

# Reflections on Secrecy and the Press from a Life in Journalism

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## Cutting the Gordian Knot

Though I have been a journalist for most of my career, my experience with over-classification and the vagaries of declassification began in 1969 during an eighteen-month stint running a subcommittee of the Senate Foreign Relations Committee that was investigating the military's role in foreign policy during the Vietnam War.

Chaired by Senator Stuart Symington (D-MO), the subcommittee held a series of closed hearings on US military activities in various countries in late 1969 and early 1970. The first transcripts we chose to release for public consumption concerned a classified hearing on the Philippines, where the Pentagon had bases that it used in the Vietnam War. A classified copy of the hearing was sent for clearance by the State Department, which returned it more than a month later with much of the testimony deleted because of classification.

That began weeks of negotiations between myself and a State Department ambassador who had been designated as the administration's liaison with the subcommittee. I pointed out that some of the deleted material had been published in newspaper and magazine articles or presented on radio or television. I was told that this information had not been "officially released" and so could not be carried in a congressional report because that would make it an authorized release of the information which the "originating agency"—State, Defense, CIA, or the White House—still wanted kept classified. (This is essentially the same argument that the government makes today to fend off releasing information about classified CIA-directed drone operations discussed in the press.)

One of the deletions concerned a reference made by Senator J. W. Fulbright (D-AR), then chairman of the full committee, to then Philippine president Ferdinand Marcos as "a crook" during a discussion of the millions of dollars of foreign military assistance that appeared to be missing. The State Department maintained that Fulbright's view of Marcos should remain classified because its disclosure would harm US foreign policy.

In the end, State's ambassador and I could not agree on between ten and twenty items, including the Fulbright statement. At that point, Symington scheduled a Saturday



morning meeting with then secretary of state Bill Rogers to go over the outstanding declassification issues. Symington and I arrived at a conference room at the State Department to be met by an entourage of department officials. When Rogers appeared, he was dressed for a tennis game to follow the meeting.

Rogers opened the meeting by asking his old friend “Stu” to begin the discussion. Symington opened his notebook and read off the first issue, which concerned a discussion of allegations of criminal activity at a Philippine base where US forces were stationed. Rogers asked a staff member to discuss the issue, but Symington intervened.

I remember the normally respectful Symington saying, in effect, “Wait a minute, Bill. This was supposed to be between me and you. It looks like this wasn’t important enough for your personal attention and if that’s the case I guess it will just be up to us senators to decide what to release publicly.” With that Symington closed the notebook, handed it to me, and we left. The subcommittee and then the full committee voted to release almost all the State Department’s classified facts and statements that were at issue—including Fulbright’s words—and the world did not collapse. Declassification issues for the subcommittee thereafter went much more easily.

Thus, it was forty-five years ago when I learned how arbitrary the nation’s classification system was. Many real secrets obviously needed to be kept. But individuals could disagree about information on the margins, and when you got to those gray areas—which included information about bad decisions and failures—it was safer for officials to classify since no one was penalized for over-classifying. It was a lesson I never forgot, and one that guides many national security journalists.

But another lesson has stuck with me from that Symington experience, a lesson that I fear some of my fellow journalists neglect. Symington’s encounter with Rogers was predicated on the principle that individuals must make reasoned judgments about the exposure of national security secrets, take responsibility for those decisions, and face whatever consequences might follow.

This essay reflects on this principle and sounds a note of caution about contemporary press attitudes toward government secrets. In writing about national security issues and events, journalists too often behave like an interest group. They often confuse their own personal interests, as well as their employers’ interests, with the public interest and cloak them with First Amendment claims. In addition, some are too quick to assert that special constitutional entitlement and act with impunity without considering that they may be interfering with legitimate investigations.

These claimed entitlements are often ones that they do not, in fact, legally possess.

## Seeing Security from Both Sides

Looking back over my nearly fifty years as a journalist, I have come to realize that my three periods of service in government—in the Army from 1955–1957 and as a Senate investigator in the early and then late 1960s—gave me a unique foundation for covering national security issues.

Drafted into the Army after college at the end of the Korean War, I completed basic training and then served as an interrogator in the Counterintelligence Corps in Washington. That Army experience taught me about the need for discipline, obedience to orders, and respect for the necessary close relationships built among military unit members. It was also my first exposure to classified information.

Twice, Chairman Fulbright convinced me to take eighteen-month sabbaticals and run investigations for his committee. The first concerned foreign government lobbying, after I had exposed in a magazine article failures in the law governing reporting of their activities. The second, noted above, was about the military in foreign policy.

Both Senate experiences taught me how little I knew as a reporter about how government really worked. It also showed me from the inside how much time the government spent, even then, putting out material for the media and how important public relations were for actors inside government.

It also made me conscious of the ways that government officials can manipulate the release of classified information and the damage that over-classification poses to real security.

Senior government officials have for years gone on background to reporters, individually or in groups, and released classified national security information in order to support or even promote their points of view. At times, this is an “authorized” leak, although sometimes it is not.

For example, during the Nixon administration Henry Kissinger as national security adviser had regular “backgrounder” sessions with White House reporters, a practice followed during the Reagan administration by George Shultz, when he headed the State Department. They both passed on to “beat” reporters information not directly attributable to them that was derived from materials that would have been marked with some security classification if circulated within government.

Such “authorized” leaks sometimes backfired because they led other senior officials—and even lower-level government employees—to do their own “leaking” of classified



information to journalists if they disagreed with the slant that was appearing in public.

Classified information leaks also came from whistleblowers—government employees who want to expose wrongdoing or individuals who feel that they have been mistreated by their bosses or the system.

For journalists, there is also the danger that leaked information dealing with classified activities may be inaccurate, or more likely only part of the story, but when published creates an erroneous or misleading impression. I have many times found that to be the case when a source opposes what he or she believes is going on, or wants to appear to be a major player but only has a limited knowledge of the events involved.

As the recipient of leaks of these sorts, I believed that—as I learned on Symington's subcommittee—much of this information should never have been stamped classified in the first place. This is a point on which almost everyone agrees.

The 9/11 Commission complained about over-classification that “leads to disrespect of the system and leaks to the press.” Secretary of State John Kerry complained last year about a “massive amount of over-classification.”<sup>1</sup> Washington attorney Abbe Lowell, who has been dealing with classification issues in courts for over a decade, explained in 2016 why over-classification occurs:

Right now, there are thousands of people in the government who can classify information. Think about the reality: A person can put a “classified” stamp on a document and ensure it is kept secret, or can leave it unclassified, subject to disclosure, and later be accused of having revealed something needing protection. No one risks any real penalty for using the stamp; the only punishment comes from not using it. The result is overclassification.<sup>2</sup>

Lowell also pointed out that something classified by a CIA official may not be considered classified by someone at an equal level at the State Department or the White House.

And yet while far too much information is classified, some secrets should remain secret. That is why journalists dealing with diplomatic and national security issues should check—and most do—with official US government sources before going public with an article based on obviously sensitive information received through non-official channels, including whistleblowers. This practice enables the government to object if it believes information that is classified could harm governmental activities if published by the media.

At the *Washington Post*, we discussed such issues up the chain, to my editor of national news, then to the executive editor if necessary. I have been involved when the defense secretary or CIA director visited the executive editor to raise questions about publishing one of my stories. I have also talked to colleagues and executive editors who have visited the White House to work out what is contained in sensitive stories directly with the president and his top staff.

Such was the case with Dana Priest's important story in 2005 about CIA prisons abroad. She spent months reporting both in Washington and abroad before putting together her stories. Questioning government officials and checking information received unofficially with relevant officials was part of the process. Serious questions were raised about the public impact of Priest's material before publication took place. The *Post* agreed to withhold the locations abroad of the CIA prisons at the request of President George W. Bush. Ironically, those country locations were disclosed within days by a web news service that did not follow the *Post's* sensitivity to the US government's situation.

Another context when the press should withhold information involves the real names of CIA case officers and analysts who are operating undercover and whose exposure could result in real harm. I learned this lesson in early 1975, when a former CIA case officer, Philip Agee, published his book, *Inside the Company: CIA Diary*, in which he provided the names of some 250 CIA officers and foreign agents. I wrote a review of the book for the *New York Times* and said that with the level of detail Agee had supplied, "It almost takes the stamina and interest of a Soviet spy to get through."<sup>3</sup>

Months after the book's publication, Richard Welch, the CIA station chief in Athens, was murdered by an anti-American terrorist group. Although Welch's name was not in Agee's book, it had been printed by a Greek weekly when—thanks to Agee's book—it had become a worldwide journalistic fad in anti-US publications to name CIA personnel. Agee himself would go on in 1978 to establish a newsletter called the *Covert Action Information Bureau*, which in a column called "Naming Names" exposed many more CIA personnel.

In 1982, responding directly to Agee's book and the newsletter, Congress passed and President Reagan signed into law the Intelligence Identities Protection Act. This law made it a federal crime for someone with access to classified information to reveal the identity of an individual operating in certain covert roles then or in the past. It also made it a crime for someone to systematically seek to expose covert agents in the belief it would harm foreign intelligence activities of the United States.



Self-censorship due to national security implications and compliance with the Intelligence Identities Protection Act are very much the exceptions to the press's strong presumption of publication. In the vast majority of cases where government officials object to the publication of classified information because of its threatened harm to national security, the press publishes nonetheless after weighing the merits of the claims. It is my experience that the government often exaggerates the harms of publication.

One such case for me occurred at the dawn of the Iran-Contra affair during the Reagan administration. I was among reporters writing the first stories about the initial disclosure in November 1986 by a Lebanese weekly that the United States had attempted to trade arms for Iran through Israel to get Tehran's support for release of American hostages held in Lebanon by jihadists. A day or two later, an impeccable government source told me that Oliver North, then a senior staffer on the National Security Council (NSC), and one of the major participants in the arms-for-hostages dealing, had secretly gone back to Lebanon to make another last-minute try to free the hostages.

When I called the Reagan White House for a comment, a spokesman for the NSC told me that not only were North's travels classified but any story that had him in the Middle East could cause his capture or even death. At the newspaper, we discussed this response and other reporters checked their sources. With then executive editor Ben Bradlee's approval we went ahead with the story.

It turned out North had already left Lebanon and was on his way back to the United States when I had made my call to the White House, but officials there just didn't want anything written about North's secret, desperate attempt to get the hostages released.

Journalists, as with government officials, do not always make the right decision about what classified information should be published and what should not. Editors, publishers, and owners who make the final calls about publication of sensitive information may not understand the broader implications of their own material, which is why it has been always necessary to let the government know what your organization is about to make public. Competition often drives the decision to publish, and the web makes such disclosures more likely.

There are often legitimate reasons for withholding information and journalists are no different from other citizens in recognizing the need for loyalty to their government when it is acting correctly. Honoring a CIA request to not publish the identity of an undercover US intelligence operative captured by an enemy is no different from

being asked by the *New York Times* to not publicize the situation of the paper's foreign correspondent, David Rohde, when he was being held by Taliban terrorists.

I have repeatedly argued in meetings with government officials that their first line of defense is having their own people keep things secret. I've never heard that someone claimed a reporter stole classified information for his or her story—although these days hacking may introduce a new element in the mix.

### Shield Laws, Pro and Con

I am unusual among journalists in believing that the media are properly subject to some aspects of government investigations. My views were shaped by my attendance from 1995 through 2001 as a part-time law student at Georgetown University Law Center, where I earned a JD degree in May 2001.

During law school I wrote a paper on the lawyer's privilege after death in which I also covered other common-law privileges—arising out of judicial opinions—such as those for doctors, religious figures, and social workers. I saw that any reporter's privilege was based primarily on state laws, since there is no such federal law or federal judicial opinion supporting one.

Congress has over the years balked at passing a so-called reporter's shield law. Instead, the protection of reporters involved in federal cases is governed by the Supreme Court's June 1972 *Branzburg vs. Hayes*<sup>4</sup> decision, which ruled that reporters are not automatically exempt from being called to testify before federal grand juries, appear for testimony in court, or even be deposed in federal civil cases.

In *Branzburg*, the Supreme Court said, "We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations." It agreed there was a conditional privilege since the government had to show strong and compelling need for the reporter's information. However, in the final analysis, the court declined to "create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy."

*Branzburg* turned aside arguments that continue to be made by advocates for a journalist shield law. "Nothing before us indicates a large number or percentage of all confidential news sources . . . would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task," the court said.



The court was correct. Just a few months after the *Branzburg* decision, stories by Bob Woodward and Carl Bernstein started appearing in the *Washington Post*. These stories revealed facts about the Watergate affair that Woodward and Bernstein had obtained from many confidential sources who had not been deterred from talking to the two reporters. Reporters have continued to receive many deep secrets in the subsequent four decades since *Branzburg*.

The court's opinion also foresaw one of today's problems for those supporters of a shield law: Who qualifies as a journalist? "The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order," the *Branzburg* court said. "Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods."

The *Branzburg* decision became more than academic to me soon after I graduated from law school.

In late 2002, for the first time in my career, I received a subpoena to appear for a sworn deposition in the federal civil case where the plaintiff, former Los Alamos National Laboratory physicist Wen Ho Lee, was seeking the identity of confidential sources I and four reporters from other news organizations used in writing or broadcasting stories about him.

Lee was suing the Energy Department and several of its officials for allegedly leaking information about him to me and the other journalists which he said violated the Privacy Act. He claimed that stories we had written based on these leaks had led the government to arrest and indict him, causing him eventually to plead guilty to a felony: violation of a law governing handling of classified information. Therefore, he claimed, the leaks had allegedly caused him harm.

Lee's lawyers had deposed many Energy Department officials and had been unsuccessful in finding the source of the leaks among them, and now wanted to question me and the other journalists under oath to find the name or names of our sources of information about their client for the stories we had written.

Unlike the other journalists, I did not move to quash the deposition subpoena.

Based on my then recent law school studies, and particularly the *Branzburg* case, I believed that journalists should respond to subpoenas like any other citizen. Those

of us who receive classified information as part of our newsgathering must realize the government officials who provide that material have taken a risk in so doing and face possible legal action and loss of their jobs.

We journalists have our own rules in deciding what to print in such circumstances. Mine have been: first, ascertain if the information is true; second, figure out whether it is something the public should know; and third, determine what harm the government believes its publication could cause. I then balance these factors; if I decide to publish, I inform and seek approval from my editors.

Once we decide to publish, I believe I should personally face some of the same legal and personal dangers my source or sources faced in providing that classified information in the first place.

That meant, in the Wen Ho Lee case, that I would appear for the deposition but—on possible penalty of contempt—not answer any question that could lead to the disclosure of my sources. As a result, I appeared twice for sworn depositions, once in January 2004, where I invoked the “reporter’s privilege” 117 times in refusing to answer questions, and again in August 2004, when again I invoked the privilege, this time some 100 times in order to protect the identity of the sources who directly provided information about Lee and the investigation of him.

As a result, in November 2005, Federal District Judge Rosemary M. Collyer found me in civil contempt, to be fined \$500 a day until I complied with her order to disclose my sources. Luckily, the fine was stayed for thirty days during which time the case settled after the government and newspapers involved agreed to pay Lee a total of \$1.6 million.

### Sources vs. Substance

In the midst of my involvement in the Lee case, both *Branzburg* and the Intelligence Identities Protection Act became relevant to me again when I was called by Special Prosecutor Patrick Fitzgerald in his criminal investigation of the leak to columnist Robert Novak of the name of covert CIA case officer Valerie Plame.

Plame’s name had appeared in his July 14, 2003, column where Novak attempted to knock down a claim by her husband, former ambassador Joseph C. Wilson, who wrote in the *New York Times* that the Bush administration was wrong when it said Iraq’s Saddam Hussein had purchased uranium from Niger, a country he had just visited on a CIA-sponsored mission. Novak named Plame after writing that two senior administration officials had told him that “Wilson’s wife suggested sending him to Niger.”



Ironically, it was the press, and particularly the *Times*, that later called for Attorney General John Ashcroft to recuse himself from the case after it appeared that the FBI had obtained conflicting statements that indicated someone in the George W. Bush White House had disclosed Plame's name to journalists.

The conflict arose from bureau agents' early interviews with I. Lewis "Scooter" Libby, then Vice President Dick Cheney's chief of staff, and the late Tim Russert, then NBC's Washington bureau chief and moderator of *Meet the Press*. Libby had told the FBI he had learned Plame's name during a July 2003 phone conversation with Russert, before Novak's column appeared. When agents later interviewed Russert, he told them he hadn't known Plame's name until it came out in Novak's column.

Ashcroft stepped aside and then deputy attorney general James Comey (now FBI director) named Patrick Fitzgerald, the US Attorney for the Northern District of Illinois, as special prosecutor. When Fitzgerald took over the inquiry, he soon learned from Deputy Secretary of State Richard Armitage that he had mentioned Plame's name to Novak.

But Fitzgerald continued his leak investigation, not just because of the conflicting Libby-Russert statements, which involved the potential crime of lying to the FBI, but also because it had become clear that after Wilson's column in the *Times*, Plame's name had been leaked to more journalists than just Novak, and by others in addition to Armitage. For months, Fitzgerald pursued the idea that there had been a White House conspiracy to leak Plame's name to a handful of Washington reporters in order to undermine her husband's statements.

In the summer of 2004, Fitzgerald contacted me to learn my source for an October 12, 2003, story in which I had written that White House officials identified Joe Wilson's wife as having generated his CIA-sponsored trip to Niger in order to cast doubt on Wilson's statement that Saddam Hussein had not bought uranium from that country. In the article, I had written that "two days before Novak's column, a *Post* reporter was told by an administration official that the White House had not paid attention to the former ambassador's CIA-sponsored trip to Niger because it was set up as a boondoggle by his wife, an analyst with the agency working on weapons of mass destruction." I added that "Plame's name was never mentioned and the purpose [of my source's disclosure] did not appear to be to generate an article, but rather to undermine Wilson's report."

Serious back-and-forth negotiations take place before a government subpoena is actually delivered to a journalist. In my case, it was during several weeks of such discussions that my attorneys made clear to Fitzgerald and his team of attorneys that

I would only discuss the origins of that story if my source had come forward to the prosecutor and identified himself or herself.

I was shown a written, sworn statement from Libby, with whom I had spoken on a background basis earlier, in which he said he was releasing me and any other journalist from that pledge of confidentiality. Libby had not in fact been my source about Wilson's wife. Nonetheless, I would not confirm any conversation with Libby on the ground that Fitzgerald could present me with similar statements from other potential sources as a way to narrow the focus to my actual source.

On August 10, 2004, Fitzgerald issued a subpoena for my appearance before his grand jury. Private discussions continued; in the weeks that followed I was told through my attorney that my source, Bush's White House Press Secretary Ari Fleischer, had admitted to Fitzgerald having spoken to me on July 12, 2003—two days before Novak's column—about Wilson and Iran's alleged purchase of uranium from Niger. When Fleischer (through our lawyers) then approved my speaking about our July 12 conversation to the prosecutor, a date was set for Fitzgerald to depose me under oath.

The deposition was taken at my attorney's office in mid-September 2004. It was agreed in advance that I would not be asked the identity of my source and thus I never had to provide it. I did fully answer all questions about the substance of the July 12 conversation, including the mention of Wilson's wife.

It was more than two years later that I learned that Fleischer, while admitting to Fitzgerald that he had spoken to me, had denied he had made mention of Wilson's wife working for the CIA. In his own testimony as a key prosecution witness, Fleischer said he had mentioned Plame's name to two other reporters in July. One of them, John Dickerson, then working for *Time* magazine and now at CBS News, has denied Fleischer told him about Plame.

In both the Wen Ho Lee and Valerie Plame cases, the media generally saw the substance of what was involved—in Lee, the downloading of highly classified nuclear weapons data, and in Plame, the apparent disclosure of a covert officer's identity—as secondary to the idea that reporters were under pressure to disclose their sources.

Personally, the cases made me realize what it was actually like to be caught up in a serious leak investigation. While under oath, you must be extremely careful that your answers are true in every way, since the penalty for error is possible jail time for perjury.



I also learned the difference between such an inquiry when it involves a civil case, where private lawyers are involved, and a federal criminal investigation when the FBI and Justice Department are on the other side. In either situation, the pressure is enormous. Even when you believe you have done nothing wrong, contrary information or sworn testimony by other individuals might challenge what you have said, with significant legal consequences.

For those of us who live by asking rather than answering questions in relatively casual, non-legal situations, this is an entirely new and intimidating environment.

### **Reporters Are Citizens, Too**

In much of their coverage of the Lee and Plame cases, reporters focused on themselves and potential threats to them personally and to a free press, particularly when it involved conflict with the government. I had a different reaction. These events reinforced my view that journalists should act, and be treated, like every other citizen, and not take personal refuge behind the First Amendment as a way to defend newsgathering activities.

This view was premised in part on *Branzburg* but also on the 1971 Supreme Court decision in the *Pentagon Papers* case.<sup>5</sup> That decision involved an action by the United States to enjoin publication in the *New York Times* and the *Washington Post* of certain classified material in the Defense Department's Pentagon Papers report leaked by Daniel Ellsberg. The court famously ruled that the government had not met the "heavy burden of showing justification for the enforcement of such a [prior] restraint."

The ruling made it possible for the *New York Times* and *Washington Post* newspapers to publish the Pentagon Papers without risk of government pre-publication censorship or punishment. However, justices Potter Stewart and Byron White in their concurring opinions raised two issues that are pertinent today.

One has to do with the responsibility of government. "I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, 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," Stewart wrote.

Their other statement should be taken to heart by today's journalists. Stewart said Congress had passed "specific and appropriate criminal laws to protect government

property and preserve government secrets . . . and several of them are of very colorable relevance to the apparent circumstances of these cases.”

White was more specific. “That the Government mistakenly chose to proceed by injunction [to halt publication] does not mean that it could not successfully proceed in another way,” he wrote.

In short, both Stewart and White suggested that a newspaper, television station, or one of today’s websites could face criminal prosecution after publication for knowingly publishing classified information that harmed the United States or helped an enemy. Justice Thurgood Marshall also implied that such a prosecution might be feasible when he contrasted the injunctive relief sought by the government, which Congress had not authorized, with criminal prosecutions for leaks of certain classified information, which Congress had authorized. And even Justice William Douglas, joined by Justice Hugo Black, focused solely on the evil of prior restraint while also noting that the Pentagon Papers “contain data concerning the communications system of the United States, the publication of which is made a crime.”

The teaching of *Branzburg* and of several opinions in the *Pentagon Papers* case also inform my opposition to journalistic attempts to get Congress to pass a federal shield law. It is true that forty-nine states and the District of Columbia have passed shield laws with various protections for journalists. Most criminal and civil cases go through state courts and at that level serve the purpose of preventing prosecutors or lawyers from automatically subpoenaing reporters who have covered events, talked to witnesses, alleged perpetrators, gathered records, and done work that those involved in such cases otherwise would have to do on their own.

But states do not generate the same sort of national security and confidential-source criminal issues as those at the center of recent contests between the media and the Justice Department.

The late, great journalist and First Amendment expert Anthony Lewis explained in 2007 during a panel titled “Are Journalists Privileged?” why “a wise federal shield law is difficult to draft.” During that panel at the Benjamin Cardozo School of Law, he cited as one “inescapable problem” the defining of “who is a journalist?”

While those in the profession focus on differentiating between the hundreds of thousands who publish news, commentary, and photographs, I have kept focus on how Congress in its attempts to fashion such a law has used different and much more dangerous standards.



In past shield laws that have actually been passed by House and Senate committees, the legislators have refused coverage of any person who is an “agent of a foreign power” or whose employer is a foreign government—language that would remove coverage to journalists from the BBC and Agence France-Presse as well as Al Jazeera, which was obviously the target at that time.

Other non-covered journalists were those “reasonably likely” to be working or associated with groups on the State Department’s list of foreign terrorist organizations, the Treasury’s Specially Designated Global Terrorist list, or anyone “attempting the crime of providing material support to” or “aiding, abetting or conspiring in illegal activity with a person or organization” on any terrorist list.<sup>6</sup>

Think if such a shield law had been proposed in the 1950s, when Congress would have excluded from its covered journalists anyone associated with the Communist Party or liberal groups designated as fellow travelers. In the 1960s and the 1970s, it probably would have excluded those who associated with anti-Vietnam War groups or radical civil rights organizations.

Who would be added to such a list by a future Congress?

Then there is the practice of Congress to add things to bills in order to get votes. One shield law that passed the House gave equal coverage to government classified information and to non-government trade secrets, health records, and consumer financial information, the latter group in order to get the support of Republican and conservative House members.

The media write about the danger of paid lobbyists seeking favors for their clients or industries. What about the lobbyists that the media has hired to get a shield law passed? Seen any stories about them?

Max Frankel, former executive editor of the *New York Times*, appearing at that same 2007 panel with Lewis, said, “The law is especially political and there is no [shield] law that we could write to address this issue, especially when you wave national security in front of the judges.”<sup>7</sup>

He added, “At certain moments, if the country is panicked with fear, it may be willing to put a reporter or two in jail. So be it. The contest must go on. It is a political contest for which . . . the law has no answer.”<sup>8</sup>

I’ll go along with Frankel when he said, “I trust the politics of this game to decide the issue in each generation of journalists.”<sup>9</sup>

Journalists are always quick to defend their interests and prerogatives in this game, but they tend to be less interested in the First Amendment when non-journalists, like lobbyists, invoke it in analogous contexts.

On August 4, 2005, the Bush administration indicted two former employees of the American Israel Public Affairs Committee (AIPAC) for alleged violations of the 1917 Espionage Act by illegally conspiring to receive and transmit classified information to journalists and foreign officials.

Steven J. Rosen and Keith Weissman, both long-time lobbyists for the pro-Israel lobbying group, were the first civilians to be indicted for obtaining allegedly classified information solely through conversations with high-ranking government officials and not through documents or other tangible items.

The case drew the attention of some First Amendment lawyers because, as was noted in arguments before US District Judge T. S. Ellis III, what the two lobbyists were doing—in receiving and disseminating information—was what journalists, academics, and think-tank experts were doing every day.

Abbe Lowell defended Rosen. He argued that his client was exercising his First Amendment rights in discussing such information with government officials, journalists, members of Congress, and Hill employees. Floyd Abrams, the New York attorney who handled many high-profile First Amendment cases, told me at that time that the AIPAC case was “the single most dangerous case for free speech and free press.”<sup>10</sup>

Perhaps because lobbyists rather than journalists were directly charged, much of the mainstream print and television media paid less attention—and gave minimal coverage—to the First Amendment threat in the AIPAC case. Lowell and Washington attorneys John Nassikas and Baruch Weiss, who represented Weissman, used almost four years’ worth of preliminary motions to develop in court the purely arbitrary nature of the government’s classification system and promised to show it publicly through the testimony at trial from more than a dozen high-ranking past and then present officials from the Bush administration, including former secretary of state Condoleezza Rice.

Rulings in the AIPAC case benefited not only Rosen and Weissman but also the press, since the same approach could provide a defense for any journalist caught up in the same situation as the AIPAC lobbyists. Faced with those Ellis decisions, the Obama Justice Department decided on May 1, 2009, to drop the case the Bush administration had started.



There is an old legal saying that “hard cases make bad law.” The AIPAC case may turn out to have been a hard case that has left a good legal precedent for lobbyists and journalists alike.

### **Manning and Snowden**

In the past, serious leaks of national security information were for the most part limited to single events or documents—except perhaps for the multi-volume Pentagon Papers which, though lengthy, concerned a single extended event. Today we have entered the era of publication of massive amounts of classified material thanks to leaks of gigantic, computer-stored, highly classified information.

It started in 2010, with the first computer-assisted, bulk leak by then Army Sgt. Bradley (now Chelsea) Manning. That was followed in 2013 by former National Security Agency (NSA) contractor Edward Snowden, who distributed thousands of documents to selected journalists.

The Manning material, turned over to Julian Assange’s Wikileaks, caused recognizable diplomatic problems for the United States and its allies because of publicly disclosed contents from some of 250,000 State Department cables published on Assange’s website. As for the classified NSA and other intelligence documents made public by various news organizations as a result of Snowden’s leaks, they led to intelligence targets changing their activities, diplomatic problems for the United States with some allies, and Congress putting some limits on future NSA electronic collection and distribution of materials.

Two results of the Manning and Snowden leaks need further exploration: the responsibility of journalists and their employers when it comes to making public huge amounts of classified information; and the oversensitive reaction of journalists when, as a result of such leaks, they become a focus of government investigations or even criticism from public officials.

As I have already said, we journalists have our own rules on what to publish or broadcast, at least when it’s one document or a handful of classified facts about a program or weapons system or even an intelligence operation. It is far from clear how journalists in general are up to sorting through thousands of classified documents and protecting information that reveals damaging secrets, although that is one of the characteristics of our free society.

Former attorney general Eric Holder faced the reality of this new situation and laid down a practical challenge to the media during an appearance at the National Press Club, February 17, 2015. “Simply because you have the ability to, because of a leaker

or a source of information that you have, you have the ability to expose that to the public, should you?" he asked.<sup>11</sup> "It is for you to decide. It is not for the government to decide."

The mainstream organizations that originally received material from Snowden—the *Washington Post* and *The Guardian*—indicated in their stories that they had contacted US and British government officials for comment before publishing documents and information. They also have said they withheld publication of some information because they recognized the damage it would cause.

Nonetheless, officials have said important intelligence operations were affected, without being too specific. For example, last September, Director of National Intelligence James Clapper told a group, "[Snowden has] done huge damage for our collection. Make no mistake about it."<sup>12</sup> He then alluded to the need to close down what he described as "the single most important source of force protection and warning for our people in Afghanistan" because of what had appeared publicly from Snowden's documents.

There is no simple solution to the continuing tension between journalists' search for information and the government's right to classify its true secrets, disclosure of which would actually harm national security.

I have always maintained that it is primarily up to the government to protect its secrets. Unless a reporter steals a document, whatever was leaked to him or her came from a government official or someone with access to that secret who has decided for whatever reason to make it public.

Therefore, the government's first responsibility is to control those with access to secrets. But as noted before, the main weakness in the system is that much too much is classified in the first instance. Once it is in the hands of a journalist, the government's only tool to prevent disclosure is persuasion. That's the way it should be.

Journalists, on the other hand, should realize their publication of classified information sets in motion a government process that could lead to a criminal investigation, not just of their sources but eventually of themselves. That prospect should be part of their thinking as they decide what to write for publication.

The media in recent years have claimed the Obama administration has moved beyond persuasion in its attempt to stifle leaks. "The administration's war on leaks and other efforts to control information are the most aggressive I've seen since the Nixon administration," former *Washington Post* executive editor Leonard Downie Jr. wrote in



his October 2013 report, “Leak investigations and surveillance in post-9/11 America,” written for the Committee to Protect Journalists.<sup>13</sup>

While journalists have widely publicized their concerns about being targeted, they all but ignored the Obama administration’s motivation. Faced with the unprecedented Manning and Snowden leaks that endangered ongoing operations, and needing to deter others, the Justice Department decided to make a concerted effort to follow up when CIA, the State Department, or Pentagon filed reports of illegal releases of classified information.

In the past, most such filings—hundreds every year—did not lead to full-scale FBI investigations. Between 2010 and 2013, however, there were eight publicized leak investigations, far more than in any prior administration.

Two in particular ignited media concerns. One involved Fox News’ James Rosen, whose June 11, 2009, “scoop” on Fox News’ website disclosed newly received intelligence about a planned North Korean nuclear test, a story which intelligence officials believed alerted the North Koreans that the United States had penetrated their leadership circle.

The other was a sweeping up of phone records of Associated Press reporters and editors, one year after a May 7, 2012, AP story. The story had described a terrorist bomb plot being foiled, but its publication forced the CIA to end an ongoing secret operation that had provided valuable intelligence against al-Qaeda in the Arabian Peninsula and promised more.

Both stories were based on unknown government sources leaking highly classified information. The State Department requested an investigation of the North Korean leak; the CIA made a similar request of the Yemeni bomb plot. Given the atmosphere, the FBI went full throttle on both.

“The focus you have to understand is not going after a reporter per se, it is going about trying to find out . . . who is the leaker, how do you prove that up?” Holder explained during a Q&A session at the Reporters Committee for Freedom of the Press on October 14, 2015.<sup>14</sup>

Holder told the reporters that night that the Justice Department takes into account the uncomfortable position this creates for them and described the special rules that apply to subpoenas directed at them or their records.

“There is a sensitivity on the part of people in government,” Holder said, “but at the same time there has to be a sensitivity on the part of the media to understand

this part of the job that often we have to do in order to protect the national security.”<sup>15</sup>

The leaks in the Rosen and AP cases did not come from whistleblowers exposing government misdeeds. They came from individuals who had broken the law when they disclosed sensitive information that when published harmed national security.

It should be pointed out that in both cases, their critical impact on intelligence-gathering was not readily apparent outside the intelligence community.

In the Rosen case, the problem was less the substance of the leaked information than it was that the story alerted the North Koreans that the United States had apparently penetrated their leadership circle. Another internal security concern at State was how quickly the material had been leaked from someone with Top Secret/Special Compartmented Information clearance among the ninety-six who had had access to this particular report.

In the AP’s Yemeni terrorist bomb plot story, it was not only that a multinational intelligence operation had to be halted and an infiltrated agent withdrawn from Yemen, but an opportunity was lost to locate and perhaps kill a wanted Yemeni-based, jihadist bomb-maker.

It also should be made clear that in both cases journalist records obtained—which were the focus of most publicity—actually helped lead quickly to finding the leakers. In the end, State Department consultant Stephen Jin-Woo Kim in the Rosen case and former FBI bomb technician Donald John Sachtleben in the AP case both entered guilty pleas rather than face trials.

Meanwhile, how much real harm to journalism did those steps really cause, despite the uproar?

One of the prime journalists’ complaints in the Rosen case was that a November 9, 2009, warrant to search Kim’s e-mail accounts referred to Rosen as a co-conspirator. Holder, in talking to the Reporters Committee, said there was no thought of indicting Rosen and that the use of the co-conspirator language was to meet a statutory requirement.

When First Amendment advocates say Rosen was “falsely” characterized as a co-conspirator, they do not understand the law. When others claim this investigation is “intimidating a growing number of government sources,” they don’t understand history.



At law school, I studied criminal procedure and how to write a warrant. Being listed as a co-conspirator does not automatically mean the person identified that way is facing indictment. It does mean that person may have participated actively or passively in the planning or discussion about a potential crime.

I remember one day at the *Washington Post* when a group of us discussed who was to talk to whom in government in order to find out the details of a still-classified National Intelligence Estimate about Iraq. As the meeting broke up—it was a time when I was attending law school—I whimsically told my colleagues that after the first one of us made a phone call, we all could be charged as co-conspirators in attempting to violate the Espionage Act.

All reporters covering national security should recognize, as we seek classified information from those with access to it, that we could be accused of conspiring to break the law. Journalists ought to think twice about encouraging a source to provide classified information with promises of any kind of reward; that could cross a legal line.

The warrant for Kim's e-mails turned up some e-mails to and from Rosen, including one showing that the reporter had set up aliases and that Rosen sought intelligence about North Korea. Kim's phone records, including his State Department phone, also showed multiple calls to and from Rosen. State's own security records showed Rosen's and Kim's comings and goings from State's own building and allowed investigators to put together their movements. Rosen, personally, was not subject to surveillance, as some had claimed.

These records, legitimately obtained, led eventually to Kim and allowed prosecutors to build the legal case and finally gain the guilty plea.

In the AP case, nearly twelve months of FBI investigation followed the initially published story, but despite 550 interviews and the review of tens of thousands of documents, the leaker of the Yemen operation had not been found.

Justice Department regulations called for exhausting other alternatives before pursuing the press. After nearly a year of unsuccessful investigation, the department decided to look to the media for the leaker. In April 2013, Deputy Attorney General James Cole signed off on the FBI subpoenaing the telephone company toll records for twenty AP phone lines in different cities. As in normal practice, the government told the phone companies not to inform AP of the subpoenas.

Within days of acquiring the phone records, investigators were able to link one AP reporter's toll records to the source and construct the case against the leaker. Shortly

thereafter, on May 13, 2013, the Justice Department informed the AP by letter of its seizure of the phone records, but did not indicate the specific reason, though speculation was that it concerned the leak investigation.

AP sharply protested the taking of a widespread number of its phone records and demanded their return and destruction of all copies, claiming in a letter to Holder they potentially revealed “communications with confidential sources across all of the newsgathering activities undertaken by the AP during a two-month period.”<sup>16</sup>

Of course similar subpoenas to individuals caught up in other cases also collect information excess to the focus of those investigations, as do authorized wiretaps. That’s how such things work.

Just five months after making that first link through the AP phone records, the Justice Department announced that Sachtleben was the leaker and was prepared to plead guilty to charges.

For months thereafter, the AP complained about the widespread nature of the collected toll records and the lack of advance notice so it could fight the subpoena in court.

At the Reporters Committee session in 2015, Holder agreed that the FBI request for AP toll records was perhaps wider than needed. He cautioned, however, that in cases such as finding a leaker it was probable there would be no prior notice since there was a possibility it could lead to giving a heads-up to the source. In such cases, the normal procedure is to present reasons for a so-called gag order to the judge and have him or her approve it as a part of the subpoena to a phone company.

### **Waving the First Amendment**

While journalists as a group are keen to investigate the slightest flaw in any individual involved in public life, they tend to be thin-skinned when it comes to any criticism of them. Just as targets of press inquiries often quickly threaten lawsuits when unfavorable stories are about to be published, some journalists are just as fast to wave the First Amendment and press freedom at the first sign a government official criticizes their coverage.

In May 2013, in the midst of the Rosen and AP cases, the White House Correspondents’ Association board issued a statement saying, “Reporters should never be threatened with prosecution for the simple act of doing their jobs.”<sup>17</sup> While admitting that “we do not know all of the facts in these cases,” the board added: “Our



country was founded on the principle of freedom of the press and nothing is more sacred to our profession.”

In a column at that time, I wrote that many journalists believe that last phrase should read “nothing is more sacred *than our profession.*”

Press freedom requires press responsibility.

A case worth studying in this regard is that of the former CIA case officer Jeffrey Sterling, who on January 26, 2015, was found guilty on nine counts of unauthorized disclosure of classified material and one count of obstruction of justice.<sup>18</sup> Sentenced to forty-two months in jail, Sterling has appealed the decision but since June 2015 has been serving time in a prison outside Denver.

The information involved a CIA covert operation, initiated in 1997, to slow down Iran’s nuclear program by using a former Russian nuclear engineer to provide misleading data to Tehran’s scientists pursuing a nuclear bomb. The engineer did pass flawed Russian plans for a nuclear triggering device to the Iranians.

In November 1998, Sterling became the case officer handling the Russian engineer as the covert plan was put into operation. In May 2000, the same month that the flawed plans were delivered to an Iranian mission in Vienna, Sterling was taken off the operation and given less important jobs. CIA officials claimed the Russian engineer had complained about him. Unhappy, Sterling in August 2000 unsuccessfully filed a series of complaints alleging employment-related racial discrimination.

In March 2001, Sterling was placed on administrative leave and on January 31, 2002, his contract with the CIA was terminated. In March 2002, an article in the *New York Times* by James Risen was published about Sterling’s discrimination suit headlined, “Fired by C.I.A., He Says Agency Practiced Bias.”

As the government alleged during the Sterling trial, there was a continuing relationship between the reporter and the former CIA case officer after that story appeared.

It came to a head initially on April 30, 2003, when at the White House, then national security adviser Condoleezza Rice described to then *Times* Washington bureau chief Jill Abramson and Risen the damage that would be done if a proposed article by Risen about the CIA operation against Iran’s nuclear program using the Russian engineer was published.

Rice made two arguments. She said that Risen's information was wrong in saying the Russian had warned the Iranians that his data was flawed, and that the CIA considered the operation still ongoing. In early May, Abramson told the White House the *Times* would not publish Risen's article.

In January 2006, however, Risen's book *State of War* was published.<sup>19</sup> It included a description of the CIA's Iran covert nuclear operation as a botched operation that ended up helping Iran "accelerate its weapons development." Publicly exposed in the book, the CIA had to close down the operation.

In a statement to the press at that time, the CIA warned that the book contained "serious inaccuracies" and that often anonymous sources were "unreliable."

After Sterling's arrest on January 6, 2011, most of the published stories about his case primarily dealt with Risen's fight to protect his source or sources for the Iran story by avoiding having to testify, first before the grand jury and then at Sterling's trial. Risen's argument, like mine, was that he would not give up the name or names of his confidential source or sources.

In Sterling's 2011 indictment, prosecutors included language saying Sterling provided to "Author A," meaning Risen, some "false and misleading information about Classified Program No. 1," referring to the Iran covert operation.

The indictment went on to say the false information was given "in order to induce Author A to publish a newspaper article about Classified Program No. 1."

But specifics of the false information were never disclosed publicly until the trial, which took place in January 2015 in Federal District Court in Alexandria, Virginia. Even then the mainstream media barely covered that element of the trial. Instead most trial stories, even after Sterling was found guilty on all counts, primarily focused on the fact that Risen was able to give minimal testimony and not reveal any sources.

As a result, Risen has emerged as the latest journalistic hero for protecting his source. But many unanswered questions remain about the accuracy of his version of the Iran covert operation.

What about all that testimony under oath by CIA officers that indicated Risen had published inaccurate information? What about his claim, still widely publicized, that this was a botched CIA activity that may have helped, rather than hurt, Iran's search for a nuclear weapon?



What should the relationship be between the reporter and a confidential source when the latter has provided highly classified information if part of what he has delivered turns out to have been wrong and the source may have known it when he gave it to the reporter?

I would argue that at that point any confidential relationship has been broken. Recall that the indictment language said that the false information was given thinking it would “induce” publication of an article. Identifying that source publicly should act as a deterrent to those who try to use confidentiality pledges from reporters to pass on deliberate misinformation.

What is the responsibility today for Risen and the *New York Times* to correct the record when at trial individuals under oath claimed there were basic flaws in the details publicized in the Iran covert operation story?

On September 26, 2000, the *Times* published a 1,500-word article that candidly admitted there were “flaws” in the way it covered Los Alamos scientist Wen Ho Lee and allegations that he may have been responsible for “the most damaging espionage of the post-cold war era.” That article came after the *Times* did a thorough investigation of its coverage of that story.

Perhaps it is time for a similar look at the stories about “Operation Merlin,” Risen’s name for the CIA’s now-ended covert attempt to disrupt the Iran nuclear program.

### **A Free Press Must Also Be Responsible**

Every news organization creates its own standards. It is truly a free press, made freer than ever by the Internet.

The Founding Fathers approved the First Amendment at a time when anyone with access to a printing press could put out a one-page handbill and pass it around to people walking down the street.

Today, anyone with a computer can reach tens of thousands or even millions with a tweet of 140 characters. With that same computer someone could also download thousands of pages of highly classified US secrets and pass them around to whomever he, she, or they want to see them. It’s been done.

Despite claims of a closed government, and a crackdown on leaks, classified information continues to be published in one forum or another.

The hope for democracy is not just in responsible leadership but also in an informed public made knowledgeable by responsible media.

When questions about a free press come up, I always return to the Founding Fathers—not to the First Amendment, but to the Constitutional Convention where the delegates expressed their concerns about the press.

Shortly after they convened their meetings in Philadelphia, the Founding Fathers voted to bar the press from attending any sessions, which eventually ran almost four months, from May 27 to September 17, 1787. They also kept their windows closed and even drew the shades. Those actions were taken to prevent the “licentious publication of their proceedings,” James Madison would later say, adding, “no constitution would ever have been adopted by the convention if the debates had been public.”

It was a good first example of the contest that existed then, and remains today, between government and journalists. The executive branch of government must maintain secrecy for many purposes, including some aspects of national security. It must also presumptively act in public so that citizens can monitor and check its actions. The executive branch alone cannot be trusted to get this balance right. The Congress has an oversight role and so does the judiciary.

It is the job of journalists to monitor the balance and to keep the people informed, even, sometimes, about information the government had classified.

But we journalists are far from perfect watchdogs when it comes to ourselves. We are human beings who—like the people we cover—are embedded in purposeful, competitive, self-regarding institutions, most of which seek readers and audiences to make a profit.

Journalists sometimes make mistakes or act with mixed motives. As a profession, we would better perform the job of dealing with government secrets if we were more sensitive to the implications of what we were doing, not just for ourselves but for others.

Like it or not, the media remain a Fourth Branch of government and as such should recognize its own responsibility for what occurs after it discloses secrets, the bad as well as the good.

It was Walter Lippmann who back in the 1920s wrote that “news and truth are not the same thing and must be clearly distinguished.”<sup>20</sup> The function of news is to signalize an



event; the function of truth is to bring to light the hidden facts, to set them in relation with each other and make a picture of reality.”

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## Jean Perkins Foundation Working Group on National Security, Technology, and Law

The Working Group on National Security, Technology, and Law brings together national and international specialists with broad interdisciplinary expertise to analyze how technology affects national security and national security law and how governments can use that technology to defend themselves, consistent with constitutional values and the rule of law.

The group focuses on a broad range of interests, from surveillance to counterterrorism to the dramatic impact that rapid technological change—digitalization, computerization, miniaturization, and automaticity—are having on national security and national security law. Topics include cybersecurity, the rise of drones and autonomous weapons systems, and the need for—and dangers of—state surveillance. The working group’s output, which includes the Aegis Paper Series, is also published on the *Lawfare* blog channel, “Aegis: Security Policy in Depth,” in partnership with the Hoover Institution.

Jack Goldsmith and Benjamin Wittes are the cochairs of the National Security, Technology, and Law Working Group.

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