three separate provisions of the Espionage Act do expressly prohibit the publication of particular national-defense information.

First, § 794(b) applies to "Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates … [the disposition of armed forces] or any other information relating to the public defense, which might be useful to the enemy." Although the provision might appear to turn on whether it is a "time of war," § 798(a) expands § 794(b) to apply so long as various national emergencies remain in place, a provision that remains satisfied today. On the merits, though, could the requisite intent be inferred from the act of publication itself?

Second, § 797 applies to whoever "reproduces, publishes, sells, or gives away" photographs of specified defense installations, unless the photographs were properly censored. Third, § 798(a), which generally relates to cryptography and was passed in 1950 at least largely in response to the *Chicago Tribune* incident from World War II, applies to whoever "communicates, furnishes, transmits, or otherwise makes available … or publishes" various prohibited materials, including "classified information … concerning the communication intelligence activities of the United States or any foreign government."[13] Section 798(b) defines "classified information" as "information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution."

In addition to the three codified provisions of the Espionage Act that expressly prohibit the act of publication, those who argue against the applicability of other provisions of the Act to the press often invoke language in one of the early drafts of the Espionage Act that was rejected by Congress. It would have provided that:

> *During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy.*[14]

As Justice Douglas noted in his concurrence in the Pentagon Papers case, the provision was rejected by the Senate at least largely on First Amendment grounds, and therefore militates against a construction of those enacted provisions that do not expressly reference "publishing" as applying to the press.[15]

D. Publication as communication to a foreign government

One other noteworthy provision of the Espionage Act is 18 U.S.C. § 794(a), which applies to "Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits … to any foreign government, or to any faction or party or military or naval force within a foreign country, … any document, … [other physical items], or information relating to the national defense." Thus, there is at least a plausible argument that the publication of certain national-security information would constitute the communication of such information to a foreign government, and the issue, once again, would turn solely on whether the publisher had "intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation." Owing to the similarities in statutory language, would the scienter requirement from *Gorin* apply to a prosecution under this section?

Overlapping § 794(a) is 50 U.S.C. § 783, enacted as part of the 1950 amendments to the Espionage Act,[16] which provides that:

> *It shall be unlawful for any officer or employee of the United States or of any department or agency thereof … to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government, any information of a kind which shall have been classified by the President … as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department, agency, or corporation by which this officer or employee is employed, to make such disclosure of such information.*

E. Inchoate liability and the press

Finally, it bears noting that the Espionage Act also contains two independent conspiracy provisions. Pursuant to § 793(g), "If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy." Section 794(c) is to similar effect.

It is in the context of the conspiracy provisions that the potential liability of the press for the publication of governmental secrets becomes a much more troubling issue. Leaving aside the individual liability of the press for the act of publication, § 793(e) prohibits the unauthorized receipt of certain national security secrets, and other provisions of the Act prohibit, in broader strokes, the obtaining of such information. Thus, one of the central issues that may surface in a future prosecution of the press under the Espionage Act is inchoate liability — whether the reporters are liable either as co-conspirators, or for aiding and abetting the individuals who provided the protected information.[17] Because such liability would attach to the possession of information, and not to its publication *per se*, the potential protections of the First Amendment's Press Clause are, at the very minimum, not as clearly established,[18] and may not provide much protection at all.[19]

II. OTHER IMPORTANT STATUTES

The Espionage Act, while constituting an important subset of statutes at issue in the balance between governmental secrecy and the freedom of the press, is a subset nonetheless. When considered in conjunction with the inchoate liability issue noted above, the other statutes should provide just as much cause for concern as the more open-ended provisions of the Espionage Act.

A. Stealing for the press is no defense

First, and perhaps most importantly, is 18 U.S.C. § 641, one of the statutes at issue (along with §§ 793(d) and 793(e)) in the famous case of *United States v. Morison*.[20] Originally enacted in 1875,[21] § 641 applies to

> *Whoever … knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof …;*
>
> *or*
>
> *Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted…*

Thus, § 641, in general terms, prohibits the conversion of any "thing of value" to the U.S. government, and also prohibits the knowing receipt of the same, "with intent to convert it to his use or gain."

Relying on § 641, the government prosecuted Samuel Morison for transmitting photographs of a new Soviet aircraft carrier to *Jane's Defence Weekly*, an English publisher of defense information. As the court noted, "The defendant would deny the application of [§ 641] to his theft because he says that he did not steal the material 'for private, covert use in illegal enterprises' but in order to give it to the press for public dissemination and information. … The mere fact that one has stolen a document in order that he may deliver it to the press, whether for money or for other personal gain, will not immunize him from responsibility for his criminal act."[22] In one exceptional case, a district court even held that using a government photocopier to make copies of government-owned documents could trigger liability under § 641.[23]

Considered in conjunction with the discussion of inchoate liability above, the potential liability under § 641 for reporters may be just as broad, if not broader, than the liability under §§ 793(d) and 793(e). As Judge Winter worried in *United States v. Truong:*

> *[B]ecause the statute was not drawn with the unauthorized disclosure of government information in mind, § 641 is not carefully crafted to specify exactly when disclosure of government information is illegal. The crucial language is "without authority." The precise contours of that phrase are not self-evident. This ambiguity is particularly disturbing because government information forms the basis of much of the discussion of public issues and, as a result, the unclear language of the statute threatens to impinge upon rights protected by the first amendment. Under § 641 as it is written, … upper level government employees*

might use their discretion in an arbitrary fashion to prevent the disclosure of government information; and government employees, newspapers, and others could not be confident in many circumstances that the disclosure of a particular piece of government information was "authorized" within the meaning of § 641. Thus, the vagueness of the "without authority" standard could pose a serious threat to public debate of national issues, thereby bringing the constitutional validity of § 641 into question because of its chilling effect on the exercise of first amendment rights.[24]

B. Publication of information by government employees

Also relevant to any discussion of freedom of the press and governmental secrecy are 18 U.S.C. §§ 952 and 1924. Enacted in 1933,[25] § 952 relates specifically to diplomatic codes and correspondence, and applies to "Whoever, by virtue of his employment by the United States, obtains from another or has or has had custody of or access to, any official diplomatic code or any matter prepared in any such code, … without authorization or competent authority, [and] willfully publishes or furnishes to another any such code or matter, or any matter which was obtained while in the process of transmission between any foreign government and its diplomatic mission in the United States." A fair reading of the statute is that it prohibits the publication by the government employee, and not by an independent third party, but inchoate liability could still lead to liability for press reporting on encrypted communications between the United States and foreign governments or its overseas missions.

In the same vein is 18 U.S.C. § 1924, enacted in 1994,[26] which prohibits the unauthorized removal and retention of classified documents or material. It applies to "Whoever, being an officer, employee, contractor, or consultant of the United States, and, by virtue of his office, employment, position, or contract, becomes possessed of documents or materials containing classified information of the United States, [who] knowingly removes such documents or materials without authority and with the intent to retain such documents or materials at an unauthorized location."

C. Additional relevant statutes

Not to be overlooked are three other statutes dealing with more specific types of secret information. First among these is the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.* Sections 2274, 2275, and 2277 thereof prohibit the communication, receipt, and disclosure, respectively, of "Restricted Data," which is defined as "all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear

material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title."[27] In the *Progressive* case, in which the U.S. government successfully enjoined the publication of an article titled "The H-Bomb Secret: How We Got It, Why We're Telling It," it was a potential violation of § 2274(b) that formed the basis for the injunction.[28]

A very different statute, and one arguably of more relevance for contemporary purposes, is the Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421 *et seq.* Section 421, specifically, prohibits the disclosure of information relating to the identity of covert agents. Whereas §§ 421(a) and 421(b) prohibit the disclosure of such information by individuals authorized to have access to classified information identifying the agent, § 421(c) applies to anyone who "discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States." The individual must intend "to identify and expose covert agents and [have] reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." Importantly, though, § 421(c) "does not predicate liability on either access to or publication of classified information."[29]

Finally, the Invention Secrecy Act of 1951, 35 U.S.C. §§ 181 *et seq.*, protects the disclosure of information relating to patents under "secrecy" orders. The statutory punishment, however, for disclosure of information relating to a patent under a secrecy order is forfeiture of the patent.[30] No criminal liability appears to attach to such disclosures.

III. Conclusion

In sum, then, the statutory framework appertaining to the balance between governmental secrecy and freedom of the press presents far more questions than answers. Owing to the dearth of significant case law interpreting the more ambiguous — and potentially controversial — provisions of the Espionage Act, and owing to the absence of a coherent, overarching statute governing the publication of national security information generally, the statutory framework provides an unsatisfactory lens through which to understand the background legal issues.

Insofar as principal liability is concerned, the central statutes to focus on are 18 U.S.C. §§ 641 and 793(e), particularly in light of the interpretation of § 793(e) adopted in the

AIPAC case in August 2006. But as suggested above, the inchoate liability issues are perhaps more substantial going forward, especially to the extent that inchoate liability would arguably provide a means around the constitutional protections of the Press Clause.

Lastly, a separate point not considered here is the scope of (and availability of legal challenges to) the meaning of "classified" information within the various provisions discussed above. Especially where the statutes reference the dissemination of information to "those not entitled to receive it," who, precisely, does that term describe? These issues are heretofore unresolved in the case law, but could potentially pose additional problems in press-related prosecutions.

ENDNOTES

[1] Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28 (Eng.); see also Official Secrets Act, 1989, c. 6 (Eng.); Official Secrets Act, 1920, 10 & 11 Geo. 5, c. 75 (Eng.).

[2] See *United States v. Rosen*, No. 1:05-cr-225, 2006 WL 2345914 (E.D. Va. Aug. 9, 2006).

[3] Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

[4] For one of the few counterexamples, see Act of Mar. 3, 1911, ch. 226, 36 Stat. 1084 (prohibiting the disclosure of certain national defense secrets) (repealed 1917).

[5] Act of June 15, 1917, ch. 30, 40 Stat. 217.

[6] 312 U.S. 19, 27-28 (1941) ("The obvious delimiting words in the statute are those requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.'"); see also *United States v. Truong*, 629 F.2d 908, 918 (4th Cir. 1980) (discussing *Gorin's* scienter requirement); *In re Squillacote*, 790 A.2d 514, 519 (D.C. 2002) (per curiam) (same).

[7] See 312 U.S. at 27-28; see also *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945) (L. Hand, J.).

[8] The three provisions were modified and separated by the Subversive Activities Control Act of 1950, Pub. L. No. 81-831, tit. I, § 18, 64 Stat. 987, 1004.

[9] *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

[10] Susan Buckley, *Reporting on the War on Terror: The Espionage Act and Other Scary Statutes* (New York: Media Law Resource Center, 2006), p. 7.

[11] *United States v. Rosen*, No. 1:05-cr-225, 2006 WL 2345914 (E.D. Va. Aug. 9, 2006).

[12] *Id.* at *31.

[13] See, e.g., *N.Y. Times*, 403 U.S. at 720-21 (Douglas, J., concurring). But see id. at 737-40 & nn.8-10 (White, J., concurring) (arguing that the *New York Times* and the *Washington Post* could constitutionally have been prosecuted for violating § 793(e)).

[14] See 55 Cong. Rec. 1763 (1917).

[15] See *N.Y. Times*, 403 U.S. at 721-22 (citing 55 Cong. Rec. 2167 (1917)).

[16] See *supra* note 9.

[17] See generally 18 U.S.C. § 2 (aiding and abetting); *id.* § 371 (conspiracy).

[18] See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 799-800 (1978) (Burger, C.J., concurring) ("The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly and 'comprehends every sort of publication which affords a vehicle of information and opinion.'" (citation and footnote omitted)).

[19] The Press Clause arguably is implicated only when the enforcement of governmental secrecy impacts the press itself. See Louis Henkin, "The Right To Know and the Duty To Withhold: The Case of the Pentagon Papers," 120 *U. Pa. L. Rev.* 271, 277 (1971).

[20] 844 F.2d 1057 (4th Cir. 1988).

[21] See Act of Mar. 3, 1875, ch. 144, 18 Stat. 479.

[22] *Morison*, 844 F.2d at 1077.

[23] See *United States v. Hubbard*, 474 F. Supp. 64 (D.D.C. 1979).

[24] *United States v. Truong*, 629 F.2d 908, 924-25 (4th Cir. 1980) (citations and footnote omitted).

[25] See Act of June 10, 1933, c. 57, 48 Stat. 122, 122-23.

[26] Intelligence Authorization Act for FY1995, Pub. L. No. 103-359, § 808(a), 108 Stat. 3423, 3453 (1994).

[27] 42 U.S.C. § 2014(y).

[28] See *United States v. The Progressive, Inc.*, 467 F. Supp. 990, 993-96 (W.D. Wis.), dismissed without opinion, 610 F.2d 819 (7th Cir. 1979).

[29] Buckley, *supra* note 35 U.S.C. § 182.

[30] See 35 U.S.C. § 182.

Timeline: The Espionage Act, related laws and the press

Prepared by Eric Nelson, First Amendment Center

Aug. 16, 2006

U.S. District Judge T.S. Ellis orders the Justice Department "to conduct an investigation into the identity of any government employee responsible for the August 2004 disclosure to CBS News of information related to the investigation of the defendants/whether the investigation relied on information collected pursuant to Foreign Intelligence Surveillance Act."

Aug. 10, 2006

A federal judge in Virginia states that the Bush administration could use espionage laws to prosecute private citizens who gained access to national defense information. Steve Aftergood, the head of the Project on Government Secrecy for the Federation of American Scientists, states that "it's a momentous ruling with radical implications. A lot of people who are in the business of gathering information … are now going to have to grapple with the potential threat of prosecution. The dividing line has always been between leakers, who may be prosecuted, and the recipients of the leak, who have never been. Now that dividing line has been erased."

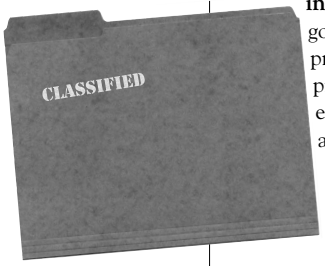
KEITH BARRACLOUGH

Steve Aftergood, director of the American Federation of Scientists government secrecy project, speaks at National Freedom of Information Day conference in March 2006.

This decision is one-of-its-kind in that a court has found that citizens, other than government employees, can be charged and prosecuted for receiving and disclosing secret government information.

Aug. 2, 2006

Sen. Christopher S. 'Kit' Bond, R-Mo., introduces S. 3774, "A bill to amend title 18, United States Code, to prohibit the unauthorized disclosure of classified information." The legislation is "aimed at cracking down on intelligence leaks by government employees or contractors by making it easier for the government to prosecute and punish those who make public America's sensitive intelligence programs." As the text of the legislation states, the bill is aimed at government employees and contractors as well as anyone who is, or has been, authorized to access properly classified information.



July 26, 2006

Russel Tice, a former National Security Agency employee, is subpoenaed by a U.S. grand jury as part of an investigation into leaks of classified information. When the NSA's highly secret program of warrantless wiretapping was revealed in December 2005, Tice said publicly that he had information about "probable unlawful and unconstitutional acts" involving the NSA director, the defense secretary and other officials as part of highly classified government operations. Tice also spoke to reporters for *The New York Times* before the newspaper published its December story disclosing the NSA program.

The subpoena says only that the grand jury is "conducting an investigation of possible violations of federal criminal laws involving the unauthorized disclosure of classified information." But it is believed to be the first public sign of the Bush administration's promised aggressive investigation into leaks about the NSA's highly secret wiretapping program.

July 18, 2006

Attorney General Alberto Gonzales tells the Senate Judiciary Committee that President Bush personally decided to block the Justice Department ethics unit from examining the role played by government lawyers in approving the National Security Agency's domestic eavesdropping program.

Additionally, Gonzales is asked about his comments in a May 21 interview in which he said he had been trying to determine whether to prosecute *The New York Times* for its disclosures about the eavesdropping program. In response, Gonzales replies that, "our longstanding practice, and it remains so today, is that we pursue the leaker." He adds that the administration "hopes to work with responsible journalists and persuade them not to publish" such articles. (*The New York Times*, July 19, 2006)

AP PHOTO

Attorney General Alberto Gonzales testifies before the Senate Judiciary Committee in Washington Tuesday, July 18, 2006, during a hearing on Justice Department oversight.

July 18, 2006

Sen. Charles Schumer, D-N.Y., and Rep. William Delahunt, D-Mass., request an inquiry into the Bush administration's apparent selective investigation into leaks of classified information to the press. In a letter to Attorney General Alberto Gonzales and Director of National Intelligence John Negroponte, Schumer and Delahunt state that while the Bush administration condemned *The New York Times* for its publication of classified information, the administration praised articles by other publications that "seem to support conclusions favorable to the administration's policies or politics." For support, Schumer and Delahunt cite 11 news reports, primarily from *The Washington Times*, containing "sensitive military and intelligence information, capabilities, methods, and sources" that the Bush administration neither condemned nor investigated.

Schumer and Delahunt: "The apparent lack of investigation into (the articles) gives the impression that the administration is unconcerned about leaks of classified information to some media sources when the revelation may have been advantageous to the administration."

July 1, 2006

Dean Baquet, editor of *The Los Angeles Times*, and Bill Keller, executive editor of *The New York Times*, co-write an Op-Ed article defending the publication of stories about the secret Swift bank-monitoring program.

Paul Steiger, managing editor of *The Wall Street Journal*, and Leonard Downie Jr., executive editor of *The Washington Post*, are asked to join the Op-Ed but both decline to take part.

June 30, 2006

A *Wall Street Journal* editorial criticizes *The New York Times* for using the *Journal* as "its ideological wingman" to deflect criticism resulting from the Swift reporting. The *Journal* editorial explains that the paper based its Swift story on "authorized" disclosures from the Treasury Department, which contacted the *Journal* with the story after it was clear that the *Times* was going to publish a similar story. (The *Journal* notes that it is a "common practice" in Washington for government officials to disclose a story that is going to become public anyway to more than one reporter.) Additionally, the *Journal* claims *Times* Publisher Arthur Sulzberger Jr. does not want to win, but rather obstruct, the war on terror. Finally, the *Journal* slams the *Times* for a wide range of misdeeds, claiming the "current political clamor" is a "warning to the press about the path the *Times* is walking."

June 30, 2006

In a report for Congress, the Government Accountability Office criticizes the Defense Department for sloppy management of its security-classification system after finding numerous errors and problems in the department's classification activity. The report also notes that the government as a whole has no common security-classification standard and no penalties for overclassification, underclassification, or failure to declassify.

June 29, 2006

The House condemns the news media's disclosure of the government's monitoring of international banking transactions, endorsing President Bush's assertion that major newspapers acted disgracefully and undermined vital anti-terrorism efforts. The GOP-crafted resolution, sponsored by Rep. Michael G. Oxley, R-Ohio, is approved 227-183.

The resolution states, in part, that the House "expects the cooperation of all news media organizations in protecting the lives of Americans and the capability of the government to identify, disrupt, and capture terrorists by not disclosing classified intelligence programs such as the Terrorist Finance Tracking Program."

Further, "the disclosure of the Terrorist Finance Tracking Program has unnecessarily complicated efforts by the United States Government to prosecute the war on terror and may have placed the lives of Americans in danger both at home and in many regions of the world." It "condemns the unauthorized disclosure of classified information by those persons responsible and expresses concern that the disclosure may endanger the lives of American citizens." (*The Washington Post*, June 30, 2006)

June 28, 2006

House Speaker Dennis Hastert, R-Ill., says *The New York Times* deserves a formal reprimand from Congress for publishing a report on the Treasury Department's financial-monitoring program.

Hastert: "Loose lips kill American people." (Reuters, June 28, 2006)

June 27, 2006

White House Press Secretary Tony Snow says the Bush administration's particularized criticism of *The New York Times* for its Swift story is attributable to the fact that the *Times* was "way ahead" of *The Wall Street Journal* and *Los Angles Times* and started reporting on the story much earlier. "The other newspapers were not involved to the same extent (as the *Times*). The *Times* is really pulling the train on this one."

Snow adds that the *Times* will not lose its White House press credentials. (*Editor & Publisher,* June 27, 2006)

June 27, 2006

Rep. J.D. Hayworth, R-Ariz., circulates a letter to House Speaker Dennis Hastert, R-Ill., asking House leaders to revoke *The New York Times'*s congressional press credentials.

June 27, 2006

***The New York Times* Executive Editor Bill Keller, in an open letter responding to critics of the *Times'* decision to publish classified information, writes that a free press is the key check on the government's abuse of power.**

June 27, 2006

Sen. Pat Roberts, chairman of the Senate Intelligence Committee, blasts U.S. media for exposing details of highly secret intelligence programs and asks the Bush administration for a formal damage assessment. Roberts, R-Kan., asks John Negroponte, U.S. Director of National Intelligence, to report particularly on damage to Bush's domestic-surveillance program as well as the Swift program that tracks private bank records. A Negroponte spokesman says Roberts' request is being reviewed by intelligence officials.

Roberts: "Numerous, recent unauthorized disclosures of sensitive intelligence programs have directly threatened important efforts in the war against terrorism. Whether the president's Terrorist Surveillance Program or the Department of Treasury's effort to track terrorist financing, we have been unable to persuade the media to act responsibly." (Reuters, June 27, 2006)

June 26, 2006

President Bush, Vice President Cheney, and Defense Secretary Rumsfeld denounce reports on the Swift financial data.

Bush: "[W]hat we did was fully authorized under the law. And the disclosure of this program is disgraceful. We're at war with a bunch of people who want to hurt the United States of America, and for people to leak that program, and for a newspaper to publish it, does great harm to the United States of America." (AP, June 27, 2006)

June 25, 2006

Rep. Peter King, chairman of the House Homeland Security Committee, urges criminal charges against *The New York Times* for reporting on Swift, the secret financial-monitoring program used to trace terrorists. King, R-N.Y., says he will write to Attorney General Alberto Gonzales urging the nation's chief law enforcer to "begin an investigation and prosecution of *The New York Times* — the reporters, the editors and the publisher." Sen. Arlen Specter, R-Pa., chairman of the Senate Judiciary Committee, declines to endorse King's call for prosecution.

June 23, 2006

***The New York Times*, *Los Angeles Times* and *The Wall Street Journal* publish articles revealing the government's classified financial-monitoring program.** Using broad government subpoenas, the program allows U.S. counterterrorism analysts to obtain financial information from a vast database maintained by a company based in Belgium. It monitors about 11 million financial transactions daily among 7,800 banks and other financial institutions in 200 countries.

Treasury Department officials urge *The New York Times* and *Los Angeles Times* not to publish stories about the Swift surveillance program. *The Wall Street Journal* receives no such request.

Vice President Dick Cheney harshly criticizes the media for publishing stories regarding Swift, a financial monitoring program that Cheney deemed "absolutely essential" to the war on terror: "What I find most disturbing about these stories is the fact that some of the news media take it upon themselves to disclose vital national security programs, thereby making it more difficult for us to prevent future attacks against the American people." (*The New York Times*, June 24, 2006)

May 23, 2006

Attorney General Alberto Gonzales defends the legality of the government's phone-data collection program, and softens an earlier statement regarding the possibility of prosecuting *New York Times* reporters who first disclosed the NSA's warrantless-eavesdropping program.

Gonzales: "Let me try to reassure journalists that my primary focus, quite frankly, is on the leak — on leakers who share the information with journalists." He adds that he would prefer to "try to persuade" journalists "that it would be better not to publish those kind of stories." (*The Washington Post*, May 24, 2006)

May 21, 2006

Attorney General Alberto Gonzales raises the possibility that journalists can be prosecuted under the Espionage Act for publishing classified information.

"There are some statutes on the book which, if you read the language carefully, would seem to indicate that that is a possibility." (*The Washington Post,* May 22, 2006)

May 18, 2006

A reporter's shield bill, the "Free Flow of Information Act of 2006," is introduced by Sens. Richard Lugar, R-Ind., Arlen Specter, R-Pa., Christopher Dodd, D-Conn., Lindsey Graham, R-S.C., and Charles Schumer, D-N.Y. The bill creates a qualified privilege protecting reporters from being compelled to reveal their confidential sources, subject to several exceptions, including a national-security exception.

The privilege can be overcome when there is clear and convincing evidence that disclosure "(1) is necessary to prevent an act of terrorism or to prevent significant and actual harm to the national security, and (2) the value of the information that would be disclosed clearly outweighs the harm to the public interest and the free flow of information that would be caused by compelling the disclosure."

A second provision in the national-security exception relates to leaks of classified information, and allows the reporter's privilege to be overcome when "(1) such unauthorized disclosure has seriously damaged the national security, (2) alternative sources of the information identifying the source have been exhausted, and (3) the harm caused by the unauthorized disclosure of properly classified Government information clearly outweighs the value to the public of the disclosed information."

May 11, 2006

***USA TODAY* reports that the NSA secretly collects phone-call records of tens of millions of Americans, using data provided by AT&T, Verizon, and BellSouth.** (BellSouth and Verizon deny the claims, and AT&T refuses to comment.)

Subsequently, *USA TODAY,* in a note to readers on June 20, 2006, backs off its assertion that BellSouth and Verizon contracted to provide telephone calling records to the NSA, acknowledging it cannot prove key elements of its May 11 story.

March 2006

Gabriel Schoenfeld, senior editor at *Commentary* magazine, proposes that *The New York Times* should be held liable under the espionage statutes for having published the Dec. 16, 2005, article revealing the existence of the Bush administration's warrantless domestic-surveillance program. ("Has the *New York Times* violated the Espionage Act?" *Commentary,* March 2006)

Dec. 16, 2005

***The New York Times* publishes an article revealing the warrantless surveillance of Americans' phone calls, carried out by the National Security Agency (NSA).**

Senior White House officials urge *The New York Times* not to publish the story. The *Times* later reports that it delayed publication of the article for a year while editors pondered the national-security issues surrounding the release of the information.

Nov. 2, 2005

***The Washington Post* publishes an article revealing CIA interrogations of al-Qaida captives in secret prisons.**

The Bush administration urges the *Post* not to publish the story. The *Post* agrees not to publish the names of the Eastern European countries involved in the covert program, at the request of senior U.S. officials.

Aug. 4, 2005

Steven J. Rosen and Keith Weissman, two former officials of a pro-Israel lobbying group, are charged with conspiring to violate the Espionage Act by allegedly disclosing classified national-security information to journalists.

Lawrence A. Franklin, a U.S. Air Force Reserve colonel and former DOD analyst, who initially disclosed the classified information to Rosen and Weissman, is later sentenced to 12 years and seven months in prison after pleading guilty to unauthorized disclosures of classified information.

Jan. 15, 2003

Jonathan Randel, a former Drug Enforcement Administration analyst, is sentenced to a year in prison and three years of probation for theft of government property for leaking confidential but unclassified government information to *The Times* of London. Randel is convicted under 18 U.S.C. 641, which imposes criminal liability on any person who steals or knowingly converts government records "or thing[s] of value" of the U.S.

May 21, 2001

The U.S. Supreme Court in *Bartnicki v. Vopper,* 532 U.S. 514 (2001), which did not directly involve the Espionage Act, notes that the press is not exempt from criminal statutes of general applicability. However, the Court declines to hold the press criminally liable for publishing information obtained in violation of federal wiretap statutes.

Jan. 20, 2001

President Clinton pardons Samuel L. Morison, the first person ever convicted of leaking classified information to the press.

Aug. 11, 2000

The 4th U.S. Circuit Court of Appeals, in *United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000), determines that information "relating to the national defense," as used in the Espionage Act, is information that is "closely held" by the government. Information that is widely available to the public or information that is officially disclosed by the government does not fall under the umbrella of the Espionage Act. But if the information is closely held by the government, even if "snippets" of it have been leaked to the press and general public, it continues to be information "relating to the national defense."

Circuit Judge William B. Traxler, writing for the majority: "[A] document containing official government information relating to the national defense will not be considered available to the public (and therefore no longer national defense information) until the official information in that document is lawfully available. Thus, as the government argues, mere leaks of classified information are insufficient to prevent prosecution for the transmission of a classified document that is the official source of the leaked information."

April 1, 1988

The 4th U.S. Circuit Court of Appeals, in *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), affirms Samuel L. Morison's conviction of espionage for selling photographs of a Soviet nuclear-powered carrier to a British publication. The court holds that government officials can be prosecuted under the Espionage Act for leaking classified information to the press.

The Court states that sections 793(d) and (e) are not limited to conduct that is ordinarily viewed as "classic spying," and that there is "no exemption in favor of one who leaks to the press."

The Court also determines that section 793 of the Espionage Act is not unconstitutionally vague or overbroad because the trial court's instructions properly narrowed the sweep of the statute by defining key phrases such as "national defense," "willfully," and "entitled to receive." However, Judge Dickson Phillips states that the Espionage Act's provisions are "broadly drawn" and "unwieldy and imprecise instruments for prosecuting" leakers.

Judge Harvie Wilkinson, concurring, points out that the press was not, and "probably could not," be prosecuted under the Espionage Act for publishing classified information.

Note: Morison was also convicted of violating 18 U.S.C 641 of the U.S. Criminal Code.

June 23, 1982

The Intelligence Identities Protection Act is enacted as an amendment to the National Security Act of 1947. The narrowly drawn law is designed to protect against the disclosure of information that reveals the identity of covert agents.

March 31, 1982

The Justice Department, in its report to Congress regarding the effectiveness of then-existing laws prohibiting the disclosure of classified information, states that sections 793(d) and (e) of the Espionage Act may be violated by "unauthorized disclosures of sensitive information."

"[T]he Department of Justice has taken the position that these statutes would be violated by the unauthorized disclosure to a member of the media of classified documents or information relating to the national defense, although intent to injure the United States or benefit a foreign nation would have to be present where the disclosure is of 'information' rather than documents or other tangible materials."

March 18, 1977

Anthony A. Lapham, general counsel for the CIA, describes provisions of the Espionage Act as "vague and clumsy," stating that outside of spying, it is "extremely doubtful" that the act was intended to apply to unauthorized disclosure of information, such as the "publication of books or leaks to the press."

In a 1979 hearing before Congress, Lapham states that the ambiguity surrounding sections 793 and 794 of the Espionage Act creates "the worst of both worlds." "On the one hand the laws stand idle and are not enforced at least in part because their meaning is so obscure, and on the other hand it is likely that the very obscurity of these laws serves to deter perfectly legitimate expression and debate by persons who must be as unsure of their liabilities as I am unsure of their obligations."

May 11, 1973

Charges against Daniel Ellsberg and Anthony Russo, who are charged under the Espionage Act for their unauthorized disclosure of the Pentagon Papers to the press, are dismissed during the fifth month of trial on grounds of government misconduct.

Note: Government prosecutors relied primarily upon sections 793(d) and (e) of the Espionage Act, as well as 18 U.S.C. 641 in their indictment of Ellsberg and Russo.

June 30, 1971

The U.S. Supreme Court in *New York Times Co. v. United States*, 403 U.S. 713 (1971), allows the continued publication of the Pentagon Papers, establishing that the press has almost absolute immunity from pre-publication restraints. However, four members of the Court — Justices Byron White, Potter Stewart, Harry Blackmun, and Chief Justice Warren Burger — hold open the possibility that journalists may be criminally prosecuted under the Espionage Act for publishing or retaining defense secrets.

White, J., concurring: "It seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793(e) (of the Espionage Act) if they communicate or withhold the materials covered by that section."


The New York Times

SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS

AP PHOTO

The New York Times resumed publication of its series of articles based on the secret Pentagon Papers in its July 1, 1971, issue.

Brennan, J., concurring, condemns injunctions "predicated upon surmise or conjecture," but nonetheless leaves open the possibility for equitable relief where "publication imperiling the safety" of the national security is at stake.

Burger, C.J., writing in dissent, expresses his belief that publishers can be prosecuted under federal laws for printing classified information.

Note: A per curiam opinion announced the judgment of the Court. Justices Black, Douglas, Brennan, Stewart, White, and Marshall each filed an individual concurring opinion. Chief Justice Burger and Justices Harlan and Blackmun wrote individual dissents.

1962

Sen. John C. Stennis, D-Miss., introduces a bill to amend section 793 to make disclosures of classified information a crime, without any narrow-intent requirement. The proposal is not enacted.

1957

The Government Security Commission proposes legislation criminalizing publication of classified information. The proposal, however, makes no progress in Congress and is abandoned by the executive branch as politically untenable.

Sept. 24, 1951

President Harry S. Truman signs the first executive order for the protection of national-security information at all federal agencies. The president's order extends classification standards that had protected military information since before World War II to include the records of all civilian agencies that have a hand in "national security" matters.

Sept. 23, 1950

The Espionage Act is amended, creating separate sections now known as 793(d) and (e).

In response to the amendment, both the Legislative Reference Service and the Attorney General state that section 793 does not, in their view, apply to conduct ordinarily engaged in by newspapers.

Addressing concerns of some members of Congress as to the breadth of section 793(e), a provision is enacted stating that "[n]othing in this Act shall be construed to authorize, require or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect." The provision is included as part of the Internal Security Act of 1950 and codified as the proviso to the Subversive Activities Act of 1950.

May 1950

Section 798 of Title 18 in the U.S. Criminal Code is enacted, criminalizing, among other things, the knowing and willful publication of "any *classified information* … concerning the *communication intelligence* activities of the United States." (emphasis added) The statute does not contain any requirement that the U.S. be at war. Additionally, broader controls on publication are debated by Congress but are, for the most part, rejected.

The statute defines "classified information" as information "specifically designated by a United States Government Agency for limited or restricted dissemination or distribution."

The statute defines "communication intelligence" as "procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients."

At the time of its passage, section 798 is supported by the American Society of Newspaper Editors.

Note: Section 798 was enacted about four months prior to the enactment of sections 793(d) and (e) in the Internal Security Act of 1950. However, the bill was introduced, reported, and debated in the same period as 793(d) and (e) were making their way through the legislative process.

June 28, 1948

Section 641 of Title 18 in the U.S. Criminal Code is enacted, imposing criminal liability on any person who steals or knowingly converts government records "or thing[s] of value" of the U.S. The statute also criminalizes the receipt or retention of any such record or thing if the recipient intends to "convert it to his use or gain," knowing it has been stolen or converted.

The U.S. Supreme Court in *Morissette v. United States*, 342 U.S. 246 (1952), determines that conviction under section 641 cannot be sustained without criminal intent.

Although section 641 was used to prosecute both Samuel L. Morison and Jonathan Randel for unauthorized dissemination of information to the press, the statute has never been applied to punish the press for disseminating unauthorized government information to the public.

Note: Section 641 consolidates four former sections of Title 18, as adopted in 1940, which in turn were derived from two sections of the Revised Statutes.

Sept. 18, 1947

The Central Intelligence Agency's founding statute, the National Security Act of 1947, is enacted. The act, and its subsequent amendments, shields much of the CIA's actions from public scrutiny, prohibiting "intelligence sources and methods from unauthorized disclosure."

July 20, 1946

Congress passes the Atomic Energy Act, which, together with its subsequent amendments, creates a comprehensive scheme to ensure against the disclosure of data concerning atomic weaponry and "special nuclear material." The act broadly prohibits anyone having possession of "restricted data" from communicating or disclosing such data to any person "with intent to injure the United States or with intent to secure an advantage to any foreign nation."

The legislative history does not shed light on whether Congress intends the act to be used to enjoin press publications. In the only reported opinion on the subject, a federal district court in *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), in 1979 concluded that it could.

Nov. 8, 1945

The 2nd U.S. Circuit Court of Appeals in *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945), determines that unless information is kept secret by the government, it cannot be considered information "relating to the national defense," as used in the Espionage Act.

Aug. 1942

Justice Department prosecutors convene a federal grand jury to consider whether to charge the *Chicago Tribune* with violation of the Espionage Act for its publication of classified information. Ultimately, no charges are brought because the grand jury declines to indict and because military officials are unwilling to share classified information about intelligence gathering.

June 7, 1942

The *Chicago Tribune* publishes a front-page story reporting on the Battle of Midway in World War II. Without specifically publishing the fact, the *Tribune* essentially states that the United States broke Japanese naval codes and is reading the enemy's encrypted communications.

The War Department and Justice Department contemplate criminally prosecuting the *Tribune* under the Espionage Act.

Jan. 13, 1941

The U.S. Supreme Court in *Gorin v. United States*, 312 U.S. 19 (1941), rules that the statutory language of the Espionage Act — specifically the terms "relating to the national defense" and "connected to the national defense" — is not unconstitutionally vague. The Court determines that the term "national defense" is a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." However, the Court narrows the statute's reach, finding that scienter or bad faith is required for conviction under sections 793(a) and (b).

The Court finds the bad-faith standard to be bound up in the requirement that the information be "used to the injury of the United States, or to the advantage of any foreign nation."

Jan. 12, 1938

Sections 795 and 797 of the Espionage Act are enacted, dealing with photographing and publishing photographs, pictures, drawings, or other "graphical representation(s)" of defense installations.

Note: Sections 795 and 797 have never been the focus of judicial opinions.

Dec. 23, 1933

President Franklin D. Roosevelt pardons those convicted under the Espionage and Sedition Acts. More than 2,000 people were convicted of sedition and other violations of the Espionage Act between 1918 and 1920. Several hundred were pardoned by Presidents Warren Harding and Calvin Coolidge during the 1920s. President Roosevelt pardons every remaining person who was convicted of sedition under the federal sedition law.

June 10, 1933

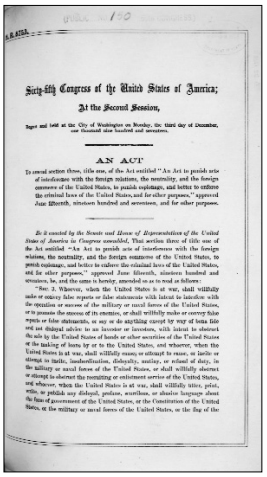
Congress, in response to the publishing activities of a former State Department code-breaker, discusses and debates the problem of regulating press publication in the interest of national security. Congress eventually criminalizes the publication by federal employees of any matter originally transmitted in foreign code.

March 3, 1921

Congress repeals the Sedition Acts.

May 16, 1918

Congress passes the Sedition Act, forbidding spoken or printed criticism of the U.S. government, the Constitution, or the flag.



Sixty-fifth Congress of the United States of America;

At the Second Session,

AN ACT

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

The Sedition Act of 1918

Oct. 1, 1917

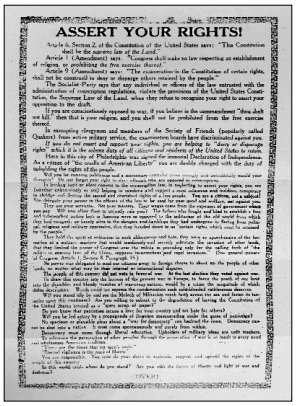
The Civil Liberties Bureau, a forerunner of the American Civil Liberties Union (ACLU), is formed primarily in response to passage of the Espionage Act.

June 15, 1917

Congress passes the Espionage Act of 1917, making it a crime to convey information with intent to interfere with the operation or success of the armed forces of the United States or to promote the success of its enemies.

The act criminalizes information-gathering activities, for the most part, only when performed with "intent or reason to believe that the information is to be used to the injury of the United States or to the advantage of any foreign nation."

In considering the Espionage Act of 1917, Congress narrowly rejects a provision that would have permitted the president to prohibit newspapers from publishing information concerning the national defense that the president determines might be useful to the enemy. The congressional action does not leave the law utterly without impact on publication and information-gathering, but rather makes them illegal when done with certain culpable states of mind such as "intent" or "reason to believe."


ASSERT YOUR RIGHTS!

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

The Espionage Act of 1917

1911

Congress passes the Defense Secrets Act of 1911, a precursor to sections 793(a) and (b), as well as portions of 793(d) and (e) and 794(a) of the Espionage Act of 1917. The statute proscribes information-gathering activities in and around military installations. It also prohibits communication of defense information to persons "not entitled to receive it."

Unlike the Espionage Act, however, the statute does not include the requirement of intent to injure the United States or advantage a foreign nation. Additionally, the Defense Secrets Act does not include the word "publishes" and the debates leading up to it do not address the idea that publication of defense information might pose a problem for national security.

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A note from the author

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— Geoffrey Stone

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