

PUBLISHING NATIONAL SECURITY SECRETS

THE CASE FOR “BENIGN INDETERMINACY”

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An Occasional Paper

Of the Paul Simon Public Policy Institute \*

Southern Illinois University

Carbondale, Illinois

February, 2007

- This paper was presented at the January, 2007 meeting of the Association of American Law Schools in Washington, D.C. and is scheduled for publication in the *Journal of National Security Law & Policy*

## Introduction

Unpopular wars inevitably lead to sharp conflicts between presidents and the press over the control of secret information. National security secrets find their way into print because government officials assigned to carry out questionable policies leak secret documents to reporters. The government responds to publication with threats of civil legal action and criminal prosecution. The Vietnam War produced the Pentagon Papers case in which the government unsuccessfully sought a prior restraint on the publication of a classified history of the Vietnam War. Now, Iraq-related cases have led to jail for some reporters, threats of jail for others and warnings of criminal prosecution for still others.<sup>1</sup> These cases, taken together, threaten to criminalize newsgathering of national security secrets.

During these times of national security stress, journalists find that their professional ethic sometimes requires them to employ newsgathering techniques that may be extra-legal and extra-constitutional – that is, not clearly protected by law or the Constitution. Reporting national security secrets and protecting the sources who leak them provide citizens with information often essential to judging the wisdom and legality of government policy. When Congress is controlled by the party of the president and is not providing robust checks on executive power, the press' extra-legal and extra-constitutional activity in reporting questionable but secret government activity provides an especially important check on presidential overreaching. Under these circumstances, the press is arguably the most effective constitutional check on executive abuse.

Journalists like to believe that they enjoy constitutional and legal protection for these essential newsgathering functions. In fact, they enjoy far less legal protection than they realize. Neither Congress nor the U.S. Supreme Court has provided journalists with legal or constitutional protection for these important methods of newsgathering. Meanwhile, White House and other national security officials routinely exaggerate the danger of publication of secret information. Over the decades, government officials have presented scant proof of harm. In a perfect First Amendment world, with a Supreme Court composed of nine Justice Brennans, such important activities of newsgathering and dissemination would have legal and constitutional protection. But given the legal landscape, the legal limbo of the status quo is preferable to the legal certainty that would further hinder important newsgathering.

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<sup>1</sup> *Reporters and Federal Subpoenas*, special report, Reporters Committee for Freedom of the Press, June 21, 2006.

In their seminal work<sup>2</sup> on the Espionage statutes, Edgar and Schmidt wrote that the nation had lived in a state of “benign indeterminacy about the rules of law governing defense secrets” since World War I.<sup>3</sup> In addition, Edgar and Schmidt concluded that sections of the Espionage Act, if read literally, could apply to the publication of secrets, although the poorly drafted law could fall to modern-day First Amendment doctrine.<sup>4</sup> Edgar and Schmidt wrote at the time of the Pentagon Papers case, but the intervening three decades have done little to alter this state of benign indeterminacy. The possibility of a prosecution under the Espionage Act remains alive partly because of unfortunate dicta in Justice White’s concurring opinion (joined by Justice Stewart) in the Pentagon Papers case stating that he would have “no difficulty sustaining convictions” under the Espionage Act.<sup>5</sup> The recent Espionage Act prosecution of lobbyists for the American Israel Public Affairs Committee, AIPAC, for their information-gathering activities heightens concern that the Espionage Act could be turned against reporters’ information-gathering.<sup>6</sup>

Nevertheless, reporters have fared well during the long era of uncertainty. No reporter has been prosecuted for disclosing national security secrets in the 200-year history of the nation. When reporters are jailed for refusing to reveal their sources the jailings are usually brief and pro forma. A study by the Reporters’ Committee for Freedom of the Press found that 17 journalists were jailed between 1984 and 1998 for refusing to reveal their sources. None of the 17 was jailed for more than a month; nine did not serve a day.<sup>7</sup> More recently, a few journalists have spent longer periods in jail, notably Judith Miller of the New York Times, who served 85 days, and Josh Wolf, a freelance blogger who has served more than 130 days.

This article argues that the press – and by extension the public – is better served by a continuation of the state of uncertainty than by bright line rules. Recent attempts by the press to argue in favor of an extravagant reporter’s privilege have backfired, partly because of unfavorable facts and partly because media lawyers have overstated the law.<sup>8</sup> As a result it is apparent that judges are likely to draw bright lines where they do not protect important newsgathering methods that journalists believe they are duty-bound to employ. Journalists will be faced with a few situations in which they make an ethical decision to protect an unnamed source and to print a national security secret even when those courses may not be protected by the law. In these situations, editors, reporters and publishers need to do a better job than in the past of explaining their ethical decisions. They need to face the fact that they are engaging in an act of civil disobedience for which they must accept the legal consequences.

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<sup>2</sup> Harold Edgar & Benno C. Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929 (1973).

<sup>3</sup> *Id.* at 936.

<sup>4</sup> *Id.* at 1031-57.

<sup>5</sup> *New York Times v. United States*, 403 U.S. 713, 737 (1971).

<sup>6</sup> *United States v. Rosen*, Case No. 1:05cr225, (E.D.Va. Aug. 6, 2006).

<sup>7</sup> Stephen Bates, *The Reporter’s Privilege, Then and Now*, The Joan Shorenstein Center, Research Paper R-23, 12 (2000).

<sup>8</sup> *See, e.g. In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, (D. C. Cir. 2005); *New York Times v. Gonzales*, ---F.3d ---, (2d Cir. 2006); *Lee, v. United States DOJ*, 327 F. Supp.26 (D.C. Cir. 2004).

## I. Communications gap

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

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

Both sets of claims are extravagant. The courts do not recognize a First Amendment right of journalists to protect confidential sources and there is little evidence that the publication of national security secrets has been chilled by jailing noted journalists and threatening to prosecute others. To the contrary, two important stories reporting national security secrets – *The New York Times*' disclosure of warrantless domestic wiretapping and the *Washington Post*'s disclosure of secret CIA prisons in eastern Europe - occurred in the wake of *Times* journalist Judith Miller serving 85 days in jail. (Journalists also will confess privately that there are few things better for a journalist's career than being put in jail for protecting a source.) Although journalists claim to be doing the people's business, they are arguing for a protected status that no citizen can claim. By asserting that the

public should leave it up to the press to decide when to publish national security secrets, journalists are laying claim to a decision for which they have no special expertise or training.

As for the claims of administration officials, there is scant evidence that national security has been harmed in any significant way by the disclosure of government secrets. The 11 “drop dead” secrets that the government cited<sup>9</sup> in its unsuccessful attempt to stop the publication of the Pentagon Papers were more compelling than the vague generalities offered by the current administration in its criticism of the NSA wiretapping and CIA prison stories. Yet there never has been evidence that either the Pentagon Papers or the recent disclosures cost American lives or hurt U.S. security. What is demonstrated by history as far back as the Pentagon Papers and before is that the government engages in a vast amount of overclassification, hiding damaging information that it mishandled the Vietnam War and that it tapped domestic telephone conversations of Americans without warrants. The administration’s threat to apply the Espionage Act to recent disclosures of national security secrets flies in the face of the legislative history of the law, which shows Congress sought to keep the president from censoring the press.<sup>10</sup>

#### **A. First Amendment is a porous shield for reporters**

When the press reports a sensitive national security secret, the government has three options, each of which involves a distinct legal analysis and different political consequences. One option is for the government to seek to obtain an injunction against publication as the Nixon administration sought to do to stop publication of the Pentagon Papers. A second option is to prosecute the journalists and sources for violating the Espionage Act, which provides criminal penalties. The third option is to subpoena the reporter to appear before a grand jury and force him or her to disclose the source of information. The prior restraint option is almost certain to fail because of the heavy burden of proof that the Pentagon Papers case places on the government – “direct, immediate and irreparable harm.”<sup>11</sup> Government attempts to stop the presses from running also are a political loser in times of high-volume dissent. The Bush administration’s apparent decision not to seek a prior restraint of the NSA or CIA prisons stories suggests that this option is highly unlikely to be employed in the future. An Espionage Act prosecution also seems unlikely because no reporter has been prosecuted under the law, and the political consequence would be substantial. That means that the lever the government is most likely to employ is the grand jury investigation to force a journalist to disclose the source or go to jail. In this arena, the journalist’s protection is limited and uncertain and the political consequences for prosecutors are minimal, judging from past cases. Neither the Judith Miller nor Josh Wolf jailing resulted in heavy public pressure to free the journalists.

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<sup>9</sup> Brief for the United States (Secret Portion), *New York Times v. United States*, 403 U.S. 713 (1971).

<sup>10</sup> *Edgar & Schmidt, supra* at 937.

<sup>11</sup> *New York Times v. United States*, 403 U.S. at 730.

## 1. Little First Amendment protection for a reporter's privilege

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

Despite the threatening words of the statutes and the unfavorable court decisions, journalists continue to operate under the belief that their publication of national security secrets is protected by the First Amendment. At times, this view is expressed in such a fashion that Howard Simons and Joseph Califano once opined that journalists "believe the First Amendment places them in a constitutionally elite class."<sup>12</sup>

During the three decades after the 1972 *Branzburg v. Hayes*<sup>13</sup> decision, journalists and their lawyers successfully turned their 5-4 loss into a victory through clever lawyering. Media lawyers essentially argued that even though Justice Lewis Powell had joined the majority in rejecting a reporter's privilege, his concurring decision should be read together with the dissent to create a limited constitutional privilege. Ironically, the court's decision not to recognize a constitutional basis for the reporter-source privilege resulted in reporters getting more protection than they had before the defeat. At the time of *Branzburg*, 17 states had shield laws; since *Branzburg* another 14 state have passed laws and 17 other states provide some judicial protection.<sup>14</sup> Three decades after *Branzburg*, First Amendment lawyers had been so successful in persuading states to adopt shield laws or their judicial equivalent that they had convinced themselves that the decision had actually created a qualified privilege for a journalist to withhold the name of confidential sources.

In the past several years, however, judges have actually read *Branzburg* and refused to recognize this reporter's privilege. As New York Times attorney George Freeman put it: "*Branzburg* has been reread and interpreted differently than the 25 years before."<sup>15</sup> The press and media lawyers have improvidently contributed to the run of bad decisions by relying on test cases with unfavorable facts. The prime example was the Judith Miller case involving a flawed heroine. Instead of exercising caution when the Valerie Plame leak surfaced, leading newspapers, including *The New York Times*, called for a criminal investigation of the leak. The *Times* ignored its long-standing editorial opposition to leak investigations giving this rationale: "As members of a profession that relies heavily on the willingness of government officials to defy their bosses and give the public vital information, we oppose "leak investigations" in principle. But that does not mean there

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<sup>12</sup> Howard Simons & Joseph A. Califano Jr., eds., *The Media and the Law*, 1 (1976).

<sup>13</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>14</sup> Nathan Swinton, Privileging A Privilege: Should The Reporter's Privilege Enjoy The Same Respect As The Attorney-Client Privilege?, 19 *Geo. J. Legal Ethics*, 979, 990 (2006).

<sup>15</sup> George Freeman, Remarks at Communications Law 2006 conference (Nov. 10, 2006).

can never be a circumstance in which leaks are wrong -- the disclosure of troop movements in wartime is a clear example.”<sup>16</sup>

The analogy was inapt. Just about everyone – lawyer, journalist, judge – agrees that the press must not disclose troop movements that would endanger soldiers’ lives. Alexander Bickel, attorney for the *Times* in the Pentagon Papers case, conceded to Justice Stewart that there could be a prior restraint of publication if the court were convinced that the disclosure of the papers would result in 100 American prisoners being executed. Bickel said, “I am afraid that my inclinations to humanity overcome the somewhat more abstract devotion to the First Amendment.”<sup>17</sup> But the leak of the name of CIA agent Valerie Plame hardly posed that kind of risk. Ms. Plame was safe in Washington D.C. rather than off on a battlefield or working covertly overseas. The suspected leaker in the Plame case also was less of a sympathetic character than in the conventional leak case. In most leak cases the leaker is a whistleblower disclosing potential government wrongdoing. In the Plame case the leak was from a potential government wrongdoer in the president’s or vice president’s office possibly attempting to punish a whistleblower – Ms. Plame’s husband Joseph Wilson - who had challenged government wrongdoing. On top of that, Ms. Miller had herself been complicit in the very wrongdoing at issue – distorting evidence of weapons of mass destruction in Iraq. Ms. Miller has written stories about nonexistent weapons of mass destruction in the run-up to the war. Finally, Ms. Miller and the other reporters involved in the case were the only witnesses to the alleged crime under investigation – disclosure of the name of a covert source. Even the proposed national shield law, inspired in part by the Miller case, would require testimony under these circumstances. It provides for disclosures that are in the public interest and that are “directly relevant to the question of guilt or innocence.”<sup>18</sup> For that reason, it would not have kept Miller out of jail had it been enacted before the events transpired.

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

Whatever the motivations, the results were disastrous for the press. The D.C. Circuit Court of Appeals rejected the argument that *Branzburg* should be read to create a limited First Amendment privilege of reporters to shield confidential sources. The *Times* had

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<sup>16</sup> Leak investigation editorial, *Investigating Leaks*, N.Y. Times, Oct. 3, 2003, at A30.

<sup>17</sup> *New York Times v. United States*, 403 U.S. 713 (1971) Oral Argument, June 26, 1971.

<sup>18</sup> Free Flow of Information Act, S. 2831, 109<sup>th</sup> Cong. § 5(b)(2) (2006).

argued that the lower court judge was “flatly wrong” in holding there was no First Amendment privilege for a news reporter; Judge Sentelle stated flatly, “the appellants are wrong.”<sup>19</sup> The *Times* had echoed the arguments made by media lawyers after *Branzburg*, that Justice Powell’s concurring opinion had recognized some instances in which journalists could go to court to contest subpoenas to testify.<sup>20</sup> But Judge Sentelle pointed out that Justice Powell had joined the majority opinion in *Branzburg*, and limited a journalist’s recourse to court to instances of bad faith on the part of prosecutors.<sup>21</sup> Clearly, there would be few cases where reporters could show bad faith by prosecutors. Judge Tatel’s concurring opinion recognized a limited, common law privilege of a reporter to protect a confidential source.<sup>22</sup> This common law privilege would require the courts to balance the importance of disclosing the information with the importance of keeping it from being disclosed.<sup>23</sup> Judge Tatel wrote that judges “must weigh the public interest in compelling disclosure, measured by the harm the leak causes, against the public interest in newsgathering, measured by the leak’s information value.”<sup>24</sup> He concluded that on balance the common law privilege did not protect Miller.<sup>25</sup>

Well after Ms. Miller had departed the *Times*, James Goodale, the *Times* lawyer of Pentagon Papers fame, was continuing to claim that Miller’s 85-day stint in jail was a great service on behalf of the First Amendment right to protect confidential sources.<sup>26</sup> Actually, the case revealed the weakness of the First Amendment argument on behalf of protecting confidential sources. More broadly, the Plame investigation had the effect of criminalizing newsgathering. Miller spent time in jail, even if she was not there on for a crime. In addition, a top aide to the vice president, Mr. Libby, is under criminal prosecution for allegedly lying about the details of his conversations with reporters. Many reporters may secretly have enjoyed seeing Mr. Libby prosecuted for a dirty trick on Ms. Plame and Mr. Wilson. But there was nothing here to cheer about from the vantage point of protecting the essential relationship between reporter and confidential source.

The Judith Miller affair wasn’t the only one in which the press hurt its own cause. Judge Posner’s devastating opinion on the reporter’s privilege in *McKevitt v. Pallasch*,<sup>27</sup> came in a case that never should have made it to the appeals court because the reporters’ arguments were so weak. Abdon Pallasch and Robert C. Herguth of the *Chicago Sun-Times* and Flynn McRoberts of the *Chicago Tribune* were ordered in July, 2006 to turn over tapes of conversations with an FBI informant, David Rupert. Rupert, an American truck driver, had been a spy for the FBI in its investigation of the Real IRA, an Irish terrorist group. The tapes of conversations between the reporters and Rupert were subpoenaed by lawyers for Michael McKevitt, an accused terrorist leader. McKevitt’s

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<sup>19</sup> *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 968 (D. C. Cir. 2005).

<sup>20</sup> *Branzburg v. Hayes*, 408 U.S. at 665.

<sup>21</sup> *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 972.

<sup>22</sup> *Id.* at 995.

<sup>23</sup> *Id.* at 998.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1002-3.

<sup>26</sup> Jessica Meyers, *The Confidentiality Crisis*, American Journalism Review, April 4, 2006.

<sup>27</sup> *McKevitt v. Pallasch*, 339 F.3d 530, (7<sup>th</sup> Cir. 2006).



lawyers wanted the tapes to prepare for cross-examining Rupert during McKevitt's trial in Ireland. The reporters sought to quash the subpoena, citing *Branzburg*. A federal district court judge ordered the tapes produced. The journalists appealed, asking the 7<sup>th</sup> Circuit to stay the production order. It refused and the tapes were produced. Attorneys for the journalists had hoped that would end the case, but Judge Posner, noting that the production of the tapes mooted any appeal,<sup>28</sup> issued an opinion explaining the panel's decision. Judge Posner used the occasion to express his skepticism about a reporter's privilege rooted in the First Amendment. "A large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope," he wrote. "Some of the cases that recognize the privilege...essentially ignore *Branzburg*, ...some treat the 'majority' opinion in *Branzburg* as actually just a plurality opinion,...some audaciously declare that *Branzburg* actually created a reporter's privilege."<sup>29</sup> In those few short sentences, Judge Posner managed to undercut decisions recognizing a reporter's privilege in 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 9<sup>th</sup> Circuits.<sup>30</sup> The 7<sup>th</sup> Circuit decision was disastrous not just because the press lost or that the opinion was written by an especially influential judge. The decision was disastrous because it was fought on losing legal terrain that didn't need to be held. The identity of the source was known, not confidential; the reporters, not the source, sought to withhold information; the reporters' motive was not to protect sources of information but to protect their scoop for the commercial advantage<sup>31</sup> of a book they were writing.

This is not to say that the press and its lawyers should simply surrender notes and names of confidential sources to inquiring government lawyers. Since the legal defeat of the Judith Miller case, the number of subpoenas to reporters for confidential source information has mushroomed. Eve Burton, general counsel for Hearst Corp., says that her company received 80 newsgathering subpoenas for its broadcast stations, newspapers and magazines from mid-2005 until the end of 2006.<sup>32</sup> In the years before the Judith Miller decision, Hearst received so few newsgathering subpoenas that it didn't keep track.<sup>33</sup>

The press is mounting a smart challenge to the leak investigation in the Balco steroids case. A court order now on appeal to the 9<sup>th</sup> Circuit would send two *San Francisco Chronicle* reporters to jail for up to 18 months and fine the newspaper \$1,000 a day as long as the reporters and paper refuse to reveal the source of grand jury information that led to stories about the Barry Bonds-Jason Giambi steroids scandal. The facts of that case are much more favorable to the press than the facts in the Judith Miller or McKevitt cases. The *Chronicle* stories revealed wrongdoing by figures of great public note, led to a congressional investigation and to reforms in baseball. In addition, the leak of grand jury transcripts occurred not during the investigative stage but after indictments. This is not to say that the government has no interest in protecting grand jury transcripts after

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<sup>28</sup> *Id.* at 531.

<sup>29</sup> *Id.* at 532.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 533.

<sup>32</sup> David Carr, *Subpoenas and the Press*, N.Y. Times, Nov. 27, 2006, at B1.

<sup>33</sup> *Id.*

indictment or that those investigated but not charged have no interest in protecting their good names. Yet the interest in protecting disclosure would seem less after indictment than before.

The amicus brief filed by the nation's news organizations avoids First Amendment doctrine, instead making the common law case for a reporter's privilege.<sup>34</sup> The brief argues that "reason and experience," demonstrate that "protecting confidential newsgathering from governmental interference dates back to the nation's founding."<sup>35</sup> The brief cites the famous Peter Zenger case from the Colonial period as the first in which a journalist protected confidential sources at threat of jail. Instead of arguing that *Branzburg* guarantees a First Amendment right to protect sources, the brief argues that the passage of shield laws in reaction to *Branzburg* reflects the development of a common law privilege. The brief bases this argument on *Jaffee v. Redmond*<sup>36</sup> in which the Court recognized a common law privilege for psychotherapists to protect the confidences of patients. Before *Jaffee* the Court had limited the development of common law to state court law decisions. But in *Jaffee* the Court wrote that adoption of state statutes could be considered as part of the development of a common law privilege.<sup>37</sup> Under the line of reasoning in the brief, the post-*Branzburg* court decisions recognizing a reporter's privilege are not misreadings of *Branzburg* but instead evidence – along with state shield laws - of the development of a common law privilege. The news organizations do not argue that this privilege is absolute, but rather that it requires a judge to engage in a balancing like that suggested by Judge Tatel in the Miller case.

One way to strengthen the protection of journalists reporting national security secrets would be to extend to the reporter's privilege cases the tough legal standard that the U.S. Supreme Court applied to prior restraints in the Pentagon Papers case. Justice Stewart's opinion in the Pentagon Papers required that the government show that disclosure would cause "direct, immediate and irreparable harm to our Nation or its people."<sup>38</sup> Early versions of the proposed federal shield law - the Free Flow of Information Act - contained language requiring "imminent and actual harm to national security" before a reporter could be required to disclose a confidential source. But the current version<sup>39</sup> has a weaker standard: whether the disclosure "seriously damaged the national security" and whether "the harm caused by the unauthorized disclosure of properly classified Government information clearly outweighs the value to the public of the disclosed information."<sup>40</sup> This balancing test would not necessarily protect the *New York Times* reporters who wrote the NSA story, or the *Washington Post* reporter who wrote the CIA prisons story. Nor would Judith Miller have been protected in the Plame case. In criminal cases, such as the Plame investigation, the bill provides for disclosures that are in the public interest and that are "directly relevant to the question of guilt or

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<sup>34</sup> Brief of Amici Curiae ABC Inc. et. al. at 10-19.

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Jaffee v. Redmond*, 518 U.S. 1 (1996).

<sup>37</sup> *Id.* at 13.

<sup>38</sup> *New York Times v. United States*, 403 U.S. 713, 730 (1971).

<sup>39</sup> Free Flow of Information Act, S. 2831, 109<sup>th</sup> Cong. (2006).

<sup>40</sup> *Id.* § 9(a)(2).

innocence.”<sup>41</sup> Ms. Miller’s conversations with Mr. Libby were relevant to the question of guilt. In other words, as fervently as the press may wish for passage of the national shield bill, the legislation may not provide protection in the most important and controversial situations.

There also could be unintended consequences from passage of a shield law. The definition of journalist in the bill<sup>42</sup> would not include a blogger who didn’t work for a news organization. For that reason, it would not help someone such as Josh Wolf, who, by the beginning of 2007 had spent more than 130 days in jail for refusing to turn over outtakes of a video he posted on his blog showing an anarchist rally at which a police officer was injured. Because the national shield law draws lines between who is and is not a journalist, it borders on the licensing of journalists, a dangerous path for the press. The same congressional hand that extends protections to journalists can take them away.

## 2. The Threat of the Espionage Act

Edgar and Schmidt demonstrated that the words of the Espionage Act, passed by the World War I Congress, can literally be interpreted to prosecute journalists for divulging national defense secrets, with the current sections 793(d) and (e) posing the greatest threat to reporters and newspapers.<sup>43</sup> The provisions make it a crime for those “lawfully having possession of”<sup>44</sup> or “having unauthorized possession of”<sup>45</sup> information relating to the national defense to willfully communicate or retain it. As Edgar and Schmidt put it: “If these statutes mean what they seem to say and are constitutional, public speech in this country since World War II has been rife with criminality. The source who leaks defense information to the press commits an offense; the reporter who holds onto defense material commits an offense; and the retired official who uses defense material in his memoirs commits an offense.”<sup>46</sup> Put another way, the front pages of the *New York Times*, *Washington Post* and *Los Angeles Times* arguably contain information several times a week the dissemination of which violates a literal reading of the Espionage Act.

Edgar and Schmidt concluded that “the legislative record is reasonably clear that a broad literal reading was not intended”<sup>47</sup> in light of Congress’ decision to cut out proposed provisions that would have permitted the Wilson administration to administer a system of press censorship. Nevertheless, comment in the Congressional debate suggests that members of Congress were aware of the implications of the broad language. In the brief debate on this portion of the law, Sen. Cummins pointed out that all citizens would be required to provide government officials with any defense information they had collected; otherwise they would be guilty of retaining it in violation of the law.<sup>48</sup> Sen. Cummins was trying to persuade the Senate to strike the retention offense for its breadth.

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<sup>41</sup> *Id.* § 5(b)(2).

<sup>42</sup> *Id.* § 3(3).

<sup>43</sup> Edgar & Schmidt, *supra* note 2 at 998.

<sup>44</sup> 18 U.S.C. § 793(d).

<sup>45</sup> 18 U.S.C. § 793(e).

<sup>46</sup> Edgar & Schmidt, *supra* note 2 at 1000.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1010.

To make his point he posed the hypothetical of an Iowa man who knew how many bushels of wheat and corn had been raised in that state. Wasn't it wrong, Sen. Cummins argued to force this Iowa man to disclose the information to an authorized official because it related to national defense? Other senators agreed with Sen. Cummins' broad interpretation of the language but refused to eliminate it from the statute.<sup>49</sup>

No reporter or news organization has been prosecuted under the Espionage Act in almost a century since passage. Nor has any person not a government official been convicted of violating the law. But that history is not reason for news organizations to be complacent in light of the AIPAC prosecution and a press statement by Attorney General Gonzales. The attorney general - asked about prosecuting news organizations for press accounts of the government's secret monitoring of international banking transactions - said, "There are some statutes on the book, which, if you read the language carefully, would seem to indicate that there is a possibility."<sup>50</sup> The attorney general added that, "We are engaged now in an investigation about what would be the appropriate course of action in that particular case...."<sup>51</sup>

The prosecution of two former lobbyists for the pro-Israeli group AIPAC magnifies the worries. If convicted, Steven J. Rosen and Keith Weissman would be the first people who were not government officials found guilty under the law. They received information from a Pentagon official relating to U.S. policy options in the Middle East, an FBI report on the Khobar Towers bombing in Saudi Arabia and Al-Qaida activities. The lobbyists relayed the information to an official at the Israeli embassy and to a *Washington Post* reporter.<sup>52</sup> If lobbyists practicing their First Amendment rights can be convicted of receiving national defense secrets, then why wouldn't journalists practicing their First Amendment rights be as vulnerable?

The outcome of the AIPAC prosecution and its import for journalists depend in part on another case lingering from a prior political era – the lawsuit by Rep. John A. Boehner, R-Ohio, against Rep. James McDermott, D-Wash., for leaking to the press a tape of a conversation about an ethics investigation of former House Speaker Newt Gingrich. A couple from Florida had taped the cell phone conversation that included statements by Rep. Boehner. The couple turned over the tape to Rep. McDermott, who was on the ethics committee. Rep. McDermott contacted reporters for the *New York Times* and *Atlanta Constitution* and allowed them to hear the tape, excerpts of which were published in both papers.<sup>53</sup> A three-judge panel of the D.C. Court of Appeals twice has decided that Rep. McDermott violated 18 U.S.C. § 2511(a)(c) by disclosing a conversation illegally intercepted by the couple; the first decision<sup>54</sup> was vacated<sup>55</sup> by the U.S. Supreme Court in light of *Bartnicki v. Vopper*.<sup>56</sup> *Bartnicki* involved the same wiretapping statute as

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<sup>49</sup> *Id.* at 1011.

<sup>50</sup> Walter Pincus, *Prosecution of Journalists is Possible in NSA Leaks*, Wash. Post, May 22, 2006 at A4.

<sup>51</sup> *Id.*

<sup>52</sup> *U.S. v. Rosen*, 445 F.Supp.2d 602, 608 (E.D. Va. 2006).

<sup>53</sup> *Boehner v. McDermott*, No. 04-7203, slip. op. at 2-6 (D.C. Cir. March 28, 2006).

<sup>54</sup> *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999).

<sup>55</sup> 532 U.S. 514 (2001).

<sup>56</sup> *Bartnicki v. Vopper*, 532 U.S. 1050 (2001).

*Boehner*. The Supreme Court ruled that the First Amendment protected a person who disclosed information lawfully received from a person who obtained the information illegally.<sup>57</sup> In *Boehner II*, the D.C. Circuit distinguished *Bartnicki* pointing out that Rep. McDermott knew the identity of the people who illegally obtained the tape, whereas the recipient in *Bartnicki* did not know the identity.<sup>58</sup> Judge Sentelle dissented, arguing that the majority's distinction was without legal or constitutional significance.<sup>59</sup>

The Government relies heavily on the majority in *Boehner II* in defending its AIPAC prosecution against Rosen and Weissman's claim that *Bartnicki* provides First Amendment protection for their legal receipt of the information. How the Supreme Court eventually resolves this issue has a big potential impact on any Espionage Act prosecutions against news organizations. In some instances, journalists know that information or documents they are receiving are secret and that their source is violating the law in providing the documents. Under the view of the *BoehnerII* majority and the government in the AIPAC prosecution, the journalist would be legally culpable and without First Amendment protection if he or she had reason to believe the information was illegally obtained or was illegally disclosed. The full D.C. Circuit is hearing the appeal in *Boehner II*, and recently ordered a second argument on the issue of whether *U.S. v. Aguilar*<sup>60</sup> limited McDermott's First Amendment protection. In *Aguilar* the Court found that "Government officials in sensitive confidential positions may have special duties of nondisclosure."<sup>61</sup> In *Aguilar* a federal judge was found to have a special duty not to disclose a secret wiretap, even after the wiretap had expired. A decision depriving Rep. McDermott of First Amendment protection because of his special duties as a member of Congress on the Ethics Committee, might not hurt journalists, who have no such duties.

Journalists might have more difficulty distinguishing themselves from Rosen and Weissman, the AIPAC lobbyists. Judge Ellis, in an opinion that is respectful of First Amendment values, points to the dicta in the Pentagon Papers case as indicating that the Espionage Act could be used to prosecute newspapers.<sup>62</sup> Judge Ellis decided in a pretrial opinion that the Espionage Act could be saved from vagueness and overbreadth challenges by imposing a thick judicial gloss that includes a specific intent requirement and narrows the meaning of "information relating to the national defense."<sup>63</sup> He summarized this judicial gloss in this passage:

"To prove that the information is related to the national defense, the government must prove: (1) that the information relates to the nation's military activities, intelligence gathering or foreign policy, (2) that the information is closely held by the government, in that it does not exist in the public domain; and (3) that the information is such that its disclosure could cause injury to the nation's security. To prove that the information was

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<sup>57</sup> *Id.*

<sup>58</sup> *Boehner v. McDermott*, No. 04-7203, slip. op. at 13-14.

<sup>59</sup> *Boehner v. McDermott*, No. 04-7203, slip. op., dissent at 6.

<sup>60</sup> *U.S. v. Aguilar*, 515 U.S. 593 (1995).

<sup>61</sup> *Id.* at 606.

<sup>62</sup> *U.S. v. Rosen*, 445 F.Supp.2d at 638.

<sup>63</sup> *Id.* at 643.

transmitted to one not entitled to receive it, the government must prove that a validly promulgated executive branch regulation or order restricted the disclosure of information to a certain set of identifiable people, and that the defendant delivered the information to a person outside this set. In addition, the government must also prove that the person alleged to have violated these provisions knew the nature of the information, knew that the person with whom they were communicating was not entitled to the information, and knew that such communication was illegal, but proceeded nonetheless. Finally, with respect only to intangible information, the government must prove that the defendant had a reason to believe that the disclosure of the information could harm the United States or aid a foreign nation, which the Supreme Court has interpreted as a requirement of bad faith.”<sup>64</sup>

Judge Ellis had to use strong judicial medicine to save the Espionage Act for the AIPAC prosecution. Would that judicial prescription save the law for a prosecution against a news organization? The Espionage Act was written at the dawn of modern First Amendment doctrine. At the time the law was written, the Supreme Court had never declared a law to be an unconstitutional violation of the First Amendment. The Government’s position in the AIPAC case is blind to the remarkable development of First Amendment doctrine since passage of the Espionage Act.<sup>65</sup> The government argued that the First Amendment was not even implicated by the AIPAC case, citing *Schenck v. U.S.*<sup>66</sup> *Schenck* is a thoroughly discredited, if unanimous decision in which the Court upheld the espionage conviction of pamphleteers opposing the draft. For the government to base its argument on such an antiquated holding calls its legal approach into serious question.

Ninety years of First Amendment development together with 90 years of history during which the Espionage Act has not been used against a newspaper or journalist combine to form a powerful historical argument against any such prosecution. That argument seems especially potent in the face of the shrinking political capital available to the Bush administration in the wake of the 2006 Congressional election and the difficulties with the war in Iraq.

## **B. Crying wolf on national security**

At the same time that journalists have exaggerated their place in the constitutional constellation, government officials have exaggerated the damage to national security caused by the publication of national security secrets. The 11-drop dead secrets in Solicitor General Griswold’s secret brief to the Supreme Court appeared on their face to be so sensitive that they might derail U.S. peace talks and prolong the Vietnam War with increased American casualties.<sup>67</sup> The brief claimed that volumes of the papers disclose:

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<sup>64</sup> *Id.*

<sup>65</sup> Government’s Supplemental Response to Defendants’ Motion to Dismiss the Superceding Indictment, U.S. v. Rosen, 445 F.Supp.2d 602, 608 (E.D. Va. 2006)..

<sup>66</sup> *Schenck v. U.S.*, 249 U.S. 47 (1919).

<sup>67</sup> Brief for the United States (Secret Portion), *New York Times v. United States*, 403 U.S. 713 (1971).

1. Diplomatic attempts to open negotiations with the North Vietnamese, disclosure of which could derail peace negotiations and delay peace.<sup>68</sup>
2. Derogatory comments offensive to U.S. allies in the war, particularly South Korea, Thailand and Australia.<sup>69</sup>
3. The names and activities of CIA agents “still active in Southeast Asia” as well as references to activities of the National Security Agency.<sup>70</sup>
4. Contingency plans of the Southeast Asia Treaty Organization (SEATO) to block the lower panhandle of Laos.<sup>71</sup>
5. Information on U.S. intelligence capabilities that could reveal U.S. estimates on how the Soviet Union would react under various situations.<sup>72</sup>
6. The judgment of the U.S. Intelligence Board on the Soviet capability to supply weapons to the North, the disclosure of which could lead to “serious consequences.”<sup>73</sup>
7. The U.S. consideration of a nuclear response against China if the Chinese attacked Thailand for its involvement in the war.<sup>74</sup>
8. A 1968 cable to Washington by then-ambassador to Moscow Llewellyn C. Thompson making predictions on likely Soviet response to mining Haiphong harbor or possibly invading North Vietnam, Laos or Cambodia.<sup>75</sup>
9. Discussions of possible South Vietnamese military action in Laos.<sup>76</sup>
10. The successes that the United States had in communications intelligence, revealing U.S. capabilities to the enemy.<sup>77</sup>
11. Confidential diplomatic communications that would endanger the lives of prisoners of war. “The longer prisoners are held, the more will die,” the Government said.<sup>78</sup>

These 11-drop-dead secrets involve sensitive subjects about which the Government has a strong interest – diplomatic initiatives, names of secret agents, intelligence estimates and capabilities and military contingency plans. The Government claimed that disclosure of the Pentagon Papers could endanger the lives of intelligence agents and prolong the war, with the resulting death of thousands more soldiers and many more prisoners of war. In many ways, these claims seem more tangible than the claims that the Bush administration has made about the consequences of press disclosures of NSA wiretaps and secret CIA prisons. But the verdict of history is that the disclosure of the papers was in the public

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<sup>68</sup> *Id.* at 4-5.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 5.

<sup>71</sup> *Id.* at 6.

<sup>72</sup> *Id.* at 6.

<sup>73</sup> *Id.* at 7.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 8.

<sup>77</sup> *Id.* at 8-9.

<sup>78</sup> *Id.* at 10.

interest and did not harm national security. Mr. Griswold himself later said, “I have never seen any trace of a threat to the national security from publication.”<sup>79</sup>

The Bush administration’s claims about the damage of publishing secrets have not involved the same kind of detail offered by the United States in the Pentagon Papers case. President Bush made a widely reported warning to *New York Times* editors on Dec. 5, 2005 that they would have “blood on their hands” if they published the NSA secret wiretapping story.<sup>80</sup> Happily, that warning has not become a reality. The Bush administration has not offered proof of any significant damage to national security from publication of national security secrets during the war on terror. At a meeting this year, Kenneth L. Wainstein, Assistant Attorney General for the National Security Division, spoke of experiences he had in criminal cases in which leaks damaged a Justice Department investigation; but Mr. Wainstein’s main examples did not involve national security cases.<sup>81</sup> Mr. Wainstein’s national security examples included two old, well-publicized cases - the *Chicago Tribune*’s 1942 disclosure that the United States had broken the Japanese code and the disclosure in the 1970s of CIA agents’ names by former CIA employee Philip Agee. The one recent example cited by Mr. Wainstein was stories and telephone calls by *Times* reporters Judith Miller and Philip Shenon in 2001 that tipped off two Islamic charities that their assets might be frozen by the government.<sup>82</sup> No claim was made that lives were jeopardized.

This isn’t to say that press disclosures of government secrets are never potentially damaging. The *Chicago Tribune* story about the Japanese code could have had serious repercussions but the Japanese apparently missed it.<sup>83</sup> Historically, the press has refused to publish information about breaking codes, CIA agents’ identities, troop movements, or other military plans that could risk American lives. The widely reported *New York Times* decisions not to disclose the Bay of Pigs invasion or the American discovery of missiles in Cuba during the Cuban Missile Crisis are two examples of the discretion exercised by the press.

## II. An ethical approach

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

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<sup>79</sup> Ervin N. Griswold, *Secret Not Worth Keeping: The courts and classified information*, Wash. Post, Feb. 15, 1989, at A25.

<sup>80</sup> Philip Taubman, *Why We Publish Secrets*, address before Paul Simon Public Policy Institute, Southern Illinois University Carbondale, Sept. 25, 2006.

<sup>81</sup> Kenneth L. Wainstein, Program of the National Security Law Section, Association of American Law Schools Meeting, Jan. 4, 2007.

<sup>82</sup> *Id.*

<sup>83</sup> Rani Gupta, *Reporters or spies?* *The News Media and the Law*, Fall 2006 at 4.



Journalism ethicists often use a decision-making device called the Potter Box for making ethical decisions. This method of ethical decision-making is named after Harvard theologian Ralph Potter. It is called a box because it teases the question into four separate parts, each represented by one quadrant of a square. One quadrant is for the facts. A second is for values – from human values such as compassion, fairness, equality and freedom of expression to journalistic values about providing information that helps readers understand the world. A third box is for principles. Some of these principles relate directly to journalism, such as truth-telling and the watch-dog function of the press. Other principles are more universal, such as Kant’s categorical imperative, the Golden Mean, the Golden Rule. The fourth box is loyalties - to citizens, readers, advertisers, civic leaders etc. Like other decision-making devices, the result of a Potter Box analysis depends on how one lays out the facts and how one weighs competing principles, values and loyalties.

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

But if journalistic principles of truth-telling, independence and watchdog reporting hold sway over the more formalistic principles, then the answer that the Potter Box cranks out is to publish. The ethical codes of such leading journalistic organizations as the Associated Press Managing Editors, the American Society of Newspaper Editors (ASNE) and the Society of Professional Journalists emphasize truth-telling, independence and watchdog journalism. “The public’s right to know about matters of importance is paramount,” says the Code of Ethics of the Associated Press Managing Editors. “The newspaper has a special responsibility as surrogate of its readers to be a vigilant watchdog of their legitimate public interests.....Truth is its guiding interest.” The Society of Professional Journalists says, “Seek truth and report it,” and “Act independently.” ASNE says, “The American press was made free...to bring an independent scrutiny to bear on the forces of power in the society, including the conduct of official power at all levels of government.....Freedom of the press....must be guarded against encroachment or assault from any quarter, public or private.” Granted the ethics codes include values about responsibility and minimizing harm and public accountability. But the principles of disclosure, truth-seeking, independence and watchdog reporting are paramount.

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

Editors, reporters and journalism deans often do a poor job of explaining their decisions to print national security secrets. When a panel of reporters at a recent dinner of the Media Law Resource Center was asked why they printed secrets about NSA wiretapping, Abu Ghraib torture and CIA black prisons, one blurted out, “Because we got it.”<sup>84</sup> Blunt, glib answers of that kind aren’t exactly the thoughtful kind of explanation that the press owes when it decides to print government secrets.

Editors and journalism deans sometimes don’t do much better. The views of five top academics<sup>85</sup> were summarized in a letter published in the *Washington Post* under the headline, “When in Doubt, Publish.”<sup>86</sup> “It is the business – and the responsibility – of the press to reveal secrets,”<sup>87</sup> the piece began. The academics go on to construct a more nuanced argument. Still, in the end, their decision boils down to this formulation: “We believe that in the case of a close case, the press should publish when editors are convinced that more damage will be done to our democratic society by keeping information away from the American people than by leveling with them.”<sup>88</sup>

The editors of the *New York Times* and *Los Angeles Times* published a written explanation of their decision last summer to publish details of the Bush administration’s program to monitor international banking transactions.<sup>89</sup> They noted that the Bush administration itself had tried to obtain favorable publicity for the program several months before it was disclosed. They also pointed out that they always give the government time to make its case that publication could risk lives. The *Times*’ NSA surveillance story was held more than a year, Keller said, until *Times* editors became convinced that the program might be illegal. The *Washington Post*’s CIA prison stories also made accommodations with the government by cutting out mention of the names of the countries that allowed the prisons within their borders.<sup>90</sup> Keller and Baquet closed by reasserting their independence and right to make these decisions on their own, without government intervention.

As a former journalist I understand this gut feeling that the press’ default position should be to publish. But the academics’ formulation raises questions that journalists have not done well answering: If journalists are not specially qualified to evaluate national security information and do not have security clearances, what makes them qualified to make the national security judgment that is part of the calculus of determining if society will be better off if the secret is disclosed? If the decision to publish rests on the editors’

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<sup>84</sup> Reporting on National Security Under Threat of Indictment, Media Law Resource Center Annual Dinner, Nov. 9, 2006.

<sup>85</sup> Geoffrey Cowan, dean Annenberg School for Communication, University of Southern California; Alex S. Jones, director, Shorenstein Center, Harvard University; John Lavine, dean, Medill School of Journalism, Northwestern University; Nicholas Lemann, dean, Graduate School of Journalism, Columbia University; Orville Schell, dean, Graduate School of Journalism, University of California at Berkeley.

<sup>86</sup> Geoffrey Cowan, Alex S. Jones, John Lavine, Nicholas Lemann, Orville Schell, *When in Doubt, Publish*, Wash. Post, July 9, 2006 at B2.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Dean Baquet and Bill Keller, *Why Do We Publish a Secret?* New York Times, July 1, 2006.

<sup>90</sup> *Id.*

judgment of the legality of the government action, as Keller said the *Times*' NSA story did, is the ultimate decision one to be made by lawyers and not editors?" And, finally, how do reporters and editors defend themselves against the accusation that they hold themselves above the law when they decide what is legal and what is not and when they refuse to provide information to the courts about the sources of illegal leaks?

Edgar and Schmidt pointed out at the time of the Pentagon Papers that the aggressive stance of the press represented a new assertiveness and "demonstrated that much of the press was no longer willing to be merely an occasionally critical associate devoted to common aims, but intended to become an adversary...."<sup>91</sup> Edgar and Schmidt wrote that this new role was a "necessary counterweight to the increasing concentration of the power of the government in the hands of the Executive Branch."<sup>92</sup> Justice Stewart's opinion in the Pentagon Papers case had made a similar point when he wrote:

"In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government. In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry--in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people."<sup>93</sup>

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

## **Conclusion**

James Goodale, the former *Times* lawyer involved in the Pentagon Papers case, told a conference of journalists and lawyers in 2006 that they should "fight like tigers" to

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<sup>91</sup> Edgar & Schmidt, *supra* note 2 at 1077.

<sup>92</sup> *Id.* at 1078.

<sup>93</sup> *New York Times v. United States*, 403 U.S. 713 (1971).

protect their First Amendment freedoms.<sup>94</sup> In light of the hostile legal environment, the uncertain protection offered by the Free Flow of Information Act and the continuing threat posed by the Espionage Act, the press might find it is better off with guerrilla legal tactics than fighting the set piece war to win a legal precedent that is beyond reach. Reporters can make sure they don't type sensitive notes on company computers, that they destroy notes as soon as possible, and that they remember not to write down sources' names. Media companies can bundle phone systems to mask calls to individual reporters. And when reporters are jailed their employers can use their ink and kilowatts on behalf of the reporter's freedom. As unappealing as journalists may seem at times, nearly 6 in 10 Americans believe that journalists should protect confidential sources even under court order to disclose them.<sup>95</sup> In light of this reservoir of understanding from the public, a government prosecution of a journalist for violation of the Espionage Act would be difficult to bring.

Professor Alexander Bickel, who argued the Pentagon Papers case before the Supreme Court on behalf of the *New York Times*, wrote afterwards that the press was less free after the case than before because "law can never make us as secure as we are when we do not need it. Those freedoms which are neither challenged nor defined are the most secure."<sup>96</sup> Professor Bickel called this absence of clear boundaries between freedom and secrecy a "disorderly situation" but suggested, that like democracy, this disorder was better than the likely alternative.<sup>97</sup> Edgar and Schmidt called this a situation of "benign indeterminacy." It just may be that press freedom may flourish better in this disorderly state of indeterminacy than in a courtroom filled with ringing rhetoric about the First Amendment.

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

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<sup>94</sup> Meyers *supra* note 25.

<sup>95</sup> *The State of the New Media 2006*, annual report, Project for Excellence in Journalism.

<sup>96</sup> Alexander Bickel, "Uninhibited, Robust and Wide-Open" *First Amendment*, 54 Commentary, 60, 61 (1972).

<sup>97</sup> Alexander Bickel, *The Morality of Consent*, Yale University Press (1975) at 79-82.