

Commentary and Analysis

Five Journalism School Deans

<http://www.washingtonpost.com/wp-dyn/content/article/2006/07/07/AR2006070701146.html>

When in Doubt, Publish

It is the business -- and the responsibility -- of the press to reveal secrets.

Journalists are constantly trying to report things that public officials and others believe should be secret, and constantly exercising restraint over what they publish.

Most Americans want their government to be held accountable, which is the *raison d'être* of watchdog journalism. At the same time, they do not want the press to disclose government secrets that are vital to national security.

The journalist's dilemma, then, lies in choosing between the risk that would result from disclosure and the parallel risk of keeping the public in the dark -- a quandary that has become all the more pointed since the attacks of Sept. 11, 2001. As deans charged with imparting the values of journalism to the next generation of reporters and editors, we favor disclosure when there are not strong reasons against it.

That issue is front and center again because of the June 23 articles in the New York Times, the Los Angeles Times and the Wall Street Journal describing the government's efforts to track terrorist financing. The New York Times has attracted most of the outrage because it took the lead in investigating the system.

It is appropriate for Americans to be concerned when news organizations publish information that the president and others in authority have strongly urged not be published. No sane citizen would wish the media to provide terrorists with information that would be likely to endanger Americans.

President Bush has denounced the Times in exceptionally harsh language, and on June 29 the House formally condemned the paper. Some critics of the Times have termed its actions "treasonous" and called for criminal charges under the Espionage Act. One conservative commentator told the San Francisco Chronicle that she would happily send Bill Keller, the paper's executive editor, to the gas chamber.

Keller has characterized the decision to publish the information as a "close call," making this an especially important example to examine. Despite its security concerns, the public has shown steady support for the media's watchdog role. Earlier this year, a survey by the Pew Research Center for the People and the Press found that 56 percent of respondents said it was very important for the media to report stories they believe are in the nation's interest. A third of respondents ranked government censorship on the grounds of national

security as more important. The public wants the press to keep a sharp lookout, but wants the job performed responsibly. We share this sentiment.

In the case of the stories about financial data, the government's main concern seemed to be that the hitherto cooperative banks might stop cooperating if the Times disclosed the existence of their financial tracking system. So far, that apparently has not happened.

For many Americans, however, the possibility of damage to terrorist surveillance should have been sufficient justification for the Times to remain silent. Why, they ask, should the press take such a chance?

There are situations in which that chance should not be taken. For instance, there was no justification for columnist Robert D. Novak to have unmasked Valerie Plame as a covert CIA officer.

We believe that in the case of a close call, 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.

We know from history that the government often claims to be concerned about national security when its concern is that disclosure will prove politically or personally embarrassing. The documents that came to be known as the Pentagon Papers in 1971 told how Presidents Dwight D. Eisenhower, John F. Kennedy and Lyndon B. Johnson had misled Americans about our role in the Vietnam War. Hence the classification of their contents.

In the aftermath of 9/11, a new climate of caution was a sensible response to a sophisticated terrorist foe. But Bush's reaction -- declaring a "war on terror" and claiming the Constitution grants almost limitless powers to the president in a time of war -- is excessive. His administration has been aggressively restricting access to information on the grounds of national security. For example, earlier this year historians complained that intelligence agencies were removing previously declassified documents from archives. Some of these papers dated as far back as the Korean War; many had been cited multiple times in books.

In general, the administration has sought to conduct much of what it calls the war on terror in secret, and it has been able to do so with little oversight from Congress, which would normally be a key check on power. When the press has played such an oversight role, it has often been harshly criticized.

For instance, a few months ago Bush denounced the Times for revealing the National Security Agency's program of monitoring international telephone calls by Americans without first obtaining warrants, as the law requires. In that case, Bush rebuked the paper for revealing a classified secret. For most observers, however, the most important secret that was revealed was that the president had ignored the statutory process that Congress had established.

Despite the rhetoric of their fiercest critics, most journalists take secrets seriously. Indeed, in a number of cases since 9/11, many news organizations, including the Times, have forgone publication of information at the request of the Bush administration. The Times held the article on domestic eavesdropping for a year, publishing it only after the paper thought that the issues raised were of great importance.

We believe that the extraordinary power of the presidency at this moment mandates more scrutiny rather than less. Yet Attorney General Alberto R. Gonzales has said he would consider prosecuting journalists for publishing classified information. Such an action would threaten to tilt the balance between disclosure and secrecy in a direction that would weaken watchdog reporting at a time when it is badly needed.

We subscribe to the vision of Carl C. Magee, a crusading journalist whose Albuquerque newspaper infuriated another president in the 1920s with revelations in the Teapot Dome scandal. Forced to close his paper after being driven to bankruptcy, Magee emerged two months later with another newspaper.

Emblazoned on the front page was a new motto, borrowed from Dante: Give Light and the People Will Find Their Own Way.

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http://www.newyorker.com/talk/content/articles/060710ta_talk_remnick

Nattering Nabobs

In the fall of 1969, Richard Nixon surveyed his domestic enemies and appointed Spiro T. Agnew, his Vice-President, to the post of White House Torquemada. There would come a day, not far off, when Agnew would have to plead nolo contendere to a charge of tax evasion, which would force his resignation and replacement by Gerald Ford, but this was his moment. Wielding a rhetorical style that might be described as “surrealist-alliterative,” Agnew denounced opponents of the war in Vietnam as “an effete corps of impudent snobs”—as “ideological eunuchs,” “professional anarchists,” and (strangely,

wonderfully) “vultures who sit in trees.” Never before or since has a populist attack come swathed in such purple raiment.

Nixon could not fail to be impressed. And so he dispatched Agnew to map out a cultural description of another enemy, the op-ed unfriendlies and the network mandarins of what was beginning to be called the media. The views of “this little group of men” who “live and work in the geographical and intellectual confines of Washington, D.C., or New York City,” Agnew noted darkly, “do not represent the views of America.” He inscribed himself in history, and in famous-quotation anthologies, forever, when he said, “In the United States today, we have more than our share of nattering nabobs of negativism. They have formed their own 4-H club—the hopeless, hysterical hypochondriacs of history.”

The exuberant playfulness of Agnew’s language (as scripted by William Safire) seemed to signal that the bluster need not be taken too seriously. But the campaign against the nabobs took fearsome legal shape when, in the summer of 1971, Nixon appealed to the Supreme Court to stop publication of the Pentagon Papers. After the *Times* started printing excerpts of the secret, internal study of how the United States went to war in Indochina, Nixon told Henry Kissinger, “People have gotta be put to the torch for this sort of thing”—and then demanded an injunction for prior restraint. Further publication of the Papers, the White House argued, would compromise codes, threaten the safety of the nation, and shatter diplomatic relations with foreign countries. None of that happened. Meanwhile, the Court sided with the First Amendment. As Justice Hugo Black wrote, “The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”

Dick Cheney, Donald Rumsfeld, and others in the Nixon-Agnew-Ford orbit left Washington believing that the imperial Presidency had been disastrously hobbled by a now imperial press. When they reappeared in 2001, under the auspices of George W. Bush, the Nixon-Agnew spirit was resurrected with them—this time without the Joycean wordplay. More than any other White House in history, Bush’s has tried to starve, mock, weaken, bypass, devalue, intimidate, and deceive the press, using tactics far more toxic than any prose devised in the name of Spiro Agnew.

Firm in the belief that the press can be gored for easy political gain, the Bush Administration has set about reducing the status of the media (specifically, what it sees as the left-wing, Eastern-establishment media) to that of a pesky yet manageable interest group, nothing more. As Andrew Card, the White House chief of staff at the time, told this magazine’s Ken Auletta, “They”—the media—“don’t represent the public any more than other people do. In our democracy, the people who represent the public stood for election. . . . I don’t believe you have a check-and-balance function.”

In the past six years, the Administration and its surrogates have issued a stream of disinformation about intelligence and Iraq; paid friendly “columnists” like Armstrong Williams and Maggie Gallagher tens of thousands of dollars to parrot the White House

line; accredited to the White House press corps a phony journalist and ex-prostitute (Jeff “Bulldog” Gannon, a.k.a. James Dale Guckert) as a reliable pitcher of softball questions; tightened Freedom of Information Act restrictions; and pioneered a genre of fake news via packaged video “reports.” The President has held fewer solo news conferences than any of his modern predecessors. The Vice-President kept the *Times* reporter off his plane because he didn’t like the paper’s coverage. The atmosphere, in general, has been one of crude manipulation and derision. After Seymour M. Hersh published, in this magazine, his third article on the Abu Ghraib prison scandal in as many weeks, the Pentagon spokesman Lawrence DiRita, overlooking the truth of the reports, publicly declared that Hersh merely “threw a lot of crap against the wall and he expects someone to peel off what’s real.” (Hersh’s articles, he said, composed a “tapestry of nonsense.”)

In recent months, the critique has grown more ominous. Cheney and other officials have attacked Dana Priest’s article in the *Washington Post* detailing the rendition of prisoners to secret jails in Europe and James Risen and Eric Lichtblau’s articles in the *Times* describing the government’s attempt to fight terrorism with warrantless domestic wiretaps. Aping the spirit, if not the élan, of his predecessor, Cheney called the articles disloyal, damaging to national security, and undeserving of the Pulitzer Prizes they won.

Late last month, the *Times* published a long report by Lichtblau and Risen on the C.I.A.’s and the Treasury Department’s monitoring of an international banking database in Brussels to track the movement of funds by Al Qaeda. The *Wall Street Journal* and the Los Angeles *Times* very quickly followed with their own articles on the government’s monitoring of Al Qaeda’s financial transactions, which has been an open secret ever since it was trumpeted by—well, by George W. Bush, in mid-September, 2001. Infuriated that the editors of the *Times* had not acceded to blandishments to kill the story, Bush and Cheney, in a coordinated offensive, described the *Times* report as a disgrace and, outrageously, as a boon to further terror attacks.

The ideological noise machine took it from there. A congressman, Peter King, and a senator, Jim Bunning, both Republicans, accused the *Times* of treason. King, whose contradictory nature once embraced the violent activities of the I.R.A., is now the chairman of the House Committee on Homeland Security. Curiously, it was King who, in September of 2004, co-chaired a hearing so that a Treasury official could tell the world how the department’s programs were driving terrorists out of the banking system; now he speaks of employing the 1917 Espionage Act to investigate and try journalists. Last week, the House approved a resolution condemning the newspapers that published the banking story for placing “the lives of Americans in danger.” The resolution passed 227–183, almost completely along party lines. On the airwaves and in the blogosphere, it got uglier. Melanie Morgan, a shouter on northern California’s biggest talk radio station, told the San Francisco *Chronicle* that if Bill Keller, the executive editor of the *Times*, “were to be tried and convicted of treason, yes, I would have no problem with him being sent to the gas chamber.”

The Bush Administration can’t really believe that these newspaper stories have undermined the battle against Al Qaeda; what’s more, it knows that over the decades

papers like the *Times* have kept many stories and countless particulars secret when editors saw that it was in the interest of national security and military safety to do so. The *Times* banking story disclosed no leads, named no targets. To say that it risked lives is like saying that an article revealing that cops tap phones to monitor the activities of the Mafia is a gift to the Five Families of New York.

The Bush Administration knows very well what it is doing and in what climate. The press—particularly the mainstream outlets the White House finds most irritating—is in a collective state of anxious transition, hurt by scandals (Congressman King was quick to mention Jayson Blair, the *Times* serial fabulist), by the appearance of a blizzard of new technologies and ideologized alternatives like Fox News, and by a general sense of economic, even existential, worry. The era of hegemonic networks and newspapers, of supremely confident Bradlees and Rosenthals, is a memory.

In the wake of the Administration's record of dishonesty and incompetence in Iraq and the consequent decline in the President's domestic polling numbers, it is not hard to discern why the White House might find a convenient enemy in the editors of the *Times*: this is an election year. The assault on the *Times* is a no-lose situation for the White House. The banking story itself showed the Administration to be doing what it had declared it was doing from the start: concertedly monitoring the financial transactions of potential terrorists. At the same time, by smearing the *Times* for the delectation of the Republican "base," the Administration could direct attention away from its failures, including, last week, the Supreme Court's decision to block its plans to try Guantánamo detainees before military commissions.

In the era of the Pentagon Papers, a war-weary White House went to the courts to stifle the press. You begin to wonder if the Bush White House, in its urgent need to find scapegoats for the myriad disasters it has inflicted, is preparing to repeat a dismal and dismaying episode of the Nixon years.— *David Remnick*

Ann Woolner, Bloomberg

http://www.bloomberg.com/apps/news?pid=20601039&refer=columnist_woolner&sid=aUCDXj8k_T.c

No Crime When Journalists Report What's Public

July 7 (Bloomberg) -- Lawyer Buddy Parker assumed years ago that the U.S. government had tracked every penny that went into and out of the accounts of his client, suspected of laundering money for terrorists.

What he can't comprehend is the stir created by reports that the feds are monitoring international banking records.

``It's a yawner," says Parker, a former assistant U.S. attorney and now a white-collar defense lawyer in Atlanta.

The shocker was the front-page placement the New York Times, Wall Street Journal and Los Angeles Times gave the story. Anyone who knows anything about international banking surely assumes government scrutiny.

“We've been announcing that we've been tracing assets and financial transactions for a long time,” says Victor Comras, a retired U.S. diplomat who oversaw a United Nations program aimed at tracking terrorist funds. “The fact of the matter is that terrorists knew we were tracking their assets and they took countermeasures early on,” Comras said in a telephone interview.

For disclosing that which was already public, journalists -- particularly those at the New York Times -- are being skewered as traitors and threatened with prosecution.

“We're at war, and for the Times to release information about secret operations and methods is treasonous,” Representative Peter King, a New York Republican and chairman of the House Homeland Security Committee, declared last week.

What secret?

Executive Order

You can still read on the White House Web site a Sept. 23, 2001, executive order from President George W. Bush that calls for “cooperation with, and sharing information by, United States and foreign financial institutions” so as “to combat the financing of terrorism.”

That order got plenty of publicity when it came out, thanks to the White House.

Likewise, international news coverage in 2002 reported on the broader conclusions of a Web-posted report for the UN Security Council, which specifically mentioned Swift. That's the Society for Worldwide Interbank Financial Communication, whose complicity in financial investigations is supposed to be one of the secrets the Times gave away.

The UN report said Swift and two other financial clearinghouses were “rich with payment information.” It said the U.S. “has begun to apply new monitoring techniques to spot and verify suspicious transactions.”

Congressional Testimony

Then there was congressional testimony by Treasury officials in 2002, and the sensitive details that then-Treasury Secretary John Snow gave journalists in 2003.

“This was not news to terrorists,” two other former counterterrorism officials, Roger Cressey and Richard Clarke, wrote in an op-ed essay for the New York Times last week.

True, digging information out of government documents isn't as easy as reading it on the front page of the Times. But the government can't honestly call it criminal for journalists to release information the government itself put into the public domain.

Besides, there is no applicable law for prosecuting journalists.

“There's a lot of talk about treason and violating national security laws, but unless and until someone parses through the very specific language of the statute and lays it up against the actual facts of the case, then that's just rhetoric,” says Sandra Baron, executive director of the Libel Defense Resource Center, funded by news organizations and their lawyers.

World War I

Unless Congress passes a new law, prosecutors would have to use either what's left of a World War I-era statute, the Espionage Act, or a 1950 amendment to it, neither of which mentions journalists, says Lee Levine, a First Amendment expert and partner in Washington's Levine Sullivan Koch & Schulz.

The 1950 provision does outlaw “publishing” certain intelligence information. But that law prohibits disclosing codes and cryptography, not more general national security issues.

Buried within the law is more general language some suggest could be used by prosecutors. But that would require interpretation so broad as to make the law unconstitutional when considered against First Amendment concerns, experts say.

Besides, prosecutors would have to show the disclosures created a “clear and present danger” or did “direct, immediate and irreparable” injury to the nation's security, according to language in various Supreme Court cases. How could it be dangerous to report that which terrorists already know?

Keeping Secrets

“The government has every right to keep secrets,” says Levine, “But the press's job is to ferret out government secrets and to exercise its independent judgment whether it's in the public interest to publish what it knows.”

This is an uncomfortable arrangement, to be sure, and one that demands responsible conduct by unelected, largely anonymous news editors. Most people would rather be safe, given the choice between being terrorized and murdered or being ill-informed about the details of secret government operations.

But that isn't the choice here, as Comras, Cressey, Clarke and Parker make clear. And yet, it is on that basis that some in Washington want to prosecute journalists.

Arrogant though we can be, as many blunders as we have made, it's worth remembering that the founders considered journalism so critical that they enshrined a free press in the Constitution.

“The government's power to censor the press was abolished so that the press would remain forever free to censure the government,” Justice Hugo Black wrote in 1971. That was when the Supreme Court ruled 6-3 against restraining the New York Times and Washington Post from publishing a classified history of events leading to the Viet Nam war, the Pentagon Papers.

“Only a free and unrestrained press can effectively expose deception in government,” Black wrote.

There are places where this concept isn't at work, as Representative Jane Harman, a Democrat from California, told her colleagues last week.

“If anyone wants to live in a society where journalists are thrown in prison,” she said, “I encourage them to move to Cuba, China or North Korea to see if they feel safer.”

Steve Chapman, Chicago Tribune

<http://www.chicagotribune.com/news/columnists/chi-0607090393jul09,1,1759071.column?coll=chi-news-col>

Have leaks crippled war on terrorism?

When The New York Times published a story about a secret government program to find terrorists by monitoring financial transactions, conservatives responded as if the paper had given Osama bin Laden the keys to a missile silo.

The story, asserted President Bush, "does great harm to the United States of America." Vice President Dick Cheney said the Times and other newspapers "have made the job of defending against further terrorist attacks more difficult." Rep. Peter King (R-N.Y.) said the Times' decision was "treasonous."

This is not the first case of the news media supposedly sabotaging the war on terrorism. That charge was heard after The Washington Post uncovered the CIA's detention of purported Al Qaeda operatives in secret prisons in Europe. When the Times revealed the National Security Agency's effort to track phone calls between Americans and people overseas suspected of terrorist ties, critics urged its prosecution under the Espionage Act.

The administration thinks it's an outrage that newspapers made these disclosures. So here's a question: Why didn't someone stop them? The government had plenty of advance notice the leaks were coming. Editors at the Times and the Post both conferred with officials who tried to dissuade them, and the Times held off publishing the NSA story for a year.

What could the government have done?

Simple: It could have gone to court and asked a federal judge to forbid the newspapers to publish. It could have done so without making public what the stories were about. Instead, it protested ineffectually--and then allowed something it says weakened our defenses.

The assumption is that the administration had no choice. The last time the government tried to stop the publication of secret information was in the 1971 Pentagon Papers case. After the Times and the Post published articles about a classified report on U.S. policy in the Vietnam War, the Nixon administration requested a court injunction to block any additional stories--and got it. But the Supreme Court shortly ruled otherwise, permitting the stories to run.

That decision is often taken to mean the government may never impose "prior restraint"--barring press organs from publishing (rather than, say, punishing them after they've done it). In fact, the real basis for the decision was that the Pentagon Papers didn't reveal any critical secrets.

Under some conditions, the court said, it would permit advance censorship. If national security truly had hung in the balance, the Nixon administration almost certainly would have won the case.

Justices Potter Stewart and Byron White, authors of the crucial opinion, indicated they would be ready to prevent the disclosure of national security information that "will surely result in direct, immediate and irreparable damage to our nation or its people." Conservatives on the court were even more open to suppressing military secrets. Even William Brennan, a fabled champion of the 1st Amendment, said he would allow suppression of a wartime story equivalent to "the publication of the sailing dates or the number and location of troops."

According to the news media's critics, these stories are just that bad. Unlike the Pentagon Papers, which discussed events that were years-old by the time of publication, the revelations dealt with current intelligence-gathering methods during wartime. Plenty of people insist they jeopardize American lives by giving terrorists vital tips on how to evade detection.

But were the stories really damaging? It's no secret to terrorists that the U.S. government tries to keep tabs on their telephone calls and bank transactions.

Does the administration actually believe its own accusations? If it saw a grave danger in letting this information out, after all, it could have acted preemptively to keep it from ever seeing print. Though there was no guarantee of success, it had nothing to lose by trying.

True, that would have sparked a flurry of outrage. But since when is Bush scared of being criticized by the press or civil libertarians?

The president has a solemn duty to protect the nation from attack.

His decision not to ask a court to block these disclosures suggests one of two things. The first is that he knowingly exposed Americans to a danger he might have averted. The second--and more likely--is that he knew the revelations wouldn't actually compromise our security.

It's one thing for Bush to claim the stories did great harm. It's another for the administration to do what a court would have required: Prove it.

Mark Bowden, Philadelphia Inquirer

http://www.philly.com/mld/inquirer/news/special_packages/sunday_review/14894621.htm

Guarding Secrets | Exposing Secrets

When two vitally important goals in democracy collide

By Mark Bowden

I had the rare occasion, for me, of talking with a group of congressmen last week in Washington, and as our session broke up, I changed the subject abruptly.

I asked, "Could you stop the present administration from locking up reporters?"

They chuckled. The request was baldly self-serving, since I often write stories that concern national security. Perhaps they also regarded my concern as far-fetched.

It isn't. Attorney General Alberto Gonzales has made it clear that reporters can be prosecuted for violating national security, and has not ruled out going after reporters from the New York Times and Washington Post for Pulitzer Prize-winning stories revealing secret wiretapping and the existence of secret prisons for terrorism suspects.

There is no doubt that he would face a significant fight if he actually tried, and constitutional guarantees of a free press haven't collapsed in this country yet, but there is no doubt that the climate is changing in this country for journalists. Subpoenaing reporters to testify in criminal cases and jailing them for refusing is one thing - there have never been solid protections for journalists who refuse to testify in court - but prosecuting journalists for national security breaches is something else. It would be a direct assault on one of this nation's fundamental checks on power. For the first time since I started writing for a living 30 years ago, there is reason for me to fear my government.

Good reporters sometimes do reveal secrets. During World War II, the Chicago Tribune printed a story that came perilously close to giving away the fact that America had cracked Japan's secret naval codes, a critical advantage in the Pacific Theater. Shortly before President Carter decided to launch the secret rescue mission to Tehran in 1980, an alert newspaper reporter in Virginia noticed helicopters being loaded on a C-5 aircraft, and speculated in print, with photographs, that the choppers might be on their way to a staging area for such an attempt.

More recently, there have been suggestions that a story in the Washington Times in 1998 might have tipped off Osama bin Laden that U.S. intelligence agencies were capable of tracking him down through his satellite and cell phones, which he abruptly stopped using. In none of these cases was a journalist prosecuted.

It is the job of a reporter to find out the truth, a mission sometimes at odds with legitimate military and intelligence interests in keeping things secret. Both goals are vitally important in a democratic society. The traditions and liberties of any community are meaningless if it cannot protect itself, but the citizens in a democratic community must be well-informed to govern themselves intelligently. The tension is particularly acute when we are at war, where the immediate stakes are so high. That tension has worked to our benefit more often than otherwise, but there is no denying that freedom of the press isn't free.

In a 1982 visit to Zambia, then under the relatively benign dictatorship of Kenneth Kaunda, I asked a young government official there why the press was censored in his country and why it was forbidden even to take a photograph in Lusaka, the capital city.

"Because 100 men with rifles could overthrow this government tomorrow," he said. "We cannot afford the luxury of a free press right now in this country."

I could see his point, and it started me thinking about press protections in my own country. In America, it was simply an article of faith, enshrined in the Constitution. I had grown up taking it for granted. Zambia's predicament gave me renewed respect for our Founding Fathers, who saw the wisdom of enshrining press freedom when our democracy was still fragile.

Our democracy is hardly fragile today. Revelations of important military secrets are rare, and where the government has tried to interfere with the press, it has usually been prompted more by political concerns than by security concerns. When President Kennedy sought to have New York Times reporter David Halberstam transferred from his post in Saigon, it wasn't for revealing military tactics; it was for writing stories that conflicted with the rosy official version of events. When President Nixon threatened to prosecute the same newspaper for publishing the Pentagon Papers - a detailed CIA history of American involvement in that war - it wasn't because the disclosures endangered the troops, but because they exposed the confusion, misinformation, and indecision behind the war's origins.

In the first two historical cases cited earlier, revelations about the Japanese naval code and the Tehran rescue mission, the enemy in both instances failed to notice. The recent stories about secret prisons in Eastern Europe, apparently leaked by a CIA official, hardly came as a major surprise to those who have been reading stories for years about the abductions and arrests of terror suspects around the world. They all had to be imprisoned somewhere. The stories did alert Americans to the increasingly elaborate nature of their government's secret prison system around the world, and they raised important policy questions about how we are fighting this open-ended war.

Surveillance by the National Security Administration may have scared some terrorist plotters off the telephone grid, but only those who weren't suspicious about U.S. government ears in the first place, and it's hard to imagine anyone engaged in criminal or subversive activity in this country who wouldn't suspect his phone was tapped. The disclosures also revealed a decision at the highest levels of government to bypass the usual safeguards against domestic surveillance - a move that may or may not have been legal, but one unquestionably of great interest to a democratic society. We may have lost something by these revelations, but we also gained something.

How you feel about the trade-off between press freedom and national security is partly a matter of perception. The staunchest defenders of government power tend to see our leaders as honest, capable and benevolent. Skeptics are more inclined to believe them avaricious, bumbling and concerned primarily with keeping and expanding their own power.

There is truth in both views. Revealing the secret moves of our government sometimes costs us, but it also protects us. When the choice meant more, our Founding Fathers accepted the risks.

The job of guarding secrets belongs to those who hold official titles and who take security oaths. The job of a reporter is, first and foremost, to find out the truth. Because my reporting from time to time has reached behind the official veil of secrecy, friends have asked me, "Aren't you worried about getting in trouble?" I have always told them, "This is America. I have never taken a security oath. My job is to find out what happened."

Publishing the truth is troublesome from time to time, but neither news leaks nor terror attacks are likely to topple the grand edifice of democracy we have enjoyed in this country for more than two centuries. Locking up reporters? That seems a more promising start.

Mark Bowden, a former Inquirer reporter, is a national correspondent for the Atlantic Monthly, and author of "Guests of the Ayatollah: The First Battle in America's War with Militant Islam."

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ONLINE EXTRA

To read an exclusive interview with writer Mark Bowden about larger issues raised by the struggle between the government's efforts to keep its actions secret and journalists' efforts to uncover them, go to <http://go.philly.com/bowden>

Jack Shafer, Slate

<http://www.slate.com/id/2145155/nav/tap2/>

Presidential Powers in a Never Ending War

Bush or Keller?

WHO DO *YOU* TRUST?

By Jack Shafer

When governments acquire emergency powers during wartime, it's with the understanding that the crisis is finite and that when the war ends the government will relinquish those powers. But what happens when a government defines its war as neverending, as the Bush administration has its so-called "war on terror"? As long as any jihadist anywhere threatens the West, the administration would have us believe, we must trust it and remain in a wartime crouch.

The current conflict will soon conclude its fifth year, making it longer than the war against Japan. Most of the temporary powers in the PATRIOT Act that had been scheduled for "sunset" were extended, and the administration has conjured secret powers not directly spelled out by legislation. The *New York Times* revealed one such example of administration overreach last December when it reported the secret NSA surveillance program. Two weeks ago the *New York Times* and the *Los Angeles Times* reported—over administration objections—the secret sifting of SWIFT bank transaction data by the CIA and Treasury Department, which the White House justifies under 1977 economic sanctions legislation.

In reporting the SWIFT story, both papers rejected the White House assertion that disclosure was improper. The president and the vice president condemned both papers, and an exploding carbuncle masquerading as a member of Congress called upon the attorney general to investigate the *New York Times* under the Espionage Act, the Comint Act, and "other relevant federal criminal statutes."

Of course, overriding a presidential request doesn't make *New York Times* Executive Editor Bill Keller and *Los Angeles Times* Editor Dean Baquet traitors. The whooping by the administration and its allies, however, does signal the breakdown of the traditional comity—I wouldn't call it "trust"—that has existed between the White House and the press. Since the end of WWII, the press has sought White House input whenever its reporters bumped up against issues of national security, and if the press has erred it's mostly erred in favor of the government position. For a good summary of recent instances in which the two *Timeses* and the *Washington Post*

have held stories or deleted sensitive information at the administration's request, see Keller and Baquet's joint op-ed from last week defending publication of their SWIFT stories.

If the press isn't being reckless, then why the breakdown? Why now?

The Keller-Baquet op-ed explains how the process ordinarily works: Publications approach the White House when they have sensitive stories about classified programs and ask for comment. "And if they want to argue that publication represents a danger to national security, we put things on hold and give them a respectful hearing. Often, we agree to participate in off-the-record conversations with officials, so they can make their case without fear of spilling more secrets onto our front pages," they write.

In an open society such as ours, it's up to the White House to convince the editors not to publish. I claim no inside knowledge about why talks between the administration and the *Timeses* cratered. Gauging from the White House's fury, I suspect that it either failed to make a plausible case for keeping the program secret or didn't want to make a case.

If the administration failed to make the case, my guess is that it's opted to mask its failure by fouling relations with the press. If it didn't want to make the case, its petulance would be understandable if not forgivable. The press has been running the table against the administration when it comes to publishing stories about classified programs. A couple of weeks before the SWIFT revelations broke, *Washington Post* Associate Editor Robert G. Kaiser catalogued a variety of scoops that I bet an all-power Bush administration would have liked to suppress in the name of national security—the Abu Ghraib outrages; the United States' rendition of terrorism suspects to countries where torture is commonplace; its secret prisons in Eastern Europe; the NSA's eavesdropping without warrants; and the surreptitious harvesting of phone logs, just to name the big ones. A couple of those stories were published after head-butting conversations between the press and the White House, so you know the White House has to be angry.

Whatever its mood, the administration may have found it politically expedient at this juncture, just before the fall elections, to cultivate a domestic perception that the *New York Times* is as much an enemy as al-Qaida. This assumes, of course, that the administration hasn't cast the press as the enemy from the beginning. There's no better illustration of Bush's disdain than former Chief of Staff Andrew Card's 2004 comment to *The New Yorker's* Ken Auletta that the press "don't represent the public any more than other people do. ... I don't believe you have a check-and-balance function."

I'm no fan of the PATRIOT Act, but at least Congress approved it and its extensions. As Stephen Chapman of the *Chicago Tribune* wrote Thursday, Congress "took pains to fit [the PATRIOT Act] within established laws and Supreme Court decisions. It required judges to sign off on the use of various investigative tools." He continues, "critics can take consolation that it paid deference to the constitutional separation of powers, to established precedents on presidential prerogatives and to the value of open debate."

So, if Bush thinks the government needs stronger measures to scrutinize financial transactions beyond what the multitudinous laws on the books already allow, his party should introduce new legislation. If he thinks investigators need more leeway in monitoring American phone conversations, let him introduce another bill. If he believes our national security requires nameless dungeons for terror suspects around the world, let him openly request that authority.

But instead of convening such a debate, Bush wants us to trust him. I'd rather trust Bill Keller.

The Nation

<http://www.thenation.com/blogs/edcut?bid=7&pid=99579>

Nation and *NY Times*: Bay of Pigs Déjà vu

"The assault on a free press ...should be recognized for what it is," wrote *New York Times* columnist Frank Rich last Sunday. "Another desperate ploy by officials trying to hide their own lethal mistakes in the shadows."

While the Bush Administration's war on a free, independent and aggressive media is unparalleled, US government attempts to suppress information are not new. More than forty years ago, for example, the *New York Times* acceded to the Kennedy Administration's request that it play down its advance knowledge of the disastrous Bay of Pigs invasion. (In [a recent editorial](#), the Times wrote that "it seems in hindsight that the editors were over-cautious" by not printing what they knew about the invasion.)

In [his open letter](#) explaining the decision to publish the banking records story, Executive Editor Bill Keller referred to the Times' handling of the Bay of Pigs story. "Our biggest failures," Keller wrote, "have generally been when we failed to dig deep enough or to report fully enough. After the Times played down its advance knowledge of the Bay of Pigs invasion, President Kennedy reportedly said he wished we had published what we knew and perhaps prevented a fiasco."

What is little known is the role *The Nation* played in this story. In November 1960, *The Nation* published the first article on preparations being made for what would become the Bay of Pigs invasion. According to Carey McWilliams, *The Nation's* editor at the time, "Ronald Hilton, director of Stanford University's Institute of Hispanic-American Studies had just returned from Guatemala with reports that it was common knowledge --indeed, it had been reported in La Hora, a leading newspaper, on October 30--that the CIA was training a guerrilla force at a secret base for an early invasion of Cuba." McWilliams promptly got in touch with Hilton, who confirmed details, and agreed that he could be quoted. McWilliams wrote an article setting forth the facts Hilton had given him, including the location of the base near the mountain town of Retalhulea. If the reports were true, McWilliams wrote, "then public pressure should be brought to bear upon the administration to abandon this dangerous and hare-brained project." in the meantime, he added, the facts should be checked out immediately "by all US news media with correspondents in Guatemala." Although a

special press release was prepared-- to which copies of the article were attached-- the wire services ignored the story and only one or two papers mentioned it.

However, *The Nation's* article was then called to the attention of a *New York Times* editor who assigned Times' reporter Paul Kennedy to do a story. Kennedy filed an article in January 1961 covering similar ground to the Nation's. But it was the Tad Szulc article in the Times-- that ran only a week before the invasion in April 1961 --that Kennedy called the Times's publisher about. The *New York Times* yielded to the President's demand that the story be reduced in prominence and detail.

According to McWilliams's memoirs (and the Columbia University "Forum" on "The Press and the Bay of Pigs" of Fall 1967), a week or so after the Bay of Pigs fiasco a group of press executives met with President Kennedy at the White House. "At this session," McWilliams recounts, "the President complained of premature disclosure of security information in the press and cited Paul Kennedy's story in the *New York Times* as a case in point. The *New York Times'* Turner Catledge then reminded Kennedy that reports about the base had previously appeared in the Guatemalan newspaper *La Hora* and *The Nation*."

The President reportedly turned to Catledge and said, "if you had printed more about the operation, you would have saved us from a colossal mistake." More than a year later, Kennedy told the *New York Times'* Orvil Dryfoos, "I wish you had run everything on Cuba...I am just sorry you didn't tell it at the time."

To his credit, top Kennedy aide and historian Arthur Schlesinger, Jr. also later said that he wished the Times had run its stories so that the whole catastrophe would have been avoided.

As McWilliams notes, "Kennedy was correct: timely disclosure of the facts might have prevented what was truly a 'colossal mistake;' but the press elected not to pursue the lead *The Nation* had provided."

Never has the need for a free and independent press been greater. Never has the need for news outlets to inform the public about government abuse and wrongdoing been greater. The Bush Administration is dedicated to sabotaging the workings of a free press--a cornerstone of a true democracy. The vituperative attacks on the *New York Times*--a newspaper that, as *The Nation's* Washington Editor David Corn points out, "consistently

published stories that hyped the WMD threat" and whose reporters "--Judith Miller and others--churned out breathless exposes based on Administration leaks and handouts from Iraqi exile groups angling to start a war"--have little to do with the paper's recent publication of the banking records story. It is part of the White House's larger and long-term game plan to delegitimize the press's role as a watchdog of government abuse, an effective counter to virtually unchecked executive power.

The other day Vice-President Cheney attacked the *New York Times'* disclosure about illegal wiretapping of US citizens. "I think that is a disgrace," Cheney said, referring to the Times winning a Pulitzer Prize for the story.

What is disgraceful is the conduct of an Administration that engages in press-bashing to score political points at the expense of constitutional principles.

Jay Rosen, New York University

http://journalism.nyu.edu/pubzone/weblogs/pressthink/2006/07/07/clsf_war.html

Bank Data Is Sifted by U.S. in Secret to Block Terror.

Secret U.S. Program Tracks Global Bank Transfers.

Since those headlines appeared on June 23, storm conditions have prevailed over the big castle of press authority. Some thoughts I hope you haven't read everywhere else...

- Who elected the press to make decisions about secrets and national security? No one, absolutely no one.

Precisely because no one elected the press it must find other means of securing its legitimacy. These are inevitably political in nature; they involve persuasion and "public opinion" as well as the protections of law. Whether the journalism is handcrafted and opinionated, or mass-produced and just-the-facts, the press isn't trustable unless it is independent of the people in charge, and stands apart from interest groups competing for power.

So independence is one means of securing legitimacy. Verification before publication is another. Transparency is a third. (Bill Keller in speeches: "As your math teacher might have said, we show our work.")

- William Safire was, I think, wrong when he asked himself on Meet the Press “who elected the media to determine what should be secret and what should not?” and answered with: “the founding fathers did.”

The institutional press, its fourth estate identity, and what Ben Bradlee recently called “a holy profession” (because “the pursuit of truth is a holy pursuit...”)— these are all modern inventions. Their legitimacy derives not from the founding fathers but from the *opinion* of living Americans that an independent and truth-telling press is vital to have as a check on government power, that its loss would be dangerous to their well being, and that professional journalists are doing the job well enough now to be that vital check.

When there are people in politics who wish to change that opinion into... *An independent and truth-telling press is vital but the press we have is not independent, it's aligned with a liberal elite, and has become a threat to national security...* they cannot be defeated by invoking the founders or reciting the Constitution. There have to be other ways of arguing the case and fighting back.

Dana Priest of the Washington Post had a good starting point: “We are covering the war on terror, it's a classified war.” Right. So what does the press do?

- If you don't trust for a moment the judgment or solemn word of the Bush Administration, then you'll view the Times decision to print the SWIFT story one way.

For example as Glenn Greenwald does: “Americans have abandoned this administration due to a long list of intense grievances with the President, and relentless, hysterical attacks on newspapers are highly unlikely to make them forget about those grievances... Ultimately, any institution or group which commits the Greatest Sin of opposing the President and imposing any limits on his powers will be subjected to this same treatment.”

- If you don't trust for a moment the judgment or solemn word of the New York Times and its editors, then you'll view the decision in a totally different way.

Hugh Hewitt at the new boombox version of Townhall.com: “The picture that has emerged after a week is of two for-profit newspapers, eager for Pulitzers and aware of the other's hunt for a headline, disregarding the urgent arguments of senior government officials and running a story on a program only dimly if at all understood by some (and by no stretch of the imagination all) terrorists, the result of which is to alert the world and even the below-average-intelligence killer of one key way the United States tracks them.”

Let's not pretend there can be any "debate" between those views. Storm conditions, yes. Discourse, no. (See Jack Shafer's Bush or Keller?) Where I could see a debate emerging is over Priest's observation: how should an independent press cover a classified war, or should it even try? If you think the press has no business digging into the government's secret fight against terrorism, then what Dana Priest and others do is deeply illegitimate at the start. This is different than criticizing bad journalism or poor judgment.

- David Ignatius ran to daylight when he asked in a column for the Post, not who should be trusted with secrets, but what have the parties involved—the Bush White House, the American press—actually done to build public confidence in their judgment as they handle secrets in a classified war?

"'Trust us' is not a winning argument in America — either with newspaper editors or the public at large," he writes. But that is what the "holy profession" says, especially when it relies on confidential sources. (And "we show our work" is vacated.) It's also the argument of the Administration. *Trust us; we know things you don't*. No, we can't show our work. But you understand why. It's the nature of the war we're in.

David Ignatius sees the cracks: "We journalists usually try to argue that we have carefully weighed the pros and cons and believe that the public benefit of disclosure outweighs any potential harm. The problem is that we aren't fully qualified to make those judgments. We make the best decisions we can, but they are based on limited knowledge."

That's part of the problem. Hosting Meet the Press July 2, Andrea Mitchell turned to Bill Safire. A lot of people think the Times is "motivated by an anti-Bush animus," she said. "Is The New York Times making a decision that is political rather than editorial?" What escapes her imagination is an editorial call that requires political judgment too. The decision to publish secrets is like that. It eludes the categories in current press think.

My views: I find the decision to publish the SWIFT story defensible, but more arguable than the earlier Times story on the National Security Agency. (That's where Nick Kristof is on it.) I don't understand why the information in this post from CounterTerrorism Blog didn't make it into the newspaper reporting. (Neither does CJR Daily.) Whether damage was done in the fight against terrorism I cannot say; that evidence is shrouded in darkness. (Read Dan Fromkin on how little has come to light.) Look, it's a classified war. The grounds for judgment are often missing.

- Are there any limits at all on the lengths to which the New York Times will go to "get" George W. Bush? Yes, there are.

We know this because the Times does not print everything it knows about what the government is doing. Nor do the other national dailies. “The fact is, journalists regularly hold back information for national security reasons,” writes Kristof, “I recently withheld information at the request of the intelligence community about secret terrorist communications.” I believe that. People in government know it happens.

But under storm conditions Heather MacDonald, writing in the Weekly Standard, can just say no. The Times, she says, is “so antagonistic to the Bush administration that *it will expose every classified antiterror program it finds out about*, no matter how legal the program, how carefully crafted to safeguard civil liberties, or how vital to protecting American lives.” (My italics.)

If the Times decides not to publish, MacDonald would normally never know about it. In fact she has no idea which classified antiterror programs the Times found out about but did not reveal, and yet she went with her categorical statement (“by now it’s undeniable”) because it expressed the rage better. The rage may be real, her certainty about what the Times will do is faked. She doesn’t know enough to know.

At his blog, The Horse’s Mouth, Greg Sargent explained the reactions since June 23 as a “diversionary tactic.” It’s “really all about reuniting a Republican base that’s cracking under multiple strains,” he said. It’s true that the New York Times makes for outstanding culture war theatre, but I think election-year tactics do not explain the severity of the storm.

More is involved. There was one sentence that struck me as mighty revealing in the joint op-ed by Bill Keller, executive editor of the New York Times, and Dean Baquet, editor of the Los Angeles Times. They had just said that the conflict between the government’s “passion for secrecy” and the press’s drive to reveal things is not a recent development, which is true.

- “This did not begin with the Bush administration,” said the editors in New York and Los Angeles, “although the polarization of the electorate and the daunting challenge of terrorism have made the tension between press and government as clamorous as at any time since Justice Black wrote.” Sorry, that won’t do.

What has made the tension between press and government especially “clamorous” is that people in charge of the Bush White House decided on a strategy for rolling back the national press. It’s part of their reclamation and expansion of executive branch power. The aim is more freedom of action for the President and his powerful VP in going after the terror networks. As I have argued before, the Bush team changed the game on Washington journalists; and they knew they could get away with it.

For some reason Keller and Baquet decided not to mention any of that. (Maybe they agree with Robert Kaiser: “What isn’t new here seems more significant than what is.”) At Yearly Kos in Las Vegas, Matt Bai, who covers politics for the New York Times Magazine, said he agreed with me that the game had been changed, and the press had not responded very well.

David Remnick summed things up in this week’s New Yorker: “More than any other White House in history, Bush’s has tried to starve, mock, weaken, bypass, devalue, intimidate, and deceive the press, using tactics far more toxic than any prose devised in the name of Spiro Agnew.”

And this week the base has responded with ugly escalations of its own. If those are the tactics what is the strategy? I think it begins with Dick Cheney’s conviction that executive power was eroded after Vietnam and Watergate, and ought to be taken back from the institutions that had grabbed too much for themselves— especially the oversight troops in Congress and the “gotcha” press.

Another part of the puzzle was brought to my attention in 2004 by journalist Ron Suskind when he wrote of the “retreat from empiricism” in the governing style of George W. Bush. Attacks on the press are part of that. So is the distortion of intelligence.

I just finished reading George Packer’s fine book, *The Assassin’s Gate*. Chapter to chapter, it follows the retreat from empiricism in the build-up to the Iraq war. The way that war came to us required victory over the facts on the ground, and over people in the government who had knowledge of what was likely to happen. The Bush forces won that victory. Executive privilege got exerted on the terrain of fact itself. That’s at stake too in the storming of the press castle.

Paul Waldman, Philadelphia Daily News

<http://www.philly.com/mld/dailynews/news/opinion/14975251.htm>

Free press under right-wing siege

LAST WEEK, conservatives declared war.

Not on the *New York Times*. Or even on the media in general. No, the conservative movement, from the White House to Republicans in Congress to Fox News to right-wing talk radio to conservative magazines, declared war on the idea of an independent press.

They declared war on the idea that journalists have not just the right but the obligation to hold those in power accountable for their actions. On the idea that journalists, not the government and not a political party, get to decide what appears in the press. On the idea that the public has a right to know what the government is doing in our name.

This is a profound threat to our democracy, and we underestimate it at our peril.

All of this happened because the *Times* published an article giving some details on the government's efforts to track terrorists' financing - something President Bush himself has bragged about repeatedly ever since Sept. 11.

Media Matters for America, for which I work, spends a lot of time pointing out the news media's missteps. But we do so because we believe in journalism, because we want it to fulfill its sacred obligations to the public, because we know that even in the world's oldest democracy, journalism is what stands between us and tyranny. The right wing does not share this belief.

There is a reason the Founders singled out the press for special protection in the Bill of Rights. They understood that without an independent, free, courageous press, democracy is impossible.

When government decides who gets to report the news and what they get to say, we no longer live in a free society. When journalists live under threat of prosecution and even violence, we cease to be citizens and become subjects.

Given the constant criticism directed at the media from conservatives, it might be easy to dismiss this latest expulsion of bile as just more of the same. But it's worth stepping back to take a look at what occurred last week.

Members of Congress have suggested revoking the Capitol Hill credentials of journalists so that only news organizations that do not displease the ruling party may be permitted to report from Congress. Other members have accused members of the media of "treason." One conservative broadcast personality suggested that the government establish an Office of Censorship to pre-screen the news. Another said, "I would have no problem with" *Times* editor Bill Keller "being sent to the gas chamber." The House passed a resolution saying it "expects the cooperation of all news media organizations."

In short, this week the right assembled a lynch mob, a band of brownshirts stalking TV studios, radio airwaves, print and the Internet, their apparent goal to revoke the First Amendment.

We have been told many times that terrorists "hate our freedoms." Yet we are asked to dismantle those freedoms because there are terrorists out there who wish to do us harm. If it's lucky, al Qaeda could kill hundreds, or thousands, of Americans. But they can't destroy the things that make America what it is. Only we can do that, and if we fail to stand up when those who call themselves patriots set out to demolish the foundations of our democracy, then we have failed ourselves, our country and all who come after us.

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Martin Nolan, San Francisco Chronicle

<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/07/09/INGIVJPJRD1.DTL>

On June 1, 1972, White House Counsel Charles Colson wrote a memo to President Richard Nixon's chief of staff, H.R. Haldeman, saying, "I hate the (New York) Times as much as anyone else and would like to be in the first wave of Army shock troops going in during the second term to tear down the printing presses."

Colson and Haldeman hated the Times because the newspaper had more credibility than Nixon did. "The press is the enemy," Nixon said many times, according to his speechwriter, William Safire.

Americans need not feel sorry for the press today, no more than they did during a similar beat-the-press episode more than three decades ago. History seldom repeats itself, but obsession with secrecy can be fatal.

The Pentagon Papers saga, like the Times coverage of the role of banks in anti-terrorism, revealed no important secrets. In both cases, the stories could have been seen as pro-administration. When the powerful rage against the press, it's not about secrets, but about secrecy for its own sake, secrecy as a source of power. Dick Cheney worked in the Nixon White House with the secrecy-obsessed Henry Kissinger. The future vice president watched and learned.

In the spring of 1971, Nixon faced a long, unpopular, unexplainable war. "Vietnamization," withdrawing U.S. troops, was moving slowly. By the end of the year, 2,357 more Americans would die in Vietnam. On March 29, Army lieutenant William Calley was convicted of killing 20 Vietnamese civilians at My Lai.

Nixon enjoyed a break from routine at the White House wedding of his daughter Tricia. On June 13, 1971, when he read his New York Times, he found Tricia's nuptials eclipsed by a report on a 47-volume study on U.S. decisions in Vietnam. Commissioned by Defense Secretary Robert McNamara and classified top secret, it documented mistakes made by presidents John Kennedy and Lyndon Johnson.

In the White House, the immediate reaction was mild. Haldeman called the story "gobbledygook," although he fretted that "the implicit infallibility of presidents, which has been an accepted thing in America, is badly hurt by this." Colson saw it as "a compendium of memos" indicting Democrats.

Their attitude changed when Kissinger returned from a trip, seething about secrecy and knowing which button to push if Nixon did not act. He told his boss, "It shows you're a weakling, Mr. President."

The Justice Department moved to stop newspapers from publishing the papers. It was an unprecedented injunction, which the Supreme Court overruled June 30 by a 6-3 vote. Of almost 20 newspapers involved in the coverage, the government sued four: the Times, the Washington Post, the St. Louis Post-Dispatch and the Boston Globe, where I was Washington bureau chief.

It's an odd feeling to see one's name as a defendant when the United States of America is the plaintiff. The Globe's lawyers told us we might go to jail, even though we all knew that "top secret" was a stale habit in D.C., where bureaucrats classify yesterday's weather report. Defense Secretary Melvin Laird, who to this day calls them "the McNamara Papers," later said that 95 percent of them were not secret at all. Solicitor General Erwin Griswold, who argued the government's case, admitted that "no harm was done by the publication of the Pentagon Papers."

The harm to Nixon was self-inflicted. Frustrated by the Supreme Court, he started a White House investigative unit called "the plumbers." This action led to more grasping for power, then to Watergate and to what White House aide Egil Krogh, the plumbers' handler, called "the downfall of the administration." Krogh went to jail, as did Colson, Haldeman and others.

For years, I wondered about the connection about being a litigant in the Pentagon Papers and my landing on Nixon's enemies list. Was the path predetermined by paranoia? My answer came in 1977 when Nixon, on the comeback trail again, explained to the British broadcaster, David Frost,

the legal philosophy of his administration's criminal actions: "When the president does it that means that it is not illegal." Nixon also referred to the presidency in that interview as "the sovereign."

This attitude lives on today. In the July 3 New Yorker magazine, Jane Mayer, in "The Hidden Power," profiles David Addington, Cheney's lawyer, who sounds like a cocksure sovereign. "I'm the decider," said President Bush, defending Defense Secretary Donald Rumsfeld. Bush has never used his veto power, preferring marginal notes that describe his dislike for new laws. Congress is mute and meek, except on life-or-death issues like gay marriage and flag-burning.

War in Iraq? What war in Iraq? Congress has not held a minute of investigative hearings into this war. In the 1960s, Sen. J. W. Fulbright and his Foreign Relations Committee investigated Vietnam, to the dismay of his fellow Democrat, LBJ. In the 1940s, then-Sen. Harry Truman investigated President Franklin Roosevelt's conduct of World War II.

The only questioners left are ink-stained wretches, in print, radio, television or on the Internet. They're not heroes and there's no "right to know," a noble concept, but not in the Constitution. Thomas Jefferson said it best in 1786: "Our liberty depends on freedom of the press, and that cannot be limited without being lost."

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Edward Wasserman, Miami Herald

<http://www.miami.com/mld/miamiherald/news/opinion/15003083.htm>

What are the limits of secrecy?

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The Bush administration and its supporters are whaling with unusual abandon on their favorite piñata, The New York Times, for exposing a secret U.S. financial surveillance program. The Times' coverage, they claim, will cripple a valuable initiative in the fight against jihadist terrorism.

President Bush and Vice President Cheney both have excoriated the paper in solemn tones for putting Americans in danger while their allies clamor for criminal prosecutions, accusing the paper of pursuing an anti-Bush vendetta at the risk of innocent lives.

That's rough talk, even under the current overheated rules of civic discourse, but the political goodies that have tumbled out have been worth the effort. The war on terror elbows the war in Iraq from the headlines, the administration is once again associated with anti-terrorist zeal, and its opponents once again look unpatriotic and hamstrung by pointless principles -- as useful to a rescue from the burning house we're told we inhabit as an out-of-date fire extinguisher.

The Times and its supporters have responded by reasserting the media's duty to report on governmental actions of wide consequence and dubious legality. Times Executive Editor Bill Keller and Dean Baquet, his counterpart at The Los Angeles Times, which has also covered the tracking program, co-wrote an open letter in which they discussed trying to ``reconcile the obligation to inform with the instinct to protect."

At the center of the controversy is a secret initiative born soon after Sept. 11, 2001. U.S. agents were granted access to a Brussels-based international bank clearinghouse to monitor movements of money involving suspicious parties. The clearinghouse, a consortium owned by 2,200 organizations and known as SWIFT, handles 11 million transactions a day involving 7,800 institutions worldwide, The New York Times reported.

The administration claims that exposing the program, which was not explicitly authorized by Congress and appears to stretch, if not rupture, the government's legal prerogatives, will spook privacy-conscious international bankers. They might then pull back from cooperating, and a valuable window on financial movements, one that purportedly yielded the arrest of the man behind the 2002 Bali bombing, would shut.

Indeed, last week the European Parliament, already chagrined by disclosures that terror suspects were being shipped to secret U.S.-linked prisons in Eastern Europe, voted to demand member governments come clean about the SWIFT arrangements.

So exposure may indeed have costs. But what does that mean about the media's obligation to respect governmental secrecy?

It's not an easy question, because we're dealing with a host of unknowables.

- **There is no government initiative** -- no matter how intrusive or abhorrent -- that we can be certain could never thwart a terrorist attack. Still, some measures lie outside the bounds of the permissible and the legal, and it's right that we refrain from taking actions, regardless of whether they might "work," if they would trash core values, undermine traditional protections, wreck the careful balance between citizen and state. That's why we don't tap phones based on newspaper subscriptions and don't take the children of suspected terrorists hostage. (At least I hope not.)

So the program's effectiveness -- even if it could be proven, which it usually can't -- doesn't necessarily entitle it to proceed secretly and unchallenged.

- **The benefits and costs of secrecy** are hard to gauge, especially when the debate is conducted by two parties -- government and media -- that have their own interests to protect and yet argue that they are acting solely in the public interest.

True, governmental secrecy is sometimes necessary, but it is always costly. It insulates policymakers from scrutiny and accountability, lets them transform bureaucratic convenience into legal necessity, gives bad ideas freer reign than publicity would tolerate. There's good reason why our traditions create a strong presumption in favor of open government, and it doesn't involve appeasing news media. It has to do with the sovereignty of citizens in a democracy.

- **Even on a practical level**, who knows when secrecy is desirable since, by its nature, it's rarely widely debated? If the ultimate objective is to deny jihadist groups access to the world financial system, wouldn't disclosure be wise, since it would flush them into more reliable, and much less efficient, informal channels? (That would explain why the administration, faced with The Times' determination to run its story, spoonfed the same story to The Wall Street Journal, which has double the circulation and unrivaled reach in international financial circles.)

The media frequently make mistakes in the way they exercise their power to inform. But governmental insistence on secrecy doesn't eliminate their duty to decide what to make public; it only makes that decision harder.

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Dan K. Thomasson, Scripps Howard News Service

<http://www.fortwayne.com/mld/journalgazette/news/editorial/15000320.htm>

Protecting liberties: Checks, balances, media

Dan K. Thomasson

WASHINGTON – Who shall guard against the guardians?

It was the most important question posed in the pursuit of democracy and the concept of a free republic. Over the millennia since it was first asked, the answer never has been as clear as since the founding of this nation – a constitutionally protected press, the ultimate overseer of the people's business.

But President Bush and his minions seem to believe in times of peril that not even the press, prized as it is by the First Amendment, has the right to question the actions of the guardian, even when they clearly skirt the edge of constitutionality. Governmental intrusions on the privacy of citizens without normal safeguards against abuse are perfectly within the wartime rights of the president, and that includes the war on terrorism, the familiar argument goes.

What is more, even the disclosure of these impingements – tapping telephones and monitoring e-mails and perusing bank transactions all without judicial sanction – can be considered treasonous. Newspapers that do so are subject to prosecution. At least that is the assertion – actually, the demand – of a claue of pre-1787 types on Capitol Hill who think “constitutional” is something one does every morning before beginning the day. The protests have become just a bit too shrill for innocence.

The president has given us the assurance that he and those under him can be trusted to do the right thing, that no honest, non-terrorist citizen of the republic has anything to fear. There will be no abuse of any of these programs. So go to bed and don't worry. That's easy enough for you to say, Mr. President. But what about those assigned to carry out your orders? Are they as honest and as diligent in their adherence to constitutional principles?

How in the world would we know? Without any oversight other than by those administering the programs, there is no way. The normal checks that protect us all are utterly missing from these exercises. There is serious danger under the circumstances that in the zeal to get those faceless enemies that we are being told constantly threaten our existence, we are doing their work for them – actually limiting our freedoms about as much as any terrorist could hope to accomplish.

There is a reason that police must seek warrants in criminal investigations, and the same reasons apply in hunting terrorists – who are criminals, after all. Following normal procedures to safeguard our civil rights is what this country is all about, and the price we pay for that may be expensive now and then.

Certainly there are times when the press's responsibilities under the First Amendment require self- (if not official) censorship, when information that would be utterly detrimental to the welfare of the nation should not be revealed. To disclose battle plans or endanger vital intelligence operations would be the height of irresponsibility.

The newspapers that broke the stories about banking and electronic surveillance are fully aware of the difference between legitimately sensitive operations and those that are avoiding the procedures long established to protect the rights of citizens. These are general fishing expeditions that may or may not have produced anything but a huge data bank of information about the private business of Americans.

Besides, those who would attack this nation are not stupid. Osama bin Laden and his ilk understand that normal telecommunications systems aren't safe, that banking channels are being monitored. There is little evidence that the programs have produced results. But again, the real question is whether Congress or the courts have properly monitored the programs – not whether they are effective.

Congress specifically enacted the Foreign Intelligence Surveillance Act to expedite eavesdropping warrants. The administration suddenly decided it had the authority to bypass a particular court and to monitor calls to or from overseas locations without approval. Disclosure of this decision did not endanger national security anymore than the revelation that long-established procedures for tracking banking transactions had been ignored.

The philosopher's guardians were there to save the republic, but at what cost, he wondered. The checks and balances and safeguards established by the nation's founders were meant to assure that the guardians don't get out of hand, that in their zeal to protect democracy they don't actually destroy it.

It is often a difficult balancing act that requires constant oversight by all the elements of the republic, most importantly the Fourth Estate.

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<http://www.baltimoresun.com/entertainment/tv/bal-id.agnew09jul09,0,4032417.story?coll=bal-artslife-tv>

Attacks on press recall Agnew's ire

He seized nation's attention with fiery 1969

By Theo Lippman Jr.

When President Bush, Vice President Dick Cheney and several members of Congress recently fired broadsides at The New York Times, the Los Angeles Times and, to a degree, The Wall Street Journal for publishing detailed accounts of a somewhat secret counterterrorism program, it was the mightiest political salvo at the press since Maryland's Spiro T. Agnew threatened the big three television networks and newspaper-dominated mixed media corporations.

"On November 13, 1969, Vice President Spiro T. Agnew became a household word when he vehemently denounced television news broadcasters as a biased 'unelected' elite who subjected President Richard M. Nixon's speeches to instant analysis," begins a chapter on Agnew in the Senate Historical Office's Vice Presidents of the United States. "'The president had a right to communicate directly with the people,' Agnew asserted, without having his words 'characterized through the prejudices of hostile critics. ...'"

Agnew didn't go as far as a few members of Congress have recently gone. At least one senator and one representative charged that the New York Times journalists were "treasonous." But Agnew said something that shook up his targets more than mere cries of treason.

"Agnew," the historical office's biography continued, "raised the possibility of a greater government regulation of 'this virtual monopoly,' a suggestion that the veteran television newscaster Walter Cronkite took 'as an implied threat to freedom of speech in this country.'"

Agnew's November speech was his first as vice president that was not written by two Maryland aides from his governorship days, Cynthia Rosenwald and Herbert Thompson. President Richard M. Nixon's press monitor, Pat Buchanan, did that job.

Rosenwald and Thompson thought it was too strong and got a few changes, but it was still one of the harshest speeches to come out of Washington since Nixon was vice president, when his principal chore was to take the low road while President Eisenhower took the high.

Agnew, it was said, became "Nixon's Nixon" after delivering the first of two anti-media speeches, in Des Moines, Iowa, at a meeting of a Republican regional committee.

Advance word on the speech circulated in the executive suites of ABC, CBS and NBC. All three networks canceled their prime time Thursday schedules to broadcast the speech - even then, a rare occurrence.

I have written elsewhere that that was "the greatest political publicity windfall ever enjoyed by a vice president - an audience estimated by one network official at fifty million."

What the millions heard was immediately seen by many in the news business as both a White House white paper and, as Cronkite put it, a thinly veiled threat.

Nixon had made a nationally televised speech two weeks before Agnew went to Iowa. The president asked the nation to support his Vietnam policy. It was the commentators' remarks afterward that lit the fuse to the Agnew broadside.

Referring to the coverage of Nixon's speech, Agnew said: "When the president completed his address - an address he spent weeks in preparing - his words and policies were subject

to instant analysis and querulous criticism. ... While every American has the right to disagree with the president of the United States ... The president of the United States has a right to communicate directly with the people who elected him."

Agnew characterized the commentators as "prejudiced" and "hostile." He said his purpose was to alert the nation to "a little group of men [living in New York or Washington] who read the same newspapers and draw their political views from the same sources. Worse, they talk constantly with one another."

The networks struck back, condemning Agnew in various programming, but the public was on his side. Polls and other public opinion studies by the networks showed Agnew won the battle of words.

NBC, for example, got 1,600 telephone calls criticizing Agnew for his speech, but 1,900 callers agreed with the vice president.

And so, a week later, Agnew went to Montgomery, Ala. for his second media speech. This time, the newspapers were targeted.

Agnew probably enjoyed this White House-generated speech more than his Des Moines attack on the networks. He had a long history of fighting the print press.

Even as Baltimore County executive in the beginning of his political career, he had bitter feuds with and retaliations against critics. When the owner of weeklies in Catonsville and Reisterstown wrote critically of his administration, he cut off the county's official advertising in those papers.

Though he got very positive - and helpful - newspaper editorial endorsements in his gubernatorial campaign in 1966, he soon became a critic of *The Sun* and *The Evening Sun*, especially after he accused local civil rights leaders of being responsible for Baltimore riots in the wake of the assassination of the Rev. Martin Luther King Jr. The papers jumped on him.

Then, when he was nominated for vice president, in 1968, commentators in his hometown papers and others elsewhere were less than enthusiastic about his nomination and his candidacy. He was sometimes criticized for fumbling and seen by others as taking the low road in his criticisms of his opponents and their supporters.

Ironically, Agnew's Montgomery speech was, at its core, something many liberal journalists and scholars have worried about.

Agnew warned that there was "a trend toward monopolization of the great public information vehicles and the concentration of more and more power over public opinion in fewer and fewer hands" as newspapers began buying up radio, television, magazines and other newspapers.

Probably because Agnew had become such a lightning rod among liberals, many commentators automatically denounced him and his message in harsh terms. A California senator said it was a part of "a reign of verbal terror against the news media." A New York senator said that if Nixon agreed with Agnew's speech, then "we are in for a grave crisis."

Agnew more or less dropped the subject after Montgomery. In 1970, he attacked liberal "nattering nabobs of negativity," a phrase playfully coined by William Safire, a Nixon speechwriter. But he had made his mark.

Thereafter, the only vice president ever forced to resign because of scandal was better known by many for his assaults on journalists. When he died in Berlin, Md., in 1996, the lead of the Associated Press news story that appeared in hundreds of newspapers began: "Spiro T. Agnew, who relished lashing out at the media ... "

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The End of Ambiguity

By Douglas McCollam

In late May of 1942 Stanley Johnston, a war correspondent for the *Chicago Tribune*,

was on a transport ship bound for San Diego along with other survivors of the *U.S.S. Lexington*, an American aircraft carrier sunk by the Japanese earlier that month during the battle of the Coral Sea. Johnston, a personable Australian and a decorated World War I veteran, was among the last men off the stricken carrier and was cited for displaying "conspicuous bravery" in his attempts to aid sailors injured during the battle. His front-page series about the harrowing engagement would rivet *Tribune* readers.

While on the trip back stateside, Johnston shared a cabin with the *Lexington's* executive officer, Mort Seligman, with whom he had forged a friendship. At some point during the trip Johnston was either given or stole (accounts vary) a secret dispatch about a Japanese

armada being assembled to attack American naval forces near the tiny island of Midway in the northern Pacific. Johnston copied down some of the information, which had been gleaned from decoded intercepts of Japanese communications. Just over a week later, after the U.S. Navy won a decisive triumph at Midway — America's first major victory in the war and a turning point in the battle for the Pacific — Johnston's editor at the *Trib*, with whom he had shared the information, realized the paper was sitting on a tremendous scoop.

An unbylined story, navy had word of jap plan to strike at sea, ran on the *Tribune's* front page on June 7, the day after the battle at Midway ended. Though it said nothing about U.S. code-breaking activities, the story cited sources in "naval intelligence" and contained a detailed breakdown of the Japanese force and its movements.

In Washington, the Roosevelt administration reacted with fury. As recounted in Michael Sweeney's book, *Secrets of Victory: The Office of Censorship and the American Press and Radio in World War II*, President Roosevelt's initial impulse was to send marines to occupy the *Tribune* building and to bring up the paper's flamboyant publisher (and longtime Roosevelt nemesis), Colonel Robert McCormick, on charges of treason. Roosevelt also considered banning reporters from future military operations or replacing them with government information officers. Though those plans were never carried out, the administration did publicly pursue charges that the paper had violated the Espionage Act of 1917, going so far as to appoint an outside prosecutor and impanel a grand jury to consider an indictment. Ultimately the case was dropped.

The story of the *Tribune's* wartime brush with the Espionage Act has resurfaced recently, with some commentators citing it as evidence that the act can, and in some cases should, be used to prosecute reporters who publish stories based on classified information that officials view as damaging to national security. Writing in the *Los Angeles Times*, Max Boot, former editorial features editor for *The Wall Street Journal*, said that these days McCormick would be "hailed as a First Amendment hero" by media types for publishing the Midway story. Expanding the attack, Gabriel Schoenfeld, senior editor of *Commentary* magazine, noted in the magazine's March issue that Congress amended the Espionage Act in 1950, specifically making it a crime to publish classified information about American or other governments' "communication intelligence activities" to the detriment of "the safety or interest of the United States." Then, in May, Attorney General Alberto Gonzales turned the heat a notch higher, suggesting to ABC News that the Bush administration would consider prosecuting journalists for stories injurious to national

security. “It depends on the circumstances,” Gonzales told the Sunday morning host George Stephanopoulos. “There are some statutes on the books which, if you read the language carefully, would seem to indicate that that is a possibility.” Gonzales later tried to qualify his remarks, but the message was clear: We know where you live.

NIXON: *Boy, if I were the publisher of a great newspaper, I wouldn't print this stuff — top-secret information.*

HALDEMAN: *But, uh, if — what's the use of the classification system — why the hell do we classify anything — if a newspaper feels no compunction about printing it?*

— President Richard Nixon and H.R. Haldeman
discussing publication of the Pentagon Papers
in the Oval Office, June 14, 1971

Most of the recent saber-rattling about press prosecutions has clearly been in the direction of West Forty-third Street in Manhattan, where *The New York Times* lives. Last December's revelation in the *Times* that the National Security Agency was tracking terrorism suspects by secretly listening in on domestic phone calls without benefit of search warrants touched off a fierce debate about press freedom and responsibility that is still reverberating in legal and political circles. President Bush called the decision to print details of the program “a shameful act.” Others saw the *Times*'s decision to publish as a heroic moment for journalism, and redemptive of the paper's earlier tarnished coverage of WMD in Iraq. In May the story's authors, James Risen and Eric Lichtblau, were awarded a Pulitzer Prize, as was Dana Priest of *The Washington Post* for her piece about secret CIA prisons, also based on classified information. Those and other stories have fueled calls for tighter controls on the press and more aggressive punishment of reporters who publish stories based on leaks of classified information, on the ground that the stories damage national security. In late May, at a rare open hearing of the House Permanent Select Committee on Intelligence, chairman Peter Hoekstra said members of

the intelligence community had testified that press leaks had ruined billions of dollars in defense programs and done more damage to national security than any foreign espionage. Some journalists, Hoekstra added, “apparently believe they should have the right to determine which national security information is or is not fit to classify.”

Fair charge? Even the most ardent defenders of the Fourth Estate might concede it contains some truth, but it also misstates the issue: journalists don’t decide what information is fit to classify; they just decide what to do with information that someone else has classified, and that they have obtained from a leaker, usually somebody with clearance who has determined the information isn’t fit to keep secret — and sometimes with good reason. Rare is the reporter who has worked in Washington long enough to see the cherry trees blossom who hasn’t encountered a government CLASSIFIED stamp on a document that could easily be picked up at the library, courthouse, or newsstand. This phenomenon is reflected in statistics showing that the number of classification decisions on documents went from 8.7 million in 2001 to 14.2 million in 2005, a jump of about 60 percent in three years. The danger in this is clear. As Justice Potter Stewart observed in the Pentagon Papers case, “if everything is classified, then nothing is, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion.”

The recent tussles between the government and journalists over the publication of classified information point to a basic tension at the heart of our constitutional system. On the one hand, the law vests the government with the right to classify information and to punish those who reveal it. On the other, the press receives a steady stream of classified information from government officials in the form of sanctioned and not-so-sanctioned leaks and publishes some of them in the belief that it is information the public should be aware of. This contradictory behavior pits two constitutional principles against one another and has resulted, through most of our history, in a kind of standoff in a zone of “intentional ambiguity,” to use the phrase of Jonathan Turley, a professor at George Washington University Law School. That zone of ambiguity — which has also variously been dubbed an “informed understanding, an untidy compromise,” or a “benign indeterminacy” — has allowed journalists to operate on the premise that so long as they didn’t do anything illegal to actively obtain classified information, they need not fear prosecution for receiving it or publishing it in a reasonably responsible manner consistent with their role under the First Amendment.

Increasingly, though, that zone of ambiguity long enjoyed by journalists is being squeezed, and not only in the area of national security.

Historically, attacks on press activities can be said to come under one of three broad headings: attempts to block publication (prior restraint); attempts to invade newsgathering (reporters as witnesses); and attempts to punish postpublication (reporters as defendants in libel or criminal prosecutions). In the case of prior restraint, most of the ambiguity was resolved in favor of the press in 1971 in *The New York Times Co. v. United States*, the Pentagon Papers case. There the Supreme Court set a very high bar for the government to block publication, even when the stories contained classified information pertaining to national security in a time of war. The decision was certainly a triumph for the press, but even in victory, the zone of ambiguity receded. Writing about the case a short time after the decision, Alexander Bickel, a Yale law professor who argued the case for the Times, sounded a cautionary, rather than jubilant, note: “Those freedoms which are neither challenged nor defined are the most secure. In this sense, for example, it is true the American press was freer before it won its battle with the government over the Pentagon Papers in 1971 than after its victory The conflict and contention by which we extend freedom seem to mark, or at least to threaten, a contradiction; and in truth they do for they endanger an assumed freedom, which appeared limitless because its limits were untried. Appearance and reality are near one. We extend the legal reality of freedom at some cost in its limitless appearance. And the cost is real.”

“It may be better that the issues be left unsettled than settled rightly . . . but that delicate approach mandates reliance upon the presence of ambiguities, both constitutional and statutory, that do not survive many trips to the courthouse,”

— Professors Harold Edgar and Benno Schmidt, Jr., writing on the balance of press freedoms and national security in May 1973

The idea that an unresolved ambiguity can work in favor of journalism was

certainly true in the area of protecting confidential sources. For more than thirty years after the Supreme Court's 1972 decision in *Branzburg v. Hayes*, there seemed a tacit understanding between the government and journalists that prosecutors would not use reporters to go after press informants. Sure, the opinion held that reporters had no right to refuse a grand jury subpoena to testify about their sources, but it was a five-to-four decision with an ambiguous concurrence by Justice Lewis Powell that seemed to leave the door open for future developments on the question. Out of that modest pile of straw First Amendment advocates spun gold, getting reporter shield laws or favorable court rulings in forty-nine of the fifty states, and convincing a surprising number of federal courts that the federal common law supported the notion of a reporter's privilege despite the holding of *Branzburg*. That levitation act, of course, came crashing down last year in the Valerie Plame leak investigation, where the court held reporters Judith Miller and Matthew Cooper in contempt for refusing to reveal their sources and demonstrated a willingness to send journalists to jail if they refused to testify when subpoenaed by a grand jury.

From the wreckage of the *Plame* decision press lawyers looked to salvage something usable. An opinion in the case by the federal appellate judge David Tatel outlined a standard under which a reporter's right to refuse to testify about sources might be honored by the courts: "Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value."

This "public interest" balancing test is now at the heart of the new reporter's shield law introduced in the Senate in May (though officially it's called the "Free Flow of Information Act.") No one, not even the most dedicated press advocates, wants to hitch a bill's prospects to the popularity of journalists among members of Congress). The bill is a replacement for a much more ambitious shield law introduced last year that would have granted reporters an almost absolute privilege against testifying in court. That bill quietly died after failing to gain political traction even among liberal Democrats, principally because of national security concerns. The new version, which is sponsored by

Republicans Richard Lugar, Arlen Specter, and Lindsey Graham, as well as Democrats Chris Dodd and Charles Schumer, takes a much narrower approach.

For example, in the current version of the bill, run-of-the-mill, nonconfidential interviews, notes, story drafts, e-mails, and video outtakes are not protected. Even for confidential sources, the public interest in the information provided (as determined by a judge) is critical to the protection the source will receive. If, for example, someone subpoenas a reporter to testify about sources for a story on Paris Hilton's latest cat fight or whether George Clooney got Botoxed, forget about the shield law.

On the other hand, the bill does set up a number of obstacles for prosecutors or private lawyers who want reporters' records or testimony about confidential sources on stories involving legitimate public issues. Those barriers are somewhat lower in the national security context, but even in cases of illegal leaks of sensitive information, prosecutors trying to overcome a pledge of anonymity must convince a judge that the harm caused by the leak clearly and convincingly outweighs the value of the public's receiving the information.

Though the bill is supported by most major news organizations and associations, even backers acknowledge that it is a long way from what press advocates wanted. George Freeman, associate general counsel for The New York Times Company, admits that it's "not our dream bill," and that he hoped for something stronger. "But you know politics is the art of compromise, and I think it at least will give us some degree of clarity."

But at what price is that "clarity" obtained? A big part of the stand Judy Miller and her backers took last year was based on the idea that reporters shouldn't distinguish between good leaks and bad leaks when protecting sources. Yet that kind of distinction is very much at the heart of the shield bill. By any measure the bill is a far cry from the kind of comprehensive privilege enjoyed by doctors and lawyers (you'd never hear a federal judge say that, as a general proposition, the public's interest is better served by forcing a lawyer or doctor to testify against his or her client or patient). The bill also places a lot of discretion in the hands of federal judges, who are asked to make decisions based on their conclusions about the social utility of the information being sought from the reporter, rather than upon any grander notions of constitutional freedoms.

It's unlikely, for example, that if the shield bill as introduced had been law it would have done much to help in the case of Miller and Matt Cooper. The opinions in their cases

showed that the judges thought the value of leaking Plame's CIA identity was greatly outweighed by the harm it caused. On the other hand it could have helped in the case of Wen Ho Lee, the former scientist at the Los Alamos nuclear weapons lab who pried \$750,000 out of five media companies in early June in connection with a suit against the federal government for violating his privacy by giving reporters personal information about him during its investigation of whether Lee spied for China. In paying the settlement, the news organizations said their decision was based on a desire to protect their reporters who were under contempt citations for refusing to name confidential sources. As the case was of undeniable public interest, under the shield law the news organizations would have had a fighting chance to convince a judge that the harm caused by the leak was outweighed by the social utility of the information.

But after reviewing the shield bill, Mark Grannis, a Washington lawyer who represents the scientist Steven Hatfill in a similar privacy action against the government involving the investigation into the anthrax letter attacks of 2001, said his client could convince a judge to balance that test in his favor. In general, Grannis thinks the bill strikes the right tone by focusing on the public interest. "Reporters are not in trouble for noble leaks," says Grannis. "This bill says the content of the leak matters." Grannis, who has subpoenaed nine reporters to testify in the Hatfill case, sees something else in the bill as well: clarity. "This goes a long way toward making clear the extent of the reporters' legal rights," Grannis says. Kevin Goldberg, who represents the American Society of Newspaper Editors, also sees new guidelines in the bill. "People were looking for clarity," he says. "At the very least reporters can now know going in what they can promise and what they can't guarantee." But would that really be a step forward? Goldberg admits it's not ideal. "The First Amendment is all that reporters should need. With a statutory solution you can always see it chipped away."

"If you go back in history to find and then analyze cases where leaks caused true danger to our national security, rather than merely embarrassment or political squirming for those in power, it is hard to find many . . . the frenzied efforts to prevent leaks has been far, far more damaging to the country than the leaks themselves."

— Congressional testimony of Walter Isaacson,
author and president and ceo of
the Aspen Institute, May 26, 2006

Even if the shield bill manages to pass Congress and get signed into law (probably

a long shot at this moment) it deals only with a reporter's ability to protect sources. If charged with a crime — violating the Espionage Act, for example — the reporter will have to look elsewhere for protection. Such a scenario is possible, but not likely. Despite the position of the attorney general, the legislative history behind the Espionage Act makes clear it was not intended to prosecute journalists. Several such provisions aimed at the press were considered and then discarded from the final bill, which generally requires an intent to harm the United States or aid a foreign government. That said, the act has been trotted out on occasion to threaten reporters, though never to actually prosecute them. In addition to the *Tribune* case during World War II, the Espionage Act was considered in the Pentagon Papers case. Though the Nixon administration didn't refer to it in its briefs, several justices, especially Byron White, held forth in their opinions that it might be possible to charge newspapers for violating the act for publishing national security secrets in certain circumstances. Those ruminations were not part of the ruling but have provided grist for legal theorists in favor of the idea. The act *was* used, if unsuccessfully, to prosecute the leakers in the case, Daniel Ellsberg and Anthony Russo. In a more obscure case, Samuel Morison, a part-time civilian analyst and contributing writer for *Jane's Defence Weekly*, was convicted under the act for publishing secret photographs he stole while working for the government. More recently, in a closely watched case, two lobbyists are being prosecuted under the act for receiving classified information and providing it to Israel. The case is viewed as having implications for journalists, though the judge has resisted making it into a test case of press freedoms (see sidebar, page 23).

In all of these cases, it should be noted, the defendants were either giving direct assistance to a foreign government or had actively misappropriated classified information. To date, there has been no case in which a working journalist in passive receipt of classified information has been prosecuted under the act for publishing the information. Such a case would bump up against the First Amendment, which the Supreme Court has consistently said trumps overly broad laws that impinge upon free-

speech rights. And the absence of such cases means that for now a zone of ambiguity dealing with the publication of classified information concerning national security still exists. Maybe cooler heads will conclude that ambiguity serves the purposes of both the press and the president.

Still, the effort to clarify the situation rumbles on in Congress. In that May hearing

of the House Permanent Select Committee on Intelligence, a central topic was whether the United States needed new laws that would better enable prosecutors to go after journalists who publish classified information, perhaps something like Britain's Official Secrets Act, which places wide swaths of information off limits to journalists.

How that could coexist with the First Amendment isn't quite clear. Perhaps knowing that, even the press critics at the hearing didn't seem to think the new laws were a great idea. John Eastman, a professor at Chapman University School of Law, argued that the Espionage Act is sufficient for the job and was undaunted by the fact that it had never been used against the press. "We may never know how great the damage to our national security the recent disclosures of classified, highly sensitive intelligence-gathering information have caused," Eastman noted in his testimony, "but . . . it is certainly the right, and may well be the duty, of the executive to prosecute those responsible for them."

But there's the rub: Should you prosecute a free-speech crime before you know if that disclosure has done any damage? As other witnesses at the hearing noted, administrations have a tendency to exaggerate the damage done by leaks. That was certainly the case in the Bay of Pigs invasion, when President Kennedy first leaned on *The New York Times* not to report the covert operation, then later told publisher Orville Dryfoos that he wished the paper had ignored him and saved his administration from its biggest fiasco. That was also the case with the Pentagon Papers, when Richard Nixon was at first blasé about the leaked report and only made it an issue of national security after his advisers convinced him the leak made Nixon look weak in the eyes of other world leaders. More recently President Bush complained that "the fact that we were following Osama bin Laden

because he was using a certain type of phone made it into the press as the result of a leak.” Bin Laden, so the story goes, promptly ditched his phone after that fact was revealed in a story in the *Washington Times*, taking away a crucial capability to monitor his movements. The allegation was also cited in the Report of the 9/11 Commission and by two former Clinton administration officials in a best-selling book. But as Glenn Kessler of *The Washington Post* established, stories about bin Laden’s use of a satellite phone had actually been in the press for years without causing any change in his behavior.

Even the example of the *Chicago Tribune*, resurrected precisely because it so clearly seems an egregious example of journalistic misconduct, is a little more complicated, and illuminating, than it first appears. After the article ran, Byron Price, director of the wartime censorship program, said that even if the *Tribune* had submitted Johnston’s story to the government for review, it would not have been killed because the Code of Wartime Practices for journalists at the time did not cover reports of enemy ships in enemy waters, a fact the *Tribune* was aware of before it published the piece. More to the point, many in the government viewed the case principally as a way to punish Robert McCormick for his vitriolic opposition to Roosevelt and the New Deal, rather than as an issue of national security.

At the House hearing, *Commentary*’s Gabriel Schoenfeld testified about the *Tribune* episode and argued forcefully that reporters who publish stories based on leaks of classified information should be subject to prosecution. Nearby, Dana Priest, one of the reporters most frequently tabbed by hardliners as worthy of being put in the dock, seemed to be paying scant attention. Instead, she and the *Post* lawyer Eric Lieberman, who was sitting next to her, were glued to their Blackberry PDAs as word circulated through the hearing room that shots had been fired in the building, which was therefore being locked down. At the end of the hearing committee chairman Hoekstra announced that, owing to the lockdown, no one would be leaving the room.

For the next few hours the crowd mingled easily, debating issues, swapping stories, phoning in dispatches, until around 3 p.m. when an FBI SWAT team poured through the door in black Kevlar vests and black helmets and wielding automatic weapons, trigger fingers at the ready. “HANDS ON YOUR HEAD! HANDS ON YOUR HEAD!” they shouted, in a credible imitation of Jack Bauer confronting a double-dealing CTU agent on 24. Already, word had filtered in that the whole mess was probably nothing (it turned out that a jumpy congressman had misinterpreted some construction noise for gunfire), so the

commando tactics seemed a little extreme. Nevertheless, the milling herd of reporters, lawyers, and politicians stood there obediently, hands on heads, arms aching, until we were lined up and led out under armed guard in little groups of ten. Somehow, given the times, it seemed a fitting end to the day.

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