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EXAMINING DOJ'S INVESTIGATION OF JOURNALISTS WHO PUBLISH CLASSIFIED INFORMATION: LESSONS FROM THE JACK ANDERSON CASE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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EXAMINING DOJ'S INVESTIGATION OF JOURNALISTS WHO PUBLISH CLASSIFIED INFORMATION: LESSONS FROM THE JACK ANDERSON CASE

TUESDAY, JUNE 6, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:30 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Grassley, Kyl, Leahy, and Feingold.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. It is 9:30, so the Judiciary Committee will proceed with this hearing on the subject of examining the efforts by the Department of Justice to control leaks by newspapers involving classified information.

We know that leaks are a fact of life in Washington, D.C., and really virtually everywhere. There is an old adage that the ship of state leaks at the top, and we saw recently that it was true with the President of the United States making a disclosure. There are very important national security interests involved in maintaining the sanctity of classified information. At the same time, there is a tradition of ferreting out governmental wrongdoing—waste, corruption, inefficiency—by disclosures to the press, which function as the guardians of the public in many, many cases. Leaks are made for a variety of reasons, and while they have a very important social purpose, they also have the potential for harmful, deleterious effects on national security.

This hearing will be looking into one aspect of expanding Executive authority, which we have seen in recent times with the warrantless national surveillance, with the signing statements where the President chooses which parts of legislation he likes and which parts he does not like, with the search and seizure on Capitol Hill, and a growing concern that the Congress of the United States has not exercised its constitutional responsibilities on oversight.

There have been a series of activities which give cause for concern. In April of this year, a CIA employee was fired for allegedly disclosing the existence of secret CIA facilities in Eastern Europe. A Washington Post reporter conducted an expose based on that in-

formation and won a Pulitzer Prize. We have seen an investigation into the disclosure of the identity of CIA agent Valerie Plame, leading to the jailing of New York Times reporter Judith Miller for some 85 days.

In response, Senator Lugar introduced legislation, which was modified by the Committee and introduced again, which would grant protection to newspaper reporters on a shield. The proposed legislation is very carefully crafted to provide an exception if national security is involved. But it has to be genuine national security. The Valerie Plame investigation started off with a national security purpose but shifted at one point to an investigation as to whether there had been perjury or obstruction of justice before a grand jury. And while those are serious charges, they do not rise to the level of a national security interest which would warrant incarcerating a reporter. That ought to be in our society the very, very last report. So the overtone of that statute will be in issue as well.

There has recently been the suggestion that newspapers and newspaper reporters can be prosecuted under a criminal statute which prohibits the disclosure of classified information. Highly doubtful in my mind that that was ever the intent of Congress, but those are the words which can be construed in a way to warrant such prosecution, different from another statute which provides for prosecution in the event that there is an assist to an enemy of the United States.

In the famous Pentagon Papers case, *United States* v. *New York Times*, in a dictum Justice White said, concurred in by Justice Stewart, that the statute would not provide for injunctive relief to stop a newspaper from publishing material, but would provide the basis for a criminal prosecution against a newspaper.

So these are very, very serious issues which we are looking at today, especially in the context of expanding Executive power in many, many directions.

We have as our first witness today Matthew Friedrich, who is the Chief of Staff of the Criminal Division, Principal Deputy Assistant Attorney General. Mr. Friedrich received his law degree from the University of Texas, bachelor's from the University of Virginia. He clerked with Judge Royal Ferguson in the United States District Court for the Western District of Texas. In 1995, he joined the Tax Division of the Department of Justice. In 1998, he returned to Texas as an Assistant U.S. Attorney. In 2001, he became an Assistant U.S. Attorney in the Eastern District of Virginia, and now he holds the position, as noted, of Principal Deputy Assistant Attorney General.

Thank you for coming in today, Mr. Friedrich. I would appreciate it if you would stand to take the oath. Do you solemnly swear that the testimony you will give before the Judiciary Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. FRIEDRICH. I do.

Chairman SPECTER. Thank you. You may be seated, and we look forward to your testimony.

STATEMENT OF MATTHEW W. FRIEDRICH, CHIEF OF STAFF AND PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. FRIEDRICH. Thank you, Mr. Chairman.

Mr. Chairman and members of the Committee, thank you for the opportunity to discuss with you today the difficult issue of unauthorized disclosures of classified information, sometimes referred to as "leaks." I intend to explain the position of the Department of Justice with respect to the scope of the relevant statutes as they relate to the press and the willful dissemination of classified information. In doing so, I cannot comment on any pending case or investigation.

In response to a recent series of leaks of classified information, President Bush has stated that such leaks have damaged our National security, hurt our ability to pursue terrorists, and put our citizens at risk. Porter Goss, then-Director of the Central Intelligence Agency, stated in February of this year that leaks have alerted our enemies to intelligence-collection technologies and operational tactics and "cost America hundreds of millions of dollars" to repair the damage caused by leaks. The WMD Commission made similar findings in its report. Members of Congress in both the Senate and the House have repeatedly acknowledged the damage caused by leaks, particularly in this post-September 11th environment.

The Department of Justice is committed to investigating and prosecuting leaks of classified information, and Congress has given the Department the statutory tools to do so. Several statutes prohibit the unauthorized disclosure of certain categories of classified information, the broadest of which is Section 793 of Title 18, which prohibits the disclosure of information "relating to national defense." Also, Section 798 of Title 18 prohibits the unauthorized disclosure of information relating to communications intelligence activities.

On May 21, 2006, Attorney General Gonzales was asked about the possibility of prosecuting members of the press for publishing classified information, and he stated, in part, as follows: "There are some statutes on the books which, if you read the language carefully, would seem to indicate that that is a possibility." There has been considerable attention paid to the Attorney General's remarks. It is critical to note, however, that the Attorney General is not the first one to recognize the possibility that reporters are not immune from potential prosecution under these statutes. Many judges and commentators have reached the same conclusion. For example, as I believe you pointed out, Mr. Chairman, in the Pentagon Papers case, there may be such a precedent there. In that case, obviously, the United States sought to restrain the New York Times from publishing classified documents relating to the Vietnam War.

While the Supreme Court did not decide the question of whether the First Amendment immunizes the press from prosecution for publishing national defense information given to them by a leaker, five concurring Justices questioned the existence of such blanket immunity. In his concurring opinion, Justice White stated: "[F]rom

the face of [the statute] and from the context of the Act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under 793(e) if they communicate or withhold materials covered by that section."

Further, the Court of Appeals for the Fourth Circuit has affirmed that the First Amendment does not prevent prosecutions under 793 for unauthorized disclosures of classified information and did so over the objection of various news organizations that appeared in the case as amici to support the defendant's First Amendment arguments. Likewise, it is the conclusion of legal commentators with respect to Section 798 that reporters are not exempt from the reach of this statute if the elements of the statute are otherwise met.

I would emphasize, however, that there is more to consider here beyond the mere question of the reach of the laws as written. The Department recognizes that freedom of the press is both vital to our Nation and protected by the First Amendment.

The Department has never in its history prosecuted a member of the press under Section 793, 798, or other sections of the Espionage Act of 1917 for the publication of classified information, even while recognizing that such a prosecution could be possible under the law.

As a policy matter, the Department has taken significant steps to protect, as much as possible, the role of the press in our society. This policy is embodied in Section 50.10 of Title 28 of the Code of Federal Regulations, which requires that the Attorney General approve not only prosecutions of members of the press but also investigative steps aimed at the press, even in cases where the press is not itself the target of the investigation. This policy—voluntarily adopted by the Department—ensures that any decision to proceed against the press in a criminal proceeding is made at the very highest levels of the Department.

In a press conference last week, the Attorney General stated that the Department's "primary focus" is on the leakers of classified information, as opposed to the press. The strong preference of the Department is to work with the press not to run stories containing classified information, as opposed to other alternatives. The Attorney General has made consistently clear that he believes that our country's national security interests and First Amendment interests are not mutually exclusive and can both be accommodated.

I appreciate very much the opportunity to appear before you and would be happy to answer your questions.

[The prepared state of Mr. Friedrich appears as a submission for the record.]

Chairman SPECTER. We have been joined by Senator Grassley. Senator Grassley, would you care to make an opening statement?

Senator GRASSLEY. I think I will put the statement in the record. It is a very short statement. I just think I will put it in the record.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Chairman SPECTER. Mr. Friedrich, you say—I believe your words—that it is undeniable that the Department of Justice has the authority to prosecute a newspaper and a reporter for disclosure of classified information?

Mr. FRIEDRICH. I believe I was quoting one of the concurring opinions in the Pentagon Papers in using that word.

Chairman SPECTER. Well, aside from the concurring opinion of Justice White, joined in by Justice Stewart, is it the position of the Department of Justice today that Section 793 would warrant—would authorize the prosecution of a newspaper and a reporter for publishing classified information?

Mr. FRIEDRICH. I think the answer to that, Senator, is that the Department has consistently interpreted that statute so as to read it as to apply to anyone to whom the elements of the statute—

Chairman SPECTER. You are giving me a yes answer?

Mr. FRIEDRICH. I am, sir.

Chairman SPECTER. And is it the position of the Department of Justice that under Section 798 a newspaper and a reporter can be prosecuted criminally for the disclosure of classified information?

Mr. FRIEDRICH. I would provide the same answer there, Senator.

Chairman SPECTER. The answer is yes?

Mr. FRIEDRICH. Yes.

Chairman SPECTER. So you are saying that the New York Times and its reporter, James Risen, are subject to prosecution for the disclosures last December 17th about the surveillance program without warrants?

Mr. FRIEDRICH. Obviously, Senator, I can't comment as to any particular case or any specific matter. As a general policy proposition, I think the Department has consistently taken the position with respect to those particular statutes that it does not—they do not exempt a class of professionals, any class of professionals, including reporters, from their reach. I think it is important at the same time to bear in mind what the Attorney General said recently, which is that our primary focus is on the leakers themselves, as opposed to members of the media.

Chairman SPECTER. I understood what you said about primary focus, but primary focus leaves latitude for a secondary focus.

Mr. FRIEDRICH. It would.

Chairman SPECTER. Has the Department of Justice considered the prosecution of any newspaper or any newspaper reporter for the disclosure of classified information?

Mr. FRIEDRICH. Again, Senator, you know, I don't think it would be appropriate for me to comment as to whether or not—

Chairman SPECTER. I am not asking you about a specific case. I did and you declined to answer, and I might have pressed it but I am not. But I am asking you whether there is any case, without specifying the case, where the Department of Justice has considered prosecuting a newspaper or a reporter for the disclosure of classified information.

Mr. FRIEDRICH. With respect, Senator, I think that I have to decline to answer that question as well. I don't think it would be appropriate for me to give an indication one way or another, and I hope people don't read anything into my answer one way or another.

Chairman SPECTER. Well, I disagree with you, Mr. Friedrich. I understand your point in not talking about a specific case. I do not agree with it, but I understand it. But I do not even understand your point in declining to answer whether the Department of Jus-

tice has ever considered it. The answer to that would lead to some other questions as to—go ahead. I see you want to speak.

Mr. FRIEDRICH. Just to clarify, I heard you initially ask me is it being considered now. I heard you a moment ago ask has it ever been considered. My understanding is there are historical examples. I think some of the later panelists may be able to comment more cogently than I can about historical examples in which that possibility—

Chairman SPECTER. I am not interested in history this morning. I am interested in current events. I am interested to know whether this Department of Justice, say the Ashcroft Department or the Gonzales Department, has ever considered the prosecution of a newspaper or a reporter for disclosure of classified information.

Mr. FRIEDRICH. With respect, Senator, I believe I have to decline to answer that question.

Chairman SPECTER. The Lugar bill, which has been significantly modified in Committee, provides for a reporter's shield but has an exception if there is a matter of national security, and it essentially calls upon the court to undertake a weighing of the public interest in the disclosure of the information to ferret out wrongdoing or the press' traditionally historic role in disclosing wrongdoing contrasted with the national security interest involved.

Do you think that that is an appropriate standard for weighing newspaper privilege contrasted with the interest of national security?

Mr. FRIEDRICH. As to the general matter of whether such a privilege should be codified, I believe that the Department has consistently taken the position that such legislation is not needed and that the procedures and policies that the Department has in place with respect to the circumstances in which compulsory process should be issued against reporters are themselves a sufficient safeguard.

Chairman SPECTER. Well, the red light went on, and I do not usually transgress, but with Senator Grassley's acquiescence, I am going to ask an important followup question. Do I have your consent, Senator?

Senator GRASSLEY. You do.

Chairman SPECTER. I appreciate that you do not think legislation is necessary, and I am not surprised. The administration does not think legislation is necessary to deal with unauthorized surveillance. The administration as yet has not provided an answer to this Committee on legislation, which has been pending for weeks, which would give jurisdiction of that program to the Foreign Intelligence Surveillance Court to determine constitutionality. Every time the Congress asserts some oversight authority, the administration pulls back.

When there was a pressure applied to have the Intelligence Committees informed about the warrantless searches, the administration declined, even though the National Security Act of 1947 mandates it for committees.

When this Committee, when the Judiciary Committee became active, the administration relented and conceded to allow a Subcommittee of the Intelligence Committee, seven Senators, to know. And the House at first resisted a Subcommittee and then finally

acquiesced on an 11-person subcommittee, and then only in the face of the Hayden nomination was the administration dragged kicking and screaming into complying with the National Security Act of 1947 to inform the Intelligence Committees.

So I am not surprised that the administration does not think that legislation is necessary. But my question was not whether the administration thought legislation was necessary. My question is whether you think that if there is legislation, it is appropriate to have a balancing test where a court would have the authority to weigh the public policy importance of the national security interest contrasted with the public policy importance of the disclosure.

Mr. FRIEDRICH. Senator, I think the best way to answer that is in the context—I know that Deputy Attorney General Comey at the time provided a statement with respect to the media shield legislation. This panel also heard from U.S. Attorney Chuck Rosenberg, who discussed in detail the Department's position at the time with respect to media shield.

I think the overall objection would be that the media shield legislation would shift from the executive branch to the courts the decision as to whether a subpoena is needed, what the competing interests are, how fast it needs to be issued, whether or not it is essential to the case. We feel that those—in terms of the Department's exercise of its responsibility in this area, I think as to confidential source subpoenas, something like only 13 have been issued in the last 15 years. That would be on the average something of one a year or less. I think the historical record would be that the Department has responsibly exercised its authority in this area and that, you know, there are going to be occasions when we need to move quickly.

I accept that the balance you pose is an important one. I think that the—I would like to think the record of the Department is that it has exercised its judgment in this area responsibly. And let's not forget, I mean, there are occasions when it may be important to move very quickly in terms of the issuance of compulsory process. I think that the example that Deputy Attorney General Comey gave—

Chairman SPECTER. Just a second.

Mr. FRIEDRICH. I am sorry, sir.

Chairman SPECTER. Go ahead.

Mr. FRIEDRICH. I think, sir, the example that Deputy Attorney General Comey gave in a prepared statement that he rendered was an occasion that came up on the afternoon of September 11th when the U.S. Attorney's Office in San Francisco wanted to issue a subpoena to a news organization which had received information, I understand, from some type of source indicating that bad things would happen on that day. I do not have any factual knowledge of that situation, but that was the example that Deputy Attorney General Comey gave, and I think it certainly highlights the fact that there may be a need to move quickly, and this legislation I think might compromise that.

Chairman SPECTER. Well, I will pick up on your point about shifting the decision from the executive branch to the judicial branch, which is exactly what I think our Constitution requires.

Senator Leahy, would you mind yielding to Senator Grassley? I intruded on his time, and he has a 10 o'clock—

Senator LEAHY. No, I have no objection. I came in late as it was.

Chairman SPECTER. Senator Grassley?

Senator GRASSLEY. Thank you, Senator Leahy.

When Director Mueller was before this Committee just a few weeks ago, I asked him about the Bureau's attempt to obtain Jack Anderson's papers by convincing the 79-year-old widow to sign a consent form that she says she did not fully understand. I wanted to know at that time whether that was an appropriate investigative technique, but Director Mueller said at that time that he did not know enough about the circumstances to answer my questions. In preparing to testify here today, I would hope that you have taken some time to learn the details of what the agents did in this case and why they did it. So I ask you, Did the agents who went back and contacted Olivia Anderson without her family's permission act appropriately?

Mr. FRIEDRICH. Senator Grassley, I think that that is a question that I am not going to be able to shed light on, but I want to carefully explain the reasons why I cannot. First of all, there is a pending trial in the Eastern District of Virginia called the Rosen and Weissman case, and in that case, the defense in that case has filed a motion to dismiss the indictment for prosecutorial misconduct based upon the actions taken in the Anderson matter. My understanding is that the district judge denied that particular motion but that that case remains pending. And since it is a part of pending litigation or relevant to a part of pending litigation, I don't think that it is something that I can comment on.

My understanding, however, Senator, is that the Bureau is following up on the questions you asked and that they intend to submit some type of response to you. And I don't want to interpose myself in the middle of that.

Senator GRASSLEY. And your view is that the circumstances in the Anderson questioning could influence that case, that other case?

Mr. FRIEDRICH. That was the position—yes, sir. The position that the defense has taken is that there is a factual link between the action in the Anderson matter and the pending investigation that has resulted in a trial in the Eastern District of Virginia. And since that is the circumstance, I simply just can't comment on that matter.

Senator GRASSLEY. According to Kevin Anderson, he informed the FBI that he was acting as his mother's attorney, and he authorized the first meeting between the mother and the FBI. However, he says he did not authorize and was unaware of the second meeting where the FBI got her to sign a consent form. Can you explain the Justice Department's policy on contacting a witness who was known to be represented by counsel? And assuming that the Anderson family is correct with what happened, did the actions of the agency in this case violate that policy?

Mr. FRIEDRICH. Certainly, Senator, speaking generically—as a general matter—there are very specific policies that the Department has with respect to contact with represented parties. There are also bar rules that apply as well. I would say, you know, the

general rule as to contact with represented parties is that, as an attorney, you are not supposed to do it. There are exceptions to that under certain circumstances, but certainly as to Department lawyers, those policies exist.

Senator GRASSLEY. Well, then, did the actions of the agents in this case violate that policy?

Mr. FRIEDRICH. Again, Senator Grassley, with respect to this specific factual circumstances, I don't have a specific comment on that for the reasons that I had mentioned earlier. I will tell you as a general matter there are some distinctions between the contact with represented parties rules as they apply to Department lawyers versus FBI agents. There are some differences between the ways in which those standards apply. Lawyers are bound by certain sources of law and policies; whereas, agents, depending on the circumstance, may not be bound by the same authorities.

Senator GRASSLEY. Well, then, let's go to the issue of classified information. There is some disagreement whether these papers contained classified information, and I would think the family would know more about that than the FBI.

The family has said that the files probably do not contain classified documents, and the FBI claimed that Professor Feldstein confirmed it. However, Professor Feldstein denies that he told the FBI that and says that he has seen no classified material in the documents. So which is it? Does the FBI have a solid reason to think that there is classified information in the files that would be harmful to the national security if the FBI did not remove them?

Mr. FRIEDRICH. There again, Senator Grassley, I don't believe I can comment on the Anderson matter specifically for the reasons that I had mentioned earlier, and hopefully the Bureau will be submitting some type of factual submission to you on that.

Senator GRASSLEY. Well, has the FBI taken time to get a subpoena or search warrant to force that issue?

Mr. FRIEDRICH. Again, with respect, I cannot comment specifically with respect to the Anderson matter, Senator.

Senator GRASSLEY. Well, Mr. Chairman, I am very disappointed. We asked some of these questions of Director Mueller. I will bet that has been more than a month ago, and we do not have any more answers. And I would think that the Department would send somebody here to testify that could answer our questions if they have any respect for this Committee whatsoever. I yield.

Senator LEAHY. I think that answers the question. They do not have any respect for this Committee. Why in heaven's name were you sent up here if all you are going to do is take the Fifth Amendment.

Chairman SPECTER. I would like to recognize you, Senator Leahy. Senator Leahy?

[Laughter.]

Senator LEAHY. Thank you, Mr. Chairman. I mean, you are basically taking what could be called a testifying Fifth Amendment. You should be ashamed of yourself, or your superiors should be ashamed of themselves. Why in heaven's name were you sent up here? I mean, you have been asked by friendly Republicans, no matter what questions you are asked, "Oh, I don't think I can an-

swer. I don't think I can answer." Why were you the one picked to come up here?

Mr. FRIEDRICH. Senator, I can tell you my understanding, that on a staff-to-staff level as between our legislative staff and the staff of the Chairman, that it was made clear before I came up here that I would not be able to talk about the Anderson—

Senator LEAHY. Well, this is what happens no matter what, from the Department of Justice or the FBI or anything else. Anytime you ask anything where there might have been a screw-up by this administration, "I don't think I can answer that. I am not really taking the Fifth. I just won't answer."

It is very, very frustrating. There is this arrogance in this administration against any kind of oversight, probably because they basically have—except possibly for this Committee—a rubber stamp Republican leadership that allows them to do anything they want. But that is what you are doing.

Let me ask you this: Is there any truth to the fact that some of these papers were looked at because it goes into the personal life of J. Edgar Hoover?

Mr. FRIEDRICH. Senator, again, with respect to the Anderson matter, I am not able to comment on that matter at all.

Senator LEAHY. So what you are doing, you are sent up here to be a punching bag. Is that it?

Mr. FRIEDRICH. Senator, again—

Senator LEAHY. You don't have to answer. I realize that. It is like the Attorney General. Is there any questions you guys are allowed to answer other than your title, the time of day? I mean, is this sort of like a prisoner-of-war kind of thing?

Mr. FRIEDRICH. Senator, I can tell you that, again, my understanding in coming up here was on a staff-to-staff level that I was—I was led to believe that the Chairman's staff was informed that I would not be able to answer questions about the Anderson case, precisely for the reasons that I discussed.

I am prepared, and if you will note the statement that I gave specifically relates to the law relating to the applicability of the Espionage Act and other statutes that go to the disclosure of classified information, that—

Senator LEAHY. Well, let me ask you a little bit about that then. We have the Espionage Act. We talk about how that can be used. It can also be used, if need be, to chill dissent. This administration has spent billions of dollars—that is billions with a "b"—to classify far more material than any administration in history, including the administration during World War II or World War I when we had real reason to do it. We found that in 2004 the Government made 15.6 million classification decisions. Sometimes they classified something that had been on a Government website for months or even years. People had downloaded it thousands of times. Suddenly they say it is classified.

We know some of this intelligence information was classified simply to cover up mistakes made by this administration. In fact, many, many, many, many times things were classified to cover up mistakes by the administration. If there was improper classification of intelligence information, would that be a proper defense to criminal charges brought under the Espionage Act?

Mr. FRIEDRICH. I think that that would—I think improper classification might be a defense to certain statutes.

Senator LEAHY. The Espionage Act?

Mr. FRIEDRICH. That one I would have to check in particular. I am not certain.

Senator LEAHY. For a moment there, I actually thought I was getting an answer and I was about to applaud you. It would be so unprecedented. And I hate to even highlight it because I do not want you to get fired for breaking precedence with the Department of Justice. But, you know, if Daniel Ellsberg had not leaked the Pentagon Papers to the New York Times and the Washington Post, we may never have known about the official misconduct during the Vietnam War. If Special Agent Coleen Rowley had not publicly revealed problems with the FBI's counterterrorism investigation, we may never have known how this administration screwed up before 9/11 and failed to connect the dots. Should Government be able to use the threat of criminal prosecution to shield the public from revealing its own mistakes?

Mr. FRIEDRICH. I think the answer to that, Senator, is that there is the Intelligence Community Whistleblower Act of 1998 that is set up for that specific purpose. If a member of the intelligence community has concerns about the legality, has an urgent concern about something that they are working on, believes it may not be legal, there is a specific process that is in place that is set up so that they can bring that to the attention of the Inspector General of their agency and the matter can be taken up from there all the way to the Hill Intelligence Committees, if necessary. So I think that—

Senator LEAHY. I am talking about people at the Department of Justice.

Mr. FRIEDRICH. I am sorry?

Senator LEAHY. What about with people within the Department of Justice? Senator Grassley, he and I and others have worked very hard on whistleblower legislature. But it seems anytime anybody uses Whistleblower, it is a career ender. They get shunted aside. They get put into non-work situations. Certain administrations—and this is something that probably reflects most administrations—will come down on them like a ton of bricks if they use it. But you think that is the only protection, the whistleblower statutes?

Mr. FRIEDRICH. What I was answering, Senator, is some have suggested simply that because there have been some leaks of classified information in the past that some have deemed to have important policy or historical value, you know, that that simply should make the wholesale leaking of classified information OK whenever someone feels like publishing it, because there have been occasions when such leaks have revealed even illegal conduct. And my response to that is that that is a false dilemma because there are procedures in place like the Intelligence Community Whistleblower Act that would allow those concerns to be handled in a classified environment, all the way up to the Hill Intelligence Committees.

Senator LEAHY. Well, let's go into the other stuff, though, when somebody does give information out to the press, the subject of this hearing. I will put my full statement in the record and not take my

time for that. But let me ask you this, you mention in your statement the Department's official policy with regard to the issuance of subpoenas to members of the news media. It requires the Attorney General to approve not only prosecutions of members of the press, but investigative steps aimed at the press, even in cases where the press itself is not the subject of an investigation. So my three questions are fairly easy.

First, did Attorney General Gonzales expressly authorize the FBI's attempt to rummage through Mr. Anderson's papers? If not, who did?

Second, has the FBI made any attempt to obtain the information from alternative non-media sources, which, as you testified, is part of the procedures?

And, third, does the important public policy against Government intimidation or harassment of the press become obsolete if a journalist has died?

Mr. FRIEDRICH. Taking the first two questions, Senator, again, as I said before, I can't comment on the Anderson matter specifically, but what I can tell you is that the procedures that are in place are geared toward the issuance of compulsory process, such as a subpoena. If there is a circumstance in which information is simply requested as a generic matter—

Senator LEAHY. But if you go to an elderly widow shortly after her husband has died and have FBI agents show up and say, "We want these papers," you don't have to get any authorization for that?

Mr. FRIEDRICH. What I can tell you, Senator, as a general matter is that those procedures are geared toward the issuance of compulsory process. You will notice that in other parts of the policy, it asks questions like, Have we attempted to obtain cooperation? Have we attempted to obtain the information from other means? So that would seem to suggest that the general policy would be to try to get voluntary compliance as opposed to issuing compulsory process.

Senator LEAHY. And it is totally voluntary if an elderly widow is faced with FBI agents flashing badges and saying, "We want these papers."

Mr. FRIEDRICH. Again, Senator, I cannot comment on the Anderson case.

Senator LEAHY. And the rest of my question I assume you are not going to answer, so—

Mr. FRIEDRICH. I would be happy to try to answer any additional questions you have.

Senator LEAHY. No, no. The rest of that question. It is a three-part question. I mean, I asked—

Mr. FRIEDRICH. Would you mind restating, sir, your third question?

Senator LEAHY. Did the FBI make any attempt to obtain the information from alternative non-media sources? And you give the same non-answer to that. Is that correct?

Mr. FRIEDRICH. I believe that your third question was something different, but I may be mistaken.

Senator LEAHY. The second part, did they make any other attempt. The third part was, does the important public policy against

Government intimidation or harassment of the press become obsolete once a journalist dies?

Mr. FRIEDRICH. Senator, I think that—let me separate that question, if I could, into the issue of deceased reporters versus deceased sources. As to the applicability of that policy toward deceased members of the media, you know, I doubt that that is something that has come up often. But in preparation for this hearing and having talked to others in the Department about it, I think that this is, frankly, an area that the Department should take a look at.

What I can tell you in the interim is as we are taking a look at it, if a case comes up which involves—where the Department is considering the issuance of compulsory process to the estate of a deceased reporter, even though these policies might not on their face apply, I will give you an assurance on behalf of the Department that they will be followed until we can followup and give you an answer on that.

Senator LEAHY. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Leahy, and your full statement will be made a part of the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Before turning to Senator Feingold, I have just a brief comment. As you have noted, there is a certain level of concern between the Congress exercising oversight and the responses of the Executive, and we fully appreciate the inherent constitutional authority the President has under Article II and the statutes which involve the Foreign Intelligence Surveillance Act and questions whether there is inherent power for the electronic surveillance program, and sometimes the discussions get a little heated. Senator Leahy and I have been able to maintain a pretty cool atmosphere. I don't really think anybody thinks you ought to be ashamed of yourself. You are carrying out the instructions from the Department of Justice, and we understand that. And we will pressure you for information to the extent we can in a respectful manner, and we will not use you as a punching bag. And when we question you, to the extent we can, we have also to question the Attorney General. He is going to be back before this Committee later this month, and we understand that you work for him and work for the Department.

Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. Just a brief statement. Thank you for holding the hearing. A free society cannot long survive without a robust free press, and that is why I have expressed concern before about the chilling effect of high-profile contempt prosecutions of journalists. It is also why I support a Federal reporter's shield law to join the reporter's privilege that is already recognized in 49 States plus the District of Columbia.

It is also why I am deeply worried about possible prosecution of journalists under the Espionage Act of 1917 for publishing classified information. As we all know by now, the Attorney General a few weeks ago was asked about this possibility. He responded that,

"There are some statutes on the books which, if you read the language carefully, would seem to indicate that that is a possibility."

That may not sound like it, but it was a very dramatic statement. The Espionage Act has never before been used to prosecute journalists for publishing classified information, and there are serious questions about whether Congress intended it to apply to journalists. It also poses very serious First Amendment questions that I know some of the witnesses will be addressing and have addressed.

Mr. Chairman, of course, we must take the leaks of classified information very seriously, but we have other tools at our disposal. Individuals who have security clearances and have made a commitment to the United States Government to keep it secret should be prosecuted if they violate the law by leaking classified information. That is where our Government's enforcement focus has always been, and I think that is where it should be. We can be tough on leakers without going after journalists and creating a very significant chilling effect. But I am grateful that you are having this hearing, Mr. Chairman, and I appreciate the opportunity to make a brief statement.

Chairman SPECTER. Thank you very much, Senator Feingold.

Mr. Friedrich, going back to your opening statement, I had asked you about the legislation introduced by Senator Lugar, and since modified in the Committee, about establishing a balancing on a shield or a reporter's privilege in terms of weighing the public policy interests of the First Amendment and public disclosure contrasted with the national security interest involved. And you responded to that that your Department was opposed to that on the ground of transferring responsibility from the executive branch to the judicial branch. And my question really turns on the preference of having the judiciary make a determination as opposed to the executive branch.

In the section that you refer to, 50.10, the standard as set forth on the Department of Justice decision to conduct an investigation—to move into the area where there are news-gathering interests is to "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice."

Well, in a case where you have a constitutional issue of freedom of the press and you have the weighty considerations involved in that kind of a balancing, isn't it the traditional standard in this country in case of a contest to have a matter decided by the courts instead of by the executive branch, which has a unique interest in the prosecution?

Mr. FRIEDRICH. Let me make two points there, Senator. First of all, as a practical matter, once a subpoena or once compulsory process is cut, you know, if the newspaper opposes that, they would file a motion to quash, which would take that matter into the courts at that point, and the courts would be able to make whatever determination they want. So far as a constitutional balancing, obviously the *Branzburg* case has held as a constitutional matter that there is not a right of reporters to appear not to testify under—the

First Amendment does not create a bar to that regardless of any pledge that a reporter may have made to his or her sources.

So I think so far as the constitutional issue in terms of the issuance of process, I believe that the Court has answered that question. There is still an open question as to whether or not there may be a privilege at common law, but I think as to the constitutional question, I believe that that question has been answered.

Chairman SPECTER. Well, whether there is a privilege in common law is not determinative if Congress decides to create a privilege. There is no newsman's privilege at common law. There is a husband and wife privilege. There is a client-attorney privilege, although there is some reason to doubt whether there is anymore an attorney-client privilege with what the Department of Justice is doing today, with the coercive activities to get lawyers and clients to waive the attorney-client privilege.

But moving aside from the common law privilege issue, which is not relevant here, isn't it desirable to have the Congress make a determination as to what the considerations are as opposed to, as you say, have the judge do whatever he or she wants?

Mr. FRIEDRICH. There, Senator, again, I think that the position of the Department—and I know you have heard testimony as to that issue from a number of representatives from the Department—has consistently been that that legislation in creating a media shield is not needed, that it would slow down the effective administration of justice, that—

Chairman SPECTER. Slow down the effective administration of justice to have Congress establish standards for what the privilege is, on a constitutional issue?

Mr. FRIEDRICH. If that would mean creating a media shield law under which the Department in every case in which it wanted to issue a subpoena would have to go to court to do so before it could be issued, yes, I think that would slow the process down. I know even in the case of litigating privilege matters in the grand jury context sometimes—

Chairman SPECTER. Well, our legislation does not require the Department of Justice to go to court before issuing a subpoena, and our legislation provides for a statutory privilege and establishes legislative standards as to what the courts should consider in determining whether the privilege is valid.

Mr. FRIEDRICH. Senator, I will be happy to have folks at the Department take a closer look at that bill and submit to you a more detailed response as to what the position of the Department is.

Chairman SPECTER. Well, the red light went on when you started your answer, but if you can get a more detailed response from the Department of Justice, more power to you. Thank you.

Senator Leahy?

Senator LEAHY. I was kind of chuckling at that myself. If you know how to get questions answered in DOJ, I have got several letters that have gone unanswered for years, both when I was Chairman and as Ranking Member of this Committee. So you have a magic touch that nobody else seems to have, including the Attorney General. In fact, some of these even Senator Specter and I have asked him in the Oval Office of the President with the Attorney General standing there, and we still do not get the answers. But

let me ask you one thing you could answer, and it has nothing to do with this.

In January, we learned that the Justice Department issued subpoenas to three major Internet companies. They wanted information about what millions—I assume most of these millions Americans are law-abiding—were searching for on the Internet. Now we hear they have asked Microsoft, AOL, Google, and other Internet companies to retain records on their customers' web-browsing activities.

My question is this: What sorts of records does the Department ask these companies to retain? For how long? What were the companies' responses? And should we be expecting a proposal from the Department for legislation in this area?

Mr. FRIEDRICH. Senator, as I sit here, I don't know the answer to that in terms of what was requested or the circumstances under which it was requested. I don't know that I will be able to respond, but I am happy to look into it, and if we can give you a response, we will.

Senator LEAHY. Well, will you do this: respond either way. If you can't respond, let me know that, because then I will know whether to ask somebody else.

Mr. FRIEDRICH. All right.

Senator LEAHY. Thank you. And as I said, and following up on what Senator Specter said, I did not want you to be here as a punching bag. I just felt some of the people in your Department maybe set you up that way.

Mr. FRIEDRICH. I will have a much happier walk back down Pennsylvania Avenue knowing that, Senator.

[Laughter.]

Senator LEAHY. It is a lovely day. I was out walking about 5:30 this morning. I hope it is still just as nice. And that is a nice walk. We are fortunate, both you and I, to be able to work in a city this beautiful and this historical. Thank you, Mr. Chairman.

Chairman SPECTER. Senator Kyl, would you care to question?

Senator KYL. No. Thank you.

Chairman SPECTER. Just another comment or two, and then we will move to the next panel.

Mr. Friedrich, when you go back to get a response from the Department of Justice on the shield law, the balancing which we have discussed here, I wish you would take with you, although we have called this to the attention of the Attorney General and the administration at very high levels, the concerns that some of us have about Congressional oversight. And when we talk about shifting the decision from the executive branch to the judicial branch, I would suggest to you that that is really the tradition of the administration of justice.

I know that the Department of Justice believes, as the inscription is over your building, the Department wins whenever justice is done. And I was a prosecutor, and a prosecutor has a quasi-judicial function to see that justice is done. But there is still a big advocate's role—a big, big, advocate's role in the prosecutor. So that when you have these questions, they are really traditionally decided in our system by the courts, not by the prosecutor, even though the prosecutor is quasi-judicial. And when you seek an an-

swer on the legislation as to reporter's shield, see if you can get one on the legislation which is pending to turn over to the Foreign Intelligence Surveillance Court the determination of constitutionality of the administration's surveillance program. And I will not ask you whether you think—or maybe I will. Don't you agree that it is the tradition in our system on these questions of disagreement between the executive and legislative branch, Article I and Article II officials, to have them decided by the courts. And isn't the tradition, before there is an invasion of privacy or a search, search and seizure, that there is the imposition of the impartial magistrate between the citizen and the Government?

Mr. FRIEDRICH. I certainly agree with you, Senator, that that is the procedure in search warrant cases and that, you know, the courts have spoken at some length about the different role of the executive and legislative branches and where the appropriate power lies between. I believe in the context of media shield legislation, certainly with respect to some of the proposals that have been put forth—and I do not claim to have familiarity with all of them. Some of them would seek to have the Government essentially get prior approval from the judicial branch before even issuing a subpoena, and that is what I was alluding to earlier.

Chairman SPECTER. Well, I appreciate your answer, and we are seeking a way to accommodate the interests of the executive branch and maintaining the secrecy of the surveillance program. We have the Foreign Intelligence Surveillance Court which has an unblemished record for maintaining confidentiality and secrecy, and they have the expertise to make the decision. And we are trying to find some way to have an accommodation with the Department of Justice, and this Committee has a different function than the Intelligence Committee. Our job is to have Congressional oversight on constitutional issues. And we are right in the middle of a constitutional issue on the electronic surveillance program, and we are right in the middle of a constitutional issue on freedom of speech and reporter's shield and the potential for prosecution under Sections 793 and 798.

But we appreciate your categorical answer that the Department of Justice thinks it has the authority to prosecute criminally because I believe that is an invitation to the Congress to legislate on the subject, because we do decide where the criminal prosecutions will be brought. That is clearly our authority, and we are now on notice as to what we need to consider.

Mr. FRIEDRICH. If I may, Senator?

Chairman SPECTER. Sure.

Mr. FRIEDRICH. Simply in terms of a categorical answer, again, I just want to clarify that I am speaking, as I believe the Attorney General was speaking, as to the potential reach of the law. I just want to again emphasize that, you know, the Attorney General has also said that our primary focus is on prosecuting the leakers as opposed to other options, and that our primary—that our much preferred path would be to attempt to work with reporters voluntarily to convince them not to publish classified information which could lead to the compromise of our most sensitive technologies, harm our young men and women who serve in the service of this country, and cause damage.

Chairman SPECTER. Well, I appreciate your addendum, and I started off by saying that the national security interests are enormous—enormous—and they have to be balanced with the constitutional rights. But where you have a criminal statute where you can send people to jail and have a chilling effect on newspapers, it is really the Congressional role to define it and to establish standards. And I think clearly the ball is in our court. You have some balls in your court, and we have some in our court.

I have just been notified that we have a vote on, so we will go vote, and we will be back promptly to take up the second panel. Thank you all.

[Recess 10:28 a.m. to 10:54 a.m.]

Chairman SPECTER. Would you gentlemen stand for the administration of the oath? Do each of you solemnly swear that the evidence you give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ANDERSON. I do.

Mr. SMOLLA. I do.

Mr. SCHOENFELD. I do.

Mr. FELDSTEIN. I do.

Chairman SPECTER. May the record who that each has answered in the affirmative. Thank you very much for coming in, gentlemen. We turn to our first witness, who is Mr. Kevin Anderson, a partner in the law firm of Fabian and Clendenin, Salt Lake City, Utah; bachelor's degree from the University of Utah; law degree from Georgetown. He acted as an assistant to his journalist father, Mr. Jack Anderson, in the 1970s. Thank you very much for coming in today, Mr. Anderson, and we look forward to your testimony.

STATEMENT OF KEVIN N. ANDERSON, FABIAN AND CLENDENIN, SALT LAKE CITY, UTAH

Mr. ANDERSON. Thank you, Chairman Specter and members of the Committee. I appreciate this opportunity. I would like to acknowledge in the room with us today is my mother, and there are six of the nine members of my family also present.

Chairman SPECTER. All present? Would they mind standing so we can recognize them and acknowledge them.

Now, you say, Mr. Anderson, that your mother is right behind you, and the others who stood are your siblings?

Mr. ANDERSON. Yes, that is correct.

Chairman SPECTER. And six of the nine?

Mr. ANDERSON. Yes, including me, are here.

Chairman SPECTER. Well, that is a wonderful family. Congratulations to you, Mrs. Anderson, and all the Andersons. And reset the clock to 5 minutes.

Mr. ANDERSON. Thank you, Senator.

I will address the events surrounding the FBI's request to access my father's papers and my family's view of how he would have reacted to the Government's investigation of journalists who publish classified information.

About 6 weeks after my father's death, FBI Agent Leslie Martell called my mother to gain access to Dad's papers. As the attorney in the family, I called her and was told that the FBI believed that there were classified documents among Dad's papers that would

help the Government in a criminal investigation. I was left with the impression that the FBI's probe concerned terrorism. I was assured that no member of the family was the target of the investigation.

As several members of this Committee know, Dad often cooperated with criminal investigations where it would not violate the confidentiality of his sources. I told Agent Martell that she could meet with Mom.

Afterwards, Mom was excited to tell me that she thought Agent Martell might be related through her family roots in West Virginia, where Mom was born and raised. She found this more interesting than what the FBI wanted. All she remembered was that it involved something about Dad's papers from the 1970s.

My Mom cooperated with the investigation. She told the FBI agents where the boxes were located. She put them in touch with Dr. Feldstein and Dr. Chambless, both of whom had reviewed some of the boxes. Dr. Chambless, with the blessing of the family, even sent a 12-page inventory of 80 of the boxes he had reviewed to the FBI.

Several weeks later, the FBI asked me to confirm that the family and not the Gelman Library at George Washington University owned the papers, and I confirmed that the family did own them. And because of the family's concern, I told the agent at that time that the family would need more information about what documents the FBI wanted.

Next I received a call from Dr. Feldstein at GW saying that the FBI claimed to have a consent that Mom had signed. I immediately called Agent Martell, upset that as the family attorney I had not been told about the consent and had not even seen it. To this day, I have not seen the consent. She was very apologetic and arranged a conference call. During that call, two FBI agents and one of the U.S. Attorneys General involved in the criminal case told me that the request for Dad's papers was in connection with the AIPAC investigation.

The FBI said that classified materials may have been passed between Dad's office and the defendants in that case and perhaps even between Dad's office and a member of the Foreign Intelligence Service in the early 1980s. They wanted to check for fingerprints on some of the documents. I told them that I thought that the presence of those types of documents in Dad's papers was extremely unlikely. I also expressed my concern to them that the AIPAC prosecution could be viewed as a step toward prosecuting journalists. I felt Dad would have vigorously opposed such an effort. The FBI and Department of Justice representatives assured me that they were not after Dad's sources, family members, or George Washington University for possession of classified documents.

We also discussed hypothetically the scope of an FBI review of Dad's papers, assuming that the family would decide to cooperate. The agents made it clear that they intended to review all of his papers, regardless of their relevance to the AIPAC case. In addition, they repeatedly stated that they would be "duty bound" to remove all possible classified documents, either permanently or redact them and return them. I felt this would destroy the political, historic, and cultural value of Dad's papers.

I made several suggestions to limit the scope. These were rejected, including my offer to personally review the papers to locate anything related to the AIPAC case. I was told that because I did not have a security clearance, I could not review my father's papers.

In early April, at a meeting with FBI's former First Amendment attorney, Michael Sullivan, and an attorney for GW, I came to the conclusion that the AIPAC investigation was nothing but a fishing expedition, at best, and at worst, a pretext for the FBI to learn what it could not discover about Dad's sources when he was alive. The family met and instructed Mr. Sullivan to formally reject the FBI's request. A copy of that letter has been provided to the Committee.

The family feels that the FBI's review of Dad's papers and removal of documents would be contrary to his wishes. He taught us that the press' constitutional role was to keep an eye on those who govern us, not to be a bulldog or a lapdog, but a watchdog. He used to say that our Founding Fathers understood that Government by its nature tends to oppress. There is nothing in the Constitution about the freedom to practice law or to practice medicine, but there is something in the Constitution about the freedom of the press. Dad was fond of quoting Thomas Jefferson, who was vilified by the press more than any recent politician. "[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to prefer the latter," Jefferson wrote.

For more than a generation, Dad and his mentor, Drew Pearson, were among the most significant journalistic checks in the Nation's capital. At a time when Members of Congress and even the White House were afraid of J. Edgar Hoover, Dad had his staff openly rifle through Hoover's trash to give the former FBI Director a taste of his own medicine. Dad often said that documents that came across his desk were classified as "national security" secrets, but he characterized them as really "political security" secrets. They showed the misdeeds and manipulations of Government employees who had abused the public trust and then tried to sweep the evidence under the secrecy stamp. Such information should not be hidden from the people.

Ours is a Government of the people. Dad taught us that the people are the sovereigns. Those who work in Government are our servants. We, the people, have the right to know what our servants are doing when they act in our name. The secrecy stamp must not shield the actions of our officials from scrutiny. The press, as the watchdog, must be free to criticize and condemn, to expose and oppose the Government.

Finally, concerning the reporter's shield law being considered by this committee, I believe that Dad would have insisted that the First Amendment provides the best shield. I know that my father was concerned with protecting his sources. This concern is real. After the recent publicity, I have been contacted by several sources who still fear that their identification would result in political, financial, and even physical harm. The FBI's efforts have underscored the need for protection of journalists, their families, and in

this case—excuse me, journalists, their sources, and in this case, even their families.

Again, thank you for this opportunity.

[The prepared statement of Mr. Anderson appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Anderson. We turn now to Dean Rodney Smolla, dean of the University of Richmond School of Law; bachelor's degree from Yale, a law degree from Duke; has taught at many law schools—College of William and Mary, Duke, University of Denver, University of Arkansas, University of Illinois, at DePaul College of Law. Quite a record, and now he is the dean at the University of Richmond School of Law. Thank you very much for coming in, and the floor is yours, Dean Smolla.

STATEMENT OF RODNEY A. SMOLLA, DEAN, UNIVERSITY OF RICHMOND SCHOOL OF LAW, RICHMOND, VIRGINIA

Mr. SMOLLA. Thank you, Mr. Chairman. I am going to go right to the heart of the constitutional and public policy issues that you and others have been addressing throughout the hearing. As you have recognized and your fellow Senators have recognized, the Constitution and the First Amendment specifically absolutely have to be a vital part of this discussion. We start with the First Amendment baseline, which is a long series of cases, a venerable series of cases, in which the Supreme Court of the United States has made it clear that all citizens, including reporters, have a presumptive First Amendment right to publish truthful information that is lawfully obtained. That is sometimes described as the Daily Mail line of cases.

It is important to remember that in almost every one of those cases, somebody did something wrong to give the material to the reporter—there was a leak, the material was classified, there was a restraining order on the material. Nevertheless, the reporter obtained the material and the Supreme Court sustained the First Amendment right of that journalist to publish that material.

Now, that line of cases puts great pressure on that phrase "lawfully obtained," and to this day, the Supreme Court has never given that phrase complete clarity. A narrow concept of it could mean that the reporter does not in some affirmative way engage in lawbreaking in obtaining the material, the reporter does not hack into the computer file or break into somebody's office. But it could also have a broader meaning. It could conceivably mean that if the reporter passively receives information that the reporter knows someone else is breaking the law in handing over to that reporter, that the reporter is in some sense tainted by the transaction and that the material is not lawfully obtained.

It is clear that the Supreme Court itself does not believe this is a First Amendment question that is completely settled. For example, in one of the famous cases in this line, *Florida Star* v. *B.J.F.*, the Court said—I will quote it directly: "The Daily Mail principle does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well."

In one of the few cases in which the Court has gotten deeply into this, a recent case, *Bartnicki* v. *Vopper*, the Supreme Court dealt with illegally intercepted cell phone conversations. None of us wants to hear our cell phone conversations broadcast on the radio or printed in a newspaper. The Supreme Court in that case held that the First Amendment protected the journalists who published and broadcast that information, even though plainly someone broke the law in intercepting it.

Now, Bartnicki is a somewhat confusing and ambivalent ruling because two Justices who were necessarily the majority in that case, Justice Breyer and Justice O'Connor, took a sort of intermediate position. Justice Breyer, who wrote that concurring opinion, said, "In this case, I believe the First Amendment protects what the reporters did, but it is important to me that what was happening is that the material that was being broadcast revealed wrongdoing, potential violence, potential lawbreakers by the speakers. And in that posture," he said, "I think the First Amendment trumps," but he left open the possibility that this was not an absolute principle and that you could have a narrowly crafted law that would satisfy the First Amendment standards.

Many of the other cases that are out there, including the Pentagon Papers case, which you have alluded to, Senator, do not give us a clear answer. We know in the Pentagon Papers case that the Supreme Court said in the context of national security that even the doctrine of prior restraint was not absolute, that there could come a situation where you would allow a prior restraint under the First Amendment. We know the Court left unresolved one of the questions you were questioning the Justice Department representative on, which is whether the Espionage Acts do or don't allow for prosecution.

But one critical thing that is central to Pentagon Papers, that is part of the holding, is that it was clearly critical to a majority of the Court that the material at issue did not compromise any ongoing live operations with regard to the prosecution of the Vietnam War. It was a matter of great public interest. It unveiled wrongdoing in some respects. But it was history, and it had passed into the public domain, it seemed the Court was saying, which shows us that it must be the rule that just because something is classified does not mean that there is carte blanche for the Government to go after a journalist who traffics in it.

It would overstate matters to say that the First Amendment absolutely bars making the receipt of information or the downstream publishing of the information unconstitutional. We know that cannot be the case. The Court has never said that in the Daily Mail line of cases, and we have one prominent example where the Court has held to the contrary, in the obscenity area, where the Supreme Court held originally in *Stanley* v. *Georgia* that you could not make the mere possession of obscene material—which was illegal. You could not make the mere possession of the material a crime because that was tantamount to making a thought crime. The Court said that rule did not apply later in the context of child pornography, where you could make the mere possession of the material a form of contraband. So we do know that there are times when

we have interests of sufficiently high order to justify a narrowly drawn statute.

The very last point I will make, Senator, is that although I think conceivably a narrowly drawn law could be crafted by Congress that would protect national security secrets with sufficient safeguards and tailoring and so on to not violate existing First Amendment doctrine, that does not mean it is a good idea. It does not mean it is wise public policy. And it certainly does not mean that we ought to interpret existing statutes as saying that, although some of the sections of existing law by their bland language would appear to encompass the mere possession or publishing of classified information.

As has already been brought out powerfully in this hearing, that is not our tradition. There is very serious doubt that this Congress intended for that to be how those laws would be used, and we have not in the history of this Republic used them that way. And in light of that cultural experience, that societal understanding, and the serious First Amendment tensions that are created if we were to go there, the better interpretation of existing law is that it is too dangerous to interpret those statutes as if they empower the Government to prosecute journalists. And it would be bad public policy, in my view, Senator, if Congress were to attempt to clarify the law in a way that would empower the Government to go after journalists. Thank you.

[The prepared statement of Mr. Smolla appears as a submission for the record.]

Chairman SPECTER. We now turn to Dr. Gabriel Schoenfeld, Commentary Magazine senior editor, who has written on a wide variety of subjects—the Vietnam War, terrorism, nuclear proliferation, the cold war, anti-Semitism; published in the New York Times, the Wall Street Journal, the Washington Post, New Republic; appeared on many TV shows; a Ph.D. from Harvard's governmental department in 1989.

Thank you very much for joining us, Dr. Schoenfeld, and we look forward to your testimony.

STATMENT OF GABRIEL SCHOENFELD, SENIOR EDITOR, COMMENTARY, NEW YORK, NEW YORK

Mr. SCHOENFELD. Thank you very much, Mr. Chairman. It is an honor to be invited here to testify today.

As a journalist, I know firsthand the vital role played by a free press in our great country. Just this past week, two members of the media were killed and a third was critically injured while reporting on the war in Iraq. One cannot be indifferent to the risks that journalists are taking on a daily basis to bring us the information on which we depend to keep our society free and our debate open and well informed.

But the tragedy that befell Kimberly Dozier and her crew also served to underscore the fact that our country is now at war. Thousands of our young men and women are in harm's way in distant locations around the world. And on September 11, 2001, as a result of a massive intelligence failure, we found that our own homeland was also in harm's way. Three thousand Americans paid for that intelligence failure with their lives.

Obviously, many different factors contributed to that intelligence lapse. One of them is the subject of today's hearing, namely, leaks of classified information. The Jack Anderson archive affair is part of an issue with broad and urgent ramifications.

The 9/11 Commission report stated that in 1998 a leak to the press led al Qaeda's senior leadership to stop using a particular communications channel, which made it much more difficult for our National Security Agency to intercept Osama bin Laden's conversations. Our Government's ability to gain insight into the plans of a deadly adversary were compromised by the actions of a leaker or leakers inside of Government and by journalists willing to publish what they had learned from those leakers, no matter what the cost to our National security.

The damage caused by that leak was not widely recognized at the time, and no action was taken against the leakers or the newspaper which first published the secret information. But the episode highlights the crucial importance of communications intelligence in the war on terrorism and the special vulnerability of this form of intelligence to disclosure.

It was precisely because of that vulnerability that in 1950 Congress added a very clear provision to the U.S. Criminal Code dealing specifically with communications intelligence. What is now known as Section 798 of Title 18 made it a crime to publish classified information pertaining to communications intelligence. I should add that that Act was passed in the aftermath of a press leak during World War II, in the Battle of Midway, when the Chicago Tribune had disclosed that our intelligence agencies had succeeded in breaking Japanese codes, which was a very serious leak that threatened the lives of thousands of American soldiers and threatened to prolong the war.

Now, Section 798 is free from all the ambiguities and constitutional problems that beset the 1917 Espionage Act. It was passed virtually without debate by Congress and won the approval at the time it was passed of, among other organizations, the American Society of Newspaper Editors.

In the years since its passage, Section 798 has never been employed for the prosecution of a journalist. It is a law that was designed for special circumstances that are very dangerous but also very rare. Unfortunately, those special and rare circumstances appear to be upon us today.

On September 11th, our country suffered a second and more terrible Pearl Harbor. Overnight, we were thrust into a new kind of war, a war in which intelligence is the most important front. It is also a war in which, if our intelligence fails us, we as an open society are uniquely vulnerable. If we are to defend ourselves successfully in this war and not fall victim to a third Pearl Harbor, perhaps a nuclear Pearl Harbor, it is imperative that our Government and our intelligence agencies preserve the ability to conduct counterterrorist operations in secret.

I do not know what classified documents, if any, might be contained in Jack Anderson's archive. But from the press reports I have seen and from the testimony here today, they do not appear to be of recent vintage, and some of them might go back as far as the Korean War. Now, surely, if the FBI can demonstrate that

there are documents in that archive the disclosure of which will damage national security or bear on criminal behavior, the FBI and the Justice Department have the statutory right to obtain a warrant to search and seize those documents. It probably would have enjoyed that right when Anderson was alive, and it certainly has them now that he is dead. Whether it should exercise that right today in the middle of the war on terrorism is another matter entirely. Unless facts come to light that alter our understanding of what is in that archive, the entire episode appears to be a misallocation of investigative resources. There are other leaks that have been far more damaging which the FBI is not pursuing with any seriousness at all, as best we can tell.

Beginning last December 16th, the New York Times published a series of articles reporting that shortly after September 11, 2001, President Bush had authorized the National Security Agency to intercept electronic communications between al Qaeda operatives and individuals inside the United States and providing details about how those interceptions were being conducted.

Now, the 9/11 Commission had identified the gap between our domestic and foreign intelligence-gathering capabilities as one of the primary weaknesses in protecting our country against terrorism. The NSA terrorist surveillance program aimed to cover that gap. The program, by the Times' own account of it, was one of our country's most closely guarded secrets in the war on terrorism.

I am not privy to the workings of the program, but a broad range of Government officials have said that the program was vital to our security and that the New York Times disclosure inflicted critical damage on a crucial counterterrorism initiative.

Compounding the direct damage caused by the compromise of the NSA program is harm of a more general sort. In waging the war on terrorism, the U.S. depends heavily on cooperation with the intelligence agencies of allied countries. When our own intelligence services, including the NSA, the most secretive branch of all, demonstrate that they are unable to keep shared information under wraps, international cooperation dries up.

According to Porter Goss, his intelligence agency counterparts in other countries informed him that our Government's inability to keep secrets had led some of them to reconsider their participation in some of our country's most important counterterrorism activities.

If Americans are still wondering why our intelligence has been as defective as it has been, why it has been leading us from disaster to disaster, one of the reasons is unquestionably the hemorrhaging of classified information into the press.

During the run-up to the Gulf War, the United States was urgently attempting to assess the state of play of Saddam Hussein's program to acquire weapons of mass destruction. One of the key sources of information suggesting an ambitious WMD program was under way was an Iraqi defector known by the code name of Curveball, who was talking to German intelligence. The U.S. remained in the dark about Curveball's true identity, yet if we had known who he was, we would have also known that he was a serial fabricator.

But the reason why German intelligence would not tell us who Curveball was, as we learned from the Silberman-Robb WMD Com-

mission report, that they refused "to share crucial information with the United States because of fear of leaks." In other words, some of the blame for our mistaken intelligence about Iraq's WMD program rests with the leakers and with those in the media who rush to publish the leaks.

Now, President Bush has called the disclosure of the NSA program, the terrorist surveillance program, by the Times a "shameful act." I have argued in the pages of Commentary that the decision to publish that story was also a crime, a violation of Section 798.

Now, today Congress sets the laws by which we live in our democracy and oversees the way that they are carried out. If Congress, representing the American people, comes to believe that the executive branch is creating too many secrets or classifying things that should not be classified, it has ample powers to set things right by funding faster and better declassification and/or changing the declassification rules.

But if, by contrast, a newspaper like the Times, a private institution, representing no one but itself, acts recklessly by publishing vital Government secrets in the middle of a perilous war, it should be prepared to accept the consequences as they have been set in law by the American people and its elected representatives. The First Amendment is not a suicide pact.

Thank you very much for your attention, Mr. Chairman.

[The prepared statement of Mr. Schoenfeld appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Dr. Schoenfeld.

Our final witness on this panel is Mr. Mark Feldstein, Director of Journalism at George Washington University, Associate Professor of Media and Public Affairs at George Washington University; bachelor's degree from Harvard, a Ph.D. from University of North Carolina. In the 1970s he was an intern for columnist Jack Anderson. For nearly 20 years, he has been an on-air correspondent for virtually every news station—CNN, ABC, NBC—and has a record as an investigative reporter, as his resume says, beaten up in the United States, detained and escorted by Government authorities in Egypt, and kicked out of Haiti.

Quite a record, Mr. Feldstein.

His book, "Poisoning the Press: Richard Nixon, Jack Anderson, and the Rise of Washington's Scandal Culture," will be published next year.

Thank you for joining us today, Mr. Feldstein, and the floor is yours.

STATEMENT OF MARK FELDSTEIN, DIRECTOR OF JOURNALISM PROGRAM, AND ASSOCIATE PROFESSOR OF MEDIA AND PUBLIC AFFAIRS, SCHOOL OF MEDIA AND PUBLIC AFFAIRS, GEORGE WASHINGTON UNIVERSITY, WASHINGTON, D.C.

Mr. FELDSTEIN. Thank you, Senator. Let me just summarize my testimony, if I might, and ask that my full statement, with some news articles and editorials about the case, be entered into the record.

Chairman SPECTER. Without objection, they will all be made a part of the record.

Mr. FELDSTEIN. Thank you.

On March 3rd, two FBI agents showed up at my home. They flashed their badges and requested 25-year-old documents I had been going through for the book I am writing about Jack Anderson. The agents told me they were investigating violations of the Espionage Act going back to the early 1980s, even though they admitted the statute of limitations had expired. It seems the Justice Department wants to prosecute people who might have leaked secrets to a reporter decades ago, a reporter who is now dead. The agents tried to get me to say we have classified documents in our archives, even though I told them I do not know of any. They seemed to view reporters' notes as the first stop in their probe rather than the last step after all others failed—the standard they are supposed to use under Justice Department guidelines.

Now, of course, the FBI is filled with thousands of brave men and women who do their jobs superbly and risk their lives for their country. But this case is troubling because whistleblowing sources, the kind Senator Grassley and other members of this Committee have championed, may be scared off if the Government starts rooting through reporters' notes, even past the grave.

Last month, FBI Director Mueller promised this Committee he would find out what happened here, and I think the FBI still owes the Committee an answer. Perhaps the Justice Department's Inspector General should investigate.

Unfortunately, this seems to be part of a larger effort to use national security to crack down on the public's right to know. We are even hearing proposals to prosecute journalists under the Espionage Act, a law passed during the hysteria of World War I and strengthened when Joe McCarthy began his witch hunt. Prosecuting the press for espionage reeks of McCarthyite madness, the kind of tactics used in dictatorships, not democracies.

Espionage? Reporters are not spies. They are patriotic. Every year, dozens of them give their lives trying to dig out the truth for the people. They are not perfect. Journalists make mistakes.

They can be arrogant. They give too much attention to trivia and sensation. But history shows that genuine harm to national security caused by reporters has been minuscule to nonexistent. Far more damage to national security has been caused by Government secrecy and deceit than by media disclosures of classified information. If anything, the problem is not that the press is too aggressive in national security reporting. It is that it is too timid.

Now, administrations often exaggerate the damage from reporting, invoking national security, when the real concern is political embarrassment. The fact is that leaks increase when Government abuses increase because whistleblowers turn to the press to get the truth out. This is healthy, a self-correcting mechanism in a democracy, and it is as old as the Republic itself.

In 1796, a newspaper published verbatim excerpts of what George Washington told his Cabinet about secret negotiations with Britain. It created an uproar in international relations. Who leaked this National security secret? Thomas Jefferson, the Secretary of State then, was the No. 1 suspect.

If you start prosecuting reporters for revealing secrets, journalists will stop telling the public about important national security misconduct. Either that, or the jails will fill up with reporters.

Neither option is good. Merely threatening to prosecute the media by twisting the Espionage Act or some other law sends a chilling message. In the words of one journalist, the Government has "already won...a victory that will bear fruit every day, whenever any reporter holds back for fear of getting into trouble, whenever a source fears to come forward lest he be exposed, whenever an editor 'goes easy' for fear of government retaliation...whenever a citizen anywhere can be influenced to think of reporters as lawbreakers, the kind of people who have to be arrested."

The journalist who said those words was Jack Anderson, writing about the Nixon administration abuses during Watergate. Unfortunately, his words appear to be equally relevant today.

Thank you.

[The prepared statement of Mr. Feldstein appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Feldstein.

We received a letter yesterday from Mr. Max Frankel, who submitted an affidavit 35 years ago in the Pentagon Papers case, and without objection, we will make part of the record Mr. Frankel's affidavit, and also his letter to the Committee dated yesterday, June 5th. And I will read one paragraph from the letter from Mr. Frankel.

"A review of the affidavit shows that, while all the names have changed, the way Washington works has not. Neither have the principles that should govern the relationship between Government and the press. Leaks of secrets and of classified information have been and continue to be routine. For a wide variety of reasons, they are essential to what I call the 'cooperative, competitive, antagonistic, and arcane relationship' between Washington reporters and American officials. The press plays a vital role in educating the public through the use of so-called secret information, much of it intentionally disclosed by honorable Government servants. They may be floating trial balloons, sending messages to foreign governments, waging internecine battles against other governmental departments, illuminating or attacking governmental policies. Their motives are as numerous as their disclosures."

Mr. Anderson, do you know if Federal authorities ever made a request to your father for any information or documents during his lifetime?

Mr. ANDERSON. During the span of his lifetime, I am sure that there were some requests. I was asked by someone in the media who said that an FBI representative had told them that about a year before he died, they had made a request. I don't know whether that is true, but in following up on that—my father was pretty much bedridden during that year, 24-hour-a-day care. I checked with the nurses and my sister who was tending him and my Mom, and none of them was familiar with any request.

Chairman SPECTER. So you know of no request?

Mr. ANDERSON. That is correct. I do not.

Chairman SPECTER. And, similarly, you know of no disclosure by your father of any of his documents.

Mr. ANDERSON. That is correct. He would not have and did not, to my knowledge.

Chairman SPECTER. And you testified that the FBI told you you could not review your father's papers?

Mr. ANDERSON. That is what they said on several occasions, actually.

Chairman SPECTER. Has the FBI gone to any compulsory process, subpoena, to obtain your father's papers?

Mr. ANDERSON. Not at this point. I should add that they have, you know, repeatedly asked various people questions and have the necessary information to do that.

Chairman SPECTER. Have you—and you do not have to answer this question. You do not have to answer any of these questions. You are not under subpoena. And if you were under subpoena, you would not necessarily have to answer the questions either if you claimed the privilege. But I will ask you: Have you reviewed any of your father's papers in the face of the FBI statement to you that you are not permitted to, authorized to?

Mr. ANDERSON. I have not in the recent past. I have not seen really any of the papers since they were—some of them were boxed up 20 years ago.

Chairman SPECTER. Aren't you interested in what they say?

Mr. ANDERSON. A little bit, but to be frank with you, I have been too busy to get out there and do that. I would completely disregard the FBI's direction to me and review them at will, though.

Chairman SPECTER. And how do you describe the volume? In boxes, you said?

Mr. ANDERSON. There are 187 boxes.

Chairman SPECTER. How big are the boxes?

Mr. ANDERSON. They are what I call banker's boxes, you know, just a typical document storage box. I couldn't tell you how many thousands of papers. And then, in addition, there are—

Chairman SPECTER. A banker's box, about 2 feet, 2½ feet, by about a foot and a half?

Mr. ANDERSON. Yes, that would be correct. And then there are 20 file drawers of small 3–x–5 cards that my Dad used to keep to index the columns that he wrote.

Chairman SPECTER. Do you have any idea why the FBI, after making a request, has not pursued compulsory process, a subpoena?

Mr. ANDERSON. I understand that they would have to go to the Department of Justice, and my guess is that the Department of Justice perhaps has a different view of the importance of the documents that might be in there.

Chairman SPECTER. Now, you say that your father and Drew Pearson went through Director J. Edgar Hoover's trash?

Mr. ANDERSON. Yes, that is correct. He did a series of articles about what they found in there, and, in fact, I think an ABC News crew videotaped one of Dad's reporters going through the trash.

Chairman SPECTER. Do you know if—well, I will ask you the question. I think the answer is obvious. Do you know whether any of these many boxes contain information about Director Hoover's trash?

Mr. ANDERSON. Well, I suspect they do because they have the information—they have copies of the columns that he wrote and some of Dad's notes related to that.

Chairman SPECTER. Mr. Feldstein, Professor Feldstein, what, again, did the FBI ask you for with respect to Mr. Anderson's files, Mr. Jack Anderson's files?

Mr. FELDSTEIN. Well, they basically wanted to go through all of them.

Chairman SPECTER. And what did you have?

Mr. FELDSTEIN. Well, my university has nearly 200 boxes that the Anderson family donated to the collection, to our collection.

Chairman SPECTER. Are those papers of the university available for public inspection?

Mr. FELDSTEIN. No, sir, not yet. We, as all archives do, first get them and then try to raise the money, because it is expensive to catalogue them—it usually takes months or years—segregate out anything the family or the donor wanted segregated, love letters, source notes, what have you, and then we make it—put it on display for the public.

Chairman SPECTER. And is it the intention of your university 1 day to make those records available to the public after being screened as you describe?

Mr. FELDSTEIN. Yes, sir.

Chairman SPECTER. What do you think would be the consequence on other reporters if you were to give the FBI access to Mr. Jack Anderson's files that you have in possession of your university? Mr. Feldstein. Well, I think it would be troubling for both journalists and academics. For journalists, the concern would be that their source notes, confidential sources, would be revealed to law enforcement authorities and that that would produce a chilling effect, making other whistleblowers reluctant to come forward out of fear that their identities would later become known. For academics, historians are always very concerned about trying to keep historical archives in order and not have them rifled through, because often the order matters, and also may discourage people from donating their papers in the future, not just at our university but everywhere, if—

Chairman SPECTER. You think it would have a chilling effect?

Mr. FELDSTEIN. Yes, sir.

Chairman SPECTER. A serious chilling effect? Mr. Feldstein. Well, how serious depends on, I suppose, how bad the rifling is that takes place and how much is confiscated. One of the problems is the FBI agents did make clear that they would be duty bound to pull out stuff that they felt should not be in there.

Chairman SPECTER. You and your university are preserving these papers so that if the FBI should ever assert a compulsory process and have that upheld by the courts, they would be available to the FBI?

Mr. FELDSTEIN. Well, I can't speak for the university or for the Anderson family, but, yes, we are preserving it and, you know, we certainly believe in abiding by the law. And we are all good citizens, too, and we don't want anything to jeopardize national security. You know, my own concern here is, frankly, I am a little skep-

tical that anything that old and that long ago really is about national security.

Chairman SPECTER. Mr. Anderson, a similar question to you. If the FBI ultimately prevails with a subpoena compulsory process, will the records be available for them to see if they are upheld in court?

Mr. ANDERSON. Not at this point in time. The family has met and decided that we would not abide by a subpoena if one were issued by the FBI, and we would give that instruction to the George Washington University.

Chairman SPECTER. Well, if the subpoena was upheld by the highest court in the country, would you risk a contempt citation rather than make the records available?

Mr. ANDERSON. I would, and I have spoken with my mother, and she would as well.

Chairman SPECTER. Well, we will not ask you for a final judgment on that today. We are far from that. But it is not an irrelevant question.

Well, Dr. Schoenfeld and Professor Smolla, you pose about as sharp a conflict as you can find on this issue. Dr. Schoenfeld wants to prosecute the New York Times and Mr. Risen, and Professor Smolla does not even want us to examine the question as to what standards would be appropriate for prosecution under 798, because that would be an invitation.

You have it on the books. You have heard, Dean Smolla, the testimony of a representative of the Department of Justice that the Department concludes as a legal matter that the Department has the authority to prosecute. Do you think that there are no circumstances, there is no conceivable circumstance under which a prosecution by the Federal Government of a newspaper or a newspaper reporter would be justified?

Mr. SMOLLA. Well, Senator, let me divide it into the statutory question and the First Amendment question. I think it is very implausible that Section 798 was thought of by Congress when it passed that law in 1950 as overturning decades of cultural understanding that we had before this law was passed and that we have observed since. And it is implausible that Congress had in mind upsetting the traditional First Amendment balance that has existed.

You would have to believe that Members of Congress imagined that there could be, for example, an illegal or unconstitutional communications interception program. It is conceivable that the executive branch could illegally be intercepting people's communications and that Congress meant to say that all the executive branch needs to do is say the existence of the program is classified, the very fact we are doing it is a secret; and if that is revealed and the reporter finds out about it, the reporter can be criminally prosecuted for exposing that.

That is a very improbable understanding of what Congress thought it was doing when it passed this law, and—

Chairman SPECTER. But is Dr. Schoenfeld wrong that the statute was passed as a reaction to the disclosure by a newspaper that the Japanese code had been broken?

Mr. SMOLLA. Well, you know, that episode took place 8 years before. As Dr. Schoenfeld has conceded, there is very little legislative history surrounding the passage of the Act. And there may be a qualitative difference between the kind of communication that reveals, in fact, how we are intercepting material, that reveals that a code has been broken, that kind of hard national security data where you can instantly see this would damage the national security of the United States if this is released, and the kind of leaks that are now being talked about, which are leaks about massive programs that don't reveal any technical secrets—the New York Times didn't explain exactly how these things were intercepted—don't even reveal the content of it. All they do is tell you that it is done without a warrant.

Chairman SPECTER. Well, yes, but are you saying that there is no conceivable circumstance which would justify prosecuting a newspaper or a reporter?

Mr. SMOLLA. No, I am not, and I am conceding that the First Amendment standard itself contemplates that there could be national security interests of the highest order and that a narrowly tailored statute in which the Congressional intent was clear and in which defense safeguards are built in, safeguards that require that there be proof that some ongoing or live operation—

Chairman SPECTER. Have you had a chance to review the Lugar-Specter bill?

Mr. SMOLLA. I think it is generally going in the right direction, Senator. We certainly should have a shield law.

Chairman SPECTER. Never mind going in the right direction.

[Laughter.]

Chairman SPECTER. Would you support it? Mr. Smolla. I think that the critical thing would be—and you alluded to this, Mr. Chairman—how broad or how narrow the national security exception is. But I absolutely support the idea that that should be the kind of thing placed in the hands of the neutral magistrate.

Chairman SPECTER. Well, since you haven't said yes, would you give us suggestions as to how to—

Mr. SMOLLA. I would be happy to do that. I would be happy to do that, Senator, but I think—

Chairman SPECTER. How to perfect it so that you would support it?

Mr. SMOLLA. I would be happy to be invited, in fact, to do that, Senator.

Chairman SPECTER. Dr. Schoenfeld, what is your thinking or the basis for your conclusion that Congressional intent on 798 was to cover a situation like the publication by the New York Times and Mr. Risen of the surveillance program?

Mr. SCHOENFELD. I can't imagine a set of circumstances that more closely fit the intention of the Congress that passed that Act. Just looking at the plain language of the law, it is unambiguous. The provision says, "Disclosure of classified information. (a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to any unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interests of the United States or for the benefit of any foreign government

to the detriment of the United States any classified information (3) concerning the communication...activities of the United States..."

Chairman SPECTER. You testified that it was your thinking that the disclosure of the breaking of the Japanese code, which put many American lives at issue, at stake, was at least in part responsible for the statute?

Mr. SCHOENFELD. Well, there was a joint Committee right after the war, in 1945, I believe, that made a series of recommendations to the Congress about tightening security in the interest of avoiding another Pearl Harbor, and this joint Committee had made reference to the 1943 Midway Chicago Tribune case. So when Congress revisited these laws in 1950, it was taking cognizance of the joint committee's recommendations, and it explicitly rejected the joint committee's recommendation that there be very blanket secrecy rules put in effect, and it carved out this one very narrow area of communications intelligence for special protection. It didn't want to impose a blanket secrecy rule, and the newspaper industry at the time—the New York Times, which was an active member in the American Society of Newspaper Editors—endorsed the passage of this law.

Chairman SPECTER. Well, I know that the law was endorsed by the American Society of Newspaper Editors, but that could cut both ways. It could cut that they endorsed it because they thought they were not being prosecuted. Why do you think that their endorsement—

Mr. SCHOENFELD. I think the journalists—

Chairman SPECTER. Excuse me.

Mr. SCHOENFELD. Sorry.

Chairman SPECTER. Let me finish the question.

Mr. SCHOENFELD. I am sorry.

Chairman SPECTER. What was the basis for your thinking that their endorsement was a recognition that there were some circumstances where it would be appropriate to prosecute a newspaper and a reporter?

Mr. SCHOENFELD. I can only conjecture, Senator, but I would think that in the climate of those years, journalists would have thought it inconceivable, except for a few perhaps on the fringes, that there would be journalists who would be eager to publish vital Government secrets in this area, especially in light of the experience in World War II and then in the early days of the cold war facing a nuclear-armed U.S.S.R.

Chairman SPECTER. Dr. Schoenfeld, what weight, if any, would you give to the fact that there has never been a prosecution under 798?

Mr. SCHOENFELD. I think that should be given some weight. Prosecutions of journalists in our country have been unprecedented, and I think that is a good thing, obviously. And—

Chairman SPECTER. Prosecutions of journalists unprecedented?

Mr. SCHOENFELD. Well, not unprecedented, but very rare.

Chairman SPECTER. Don't tell Judith Miller that.

Mr. SCHOENFELD. They are rare. Well, she wasn't prosecuted. She was held in contempt. But they have been historically very rare, and that is as it should be. That is right and proper. However, I think the New York Times crossed a line here. I would dis-

tinguish it also from other recent leak cases. For example, Dana Priest, a Washington Post reporter, who wrote about clandestine prisons in Eastern Europe, is probably not an easy target for prosecution. It seems to me that Section 798 is not implicated, and you are already into the very murky territory of the Espionage Act, and there I think the courts might as well find constitutional objection to prosecution for that kind of leak.

Chairman SPECTER. Coming back to the Judith Miller case, which started off as a national security case on the identity of the CIA agent, and then shifted to an inquiry into whether there had been obstruction of justice or perjury, do you think that there is an adequate basis for jailing a reporter when you do not have a national security interest in issue?

Mr. SCHOENFELD. Well, since *Branzburg*, the courts have ruled that journalists are obliged to testify about what they know regarding criminal matters, so clearly there is no protection now for journalists. And I think that the—I read the testimony of the Justice Department officials before your Committee about the shield law, and I found it very compelling. I oppose the legislation—that I have seen, in any case—that was commented on by the Justice Department.

Chairman SPECTER. Have you had a chance to review the Lugar-Specter bill?

Mr. SCHOENFELD. I am not sure that I have. I reviewed what was testified to by a Justice Department official by the name of Chuck Rosenberg, I believe, and not further.

Chairman SPECTER. Dr. Schoenfeld, you testified that if the Congress thinks the administration is overclassifying, Congress can change that. What do you do in a situation where the Congress does not know what is being classified? You have the electronic surveillance matter, which you testified about, disclosed in the New York Times on December 16th. The administration had only informed the so-called Gang of Eight—the leaders of both Houses and the Chairman and Ranking Member of both Houses—which had been a tradition. It did not comply with the law. As you know, the National Security Act of 1947 requires that the Intelligence Committees of both Houses be informed.

In the 104th Congress, I was a member of the Gang of Eight as Chairman of the Intelligence Committee. I do not think they told us much. They did not tell the Gang of Eight much from what I saw. But, obviously, informing the Gang of Eight was not in compliance with the law. Then after the New York Times disclosure and certain activities undertaken by this Committee, the administration was willing to tell a Subcommittee of the Senate Intelligence Committee, 7 of the 15 members. And then the House of Representatives initially declined to have a Subcommittee told on the ground that that did not comply with the statute. But then they finally accepted a Subcommittee of 11.

And then on the eve of the confirmation hearings of General Hayden, the administration decided to comply with the law. So now you have the two Intelligence Committees informed. But the Judiciary Committee, which has the oversight responsibility on constitutionality, is not informed, nor is the Chairman and the Rank-

ing Member, which is what the administration sometimes does when it does not want to inform a full committee.

Now, so you have 15 of 100 Senators informed, and you have a small percentage of the House informed, the Intelligence Committees. So how can Congress act to change the classification when Congress cannot find out what is being classified?

Mr. SCHOENFELD. Well, it appears to me, Senator, that there is a genuine clash here between the branches; however, within Congress itself, there does not seem to be an overriding clamor to change the way that Congress is being informed. In fact—

Chairman SPECTER. Do you think the absence of an overwhelming clamor in Congress means anything?

Mr. SCHOENFELD. Well, I think it does.

[Laughter.]

Mr. SCHOENFELD. Yes, Senator, I think it does. Congress operates by majorities, and there is not clearly not a majority in Congress that is pushing hard to change the way that the Judiciary Committee is informed about executive branch programs.

Chairman SPECTER. Let me interrupt you just long enough to state my agreement with you on that.

Mr. SCHOENFELD. I am sorry. Could you repeat that, Senator?

Chairman SPECTER. No.

[Laughter.]

Chairman SPECTER. I agree with you that there is not an overwhelming clamor by Congress, but I would not say that means a whole hell of a lot, if I may use that expression publicly. But you are right, there is not a clamor. There is not a clamor. But where you have a program which violates the Foreign Intelligence Surveillance Act, which prohibits any electronic surveillance without a warrant issued by that court, and you have the interposition by the Government of Article II powers, inherent power, which trumps a statute, admittedly, but you can't make a determination as to whether there is a legitimate exercise of Article II power because it is a balancing test—the President does not have a blank check. It is a balancing test. And you can't balance if you don't know what there is involved. What does Congress do? We could pass another law, but that one could be ignored, too, under the trumping doctrine. So what does Congress do?

Mr. SCHOENFELD. Well, I think in this kind of clash, ultimately it is going to be decided as a political question. If the voters are unhappy with the way that the administration is treating Congress or unhappy with the way Congress is asserting its authority, presumably they will let our elected officials know in the next election. But my sense is that the voters are not unhappy—

Chairman SPECTER. Wait a minute—

Mr. SCHOENFELD. May I finish my statement? General Hayden, who was overseeing this so-called illegal program, and according to some who I have heard argue that he is a criminal for doing so, was just confirmed by a vote of 78–15 as CIA Director. So it suggests to me that there is quite a bit of opinion inside of Congress, and the Senate in particular, that does not regard this as an illegal program. That kind of vote is overwhelming.

Chairman SPECTER. Well, I don't think anybody ever suggested that anybody was a criminal. To be a criminal, you have to have

criminal intent, and no one has challenged General Hayden's good faith and the good faith of anybody in the administration in thinking that there are Article II powers. But if the voters decide that the Congress ought to be thrown out and a new Congress put in and Congress passes another law, the President can ignore that as well. We can throw out all the House of Representatives in November, throw out enough Senators to make an impression, but come back and pass another law. If you don't know what Article II powers are being imposed to evaluate whether they are being trumped are not, you cannot tell.

Dr. Schoenfeld, what do you think of the bill which would give to the Foreign Intelligence Surveillance Court—we had four former Foreign Intelligence Surveillance judges at this witness stand, and they examined the legislative proposal which would give to the FISA Court the program to determine constitutionality in accordance with the generalized approach that there has to be a judicial determination of constitutionality. They have a record for maintaining secrecy, and they have the expertise. What would you think of giving it to them to determine constitutionality?

Mr. SCHOENFELD. I think that is a perfectly reasonable suggestion, and I am surprised the administration hasn't moved with it. But it seems to me a plausible way to resolve this controversy.

Chairman SPECTER. Well, the administration has not even said no, so we are not sure what their attitude is. But they have been asked many times, and we intend to continue to ask them more.

Would you be able to answer some questions that we want to submit in writing, Dean Smolla?

Mr. SMOLLA. Absolutely, Senator.

Chairman SPECTER. Dr. Schoenfeld?

Mr. SCHOENFELD. I will do my best.

Chairman SPECTER. Mr. Anderson?

Mr. ANDERSON. Yes, Senator.

Chairman SPECTER. Professor Feldstein?

Mr. FELDSTEIN. Yes.

Chairman SPECTER. There are a lot of good questions which have been prepared by staff, and I think we have gone about as far as we can go here on the discussion.

In addition to suggestions, Dean Smolla, on the Lugar-Specter bill, if you have any suggestions on 798, I would be interested in them.

Mr. SMOLLA. I would be happy to supply them, Senator.

Chairman SPECTER. It may be that Congress ought to leave that alone. Let me ask you, Professor Feldstein, do you think Congress ought to pick up 798 in view of what the Attorney General says, or perhaps more importantly, what Dr. Schoenfeld says and provide some standards for prosecuting newspapers and journalists?

Mr. FELDSTEIN. Well, I am not an expert in this area, and I am not an attorney.

Chairman SPECTER. If you are not an expert, Professor Feldstein, tell me who is.

[Laughter.]

Mr. FELDSTEIN. Well, maybe the Reporters Committee for Freedom of the Press, some press groups like that. You know, it used to be that reporters felt the First Amendment gave them enough

protection. To me, the idea of prosecuting journalists under the Espionage Act is outlandish. If I thought there was serious impetus to do that, then perhaps a legislative remedy would be a good thing to head that off.

Chairman SPECTER. Don't you think there is an issue as to whether there is a serious intent to use these statutes for criminal prosecution?

Mr. FELDSTEIN. Well, I fear, based on developments recently, that that is the case, and I think that if Congress were able to narrow that in, that would be excellent. I would fear, if Congress tried and failed, that that might be inadvertently interpreted as a green light.

Chairman SPECTER. Why inadvertently interpreted? That would be advertently interpreted.

[Laughter.]

Mr. FELDSTEIN. OK. Fair enough.

Chairman SPECTER. Mr. Anderson, do you think we ought to try to set standards for utilization of 798?

Mr. ANDERSON. I am pretty sure that Dad would have thought that the First Amendment was the only standard that was needed. I am pretty sure that it would have been the only standard that he would have honored. I probably am more inclined to agree with Dr. Feldstein that when you start to meddle, it becomes very difficult.

I have not seen and I have not heard discussed today, including the New York Times case, anything that I would consider even bordering on espionage or activities by reporters that were designed to hurt the national security of this country. But for those reports, we would not even be having this discussion.

Chairman SPECTER. Dr. Schoenfeld, do you think we ought to try to provide some Congressional standards for 798?

Mr. SCHOENFELD. Well, 798 appears to me to be rather unambiguous. That is one of the interesting features about that law, as compared to Section 793 and the Espionage Act, which we are not talking about here today. I am talking about Section 798, which is an entirely different statute.

Section 793 and Section 794 are riddled with ambiguities. In the words of Harold Edgar and Benno Schmidt, who wrote an exhaustive and very brilliant study of them, those statutes are, in their words, "incomprehensible" and there would be good reason to review them. However, the benign indeterminacy that those statutes have created have also served us well over the years. Perhaps that indeterminate, ambiguous understanding of the law is now eroding in the face of more aggressive press willingness to publish secrets, and perhaps there might be some reason to revisit those statutes as well.

Chairman SPECTER. Dean Smolla, you have already said you are unwilling to tamper with it. Do you stand by that?

Mr. SMOLLA. Except to clarify it is not supposed to be used. I wouldn't encourage Congress to make it easier to prosecute journalists. If there was any clarification, it would be to clarify that it was never intended to reach that.

Chairman SPECTER. I would be interested in the specifics if you have some language. I would be interested in the specifics if anybody has some language on that subject.

Thank you very much, gentlemen. We are going to give you the written questions because they are profound questions the staff has prepared. Thank you all.

[Whereupon, at 12 noon, the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Senator Specter
"Examining DOJ's Investigation of Journalists Who Publish Classified Information: Lessons from the Jack Anderson Case"
June 6, 2006
Kevin Anderson
Questions

1. According to media reports and the April 18, 2006 letter of your family's lawyer, Michael Sullivan's, the FBI approached you, your mother, and the custodian of your father's papers, Mark Feldstein, to request broad access to materials the FBI claims are classified. Your family then informed the FBI, through attorney Sullivan, that it would not be granting the FBI's request for documents.

   - Mr. Anderson, to your knowledge, did the FBI ask your father for access to these documents during his lifetime?

     Not in the last few years of his life. I visited my father often and regularly during that time period. I spent about ¼ of my time in Washington, DC. He never mentioned that any such request was made.

     After the family released the April 18, 2006 letter, I was asked a similar question by a reporter. I then personally checked up on this issue. For almost two years prior to his death, my father was mostly confined to his bed and home. He received 24 hour per day care. I checked with my mother and my sister, Tanya A. Neider, who lived with my parents and coordinated the nurses who took care of dad during those years. None of them were aware of any such request.

   - Have representatives of the FBI given you an explanation for why they want such broad access to your father's files, including materials from 1980 until his death?

     Yes, and no. The FBI has not provided a coherent or credible explanation as to why they are seeking such "broad access" to my father's files. In telephone conversations with representatives of the FBI and the Department of Justice ("DOJ"), I was told that they were seeking access to dad's files in connection with their investigation of Messrs. Rosen and Weissman, two former officials of the American Israel Public Affairs Committee ("AIPAC"). Subsequent public statements by FBI officials, however, appeared to contradict this position and caused the family to question whether the bureau was being honest and forthcoming with either the family or the American public.

- Were any limits discussed by the parties to try to accommodate the confidentiality of your father's files with what specifically the FBI was seeking? What limits were proposed?

Yes. During conversations with the FBI Michael Sullivan and I first suggested that the FBI make an attempt to obtain the information from alternative non-media sources. The FBI acknowledged to us that they had not even reviewed dad's old columns to determine if he had written about anything within the realm of topics relating to the AIPAC investigation. In addition, during my several conversations with FBI and DOJ representatives, I hypothetically discussed the scope and logistics of the FBI's review of dad's papers, assuming the family were willing to cooperate. These discussions were fluid and preliminary in nature. During the course of these discussions, we suggested that the family might consider the following:

- *For me to review the papers to locate anything that related to the AIPAC case;*
- *To have an agreed, neutral individual review the papers to locate anything that related to the AIPAC case;*
- *For me to review the papers to locate anything during a specified period of time; or*
- *To have an agreed, neutral individual review the papers to locate anything during a specified period of time.*

Any documents thus located could be reviewed by FBI and/or DOJ representatives after we determined that no source would be compromised.

In response, the FBI and DOJ representatives variously stated that:

- *They would need to review all of Dad's papers, regardless of their relevance to the AIPAC case;*
- *I could not review the documents because I did not have a security clearance, in the event there were classified materials present;*
- *Only trained FBI agents could review the documents; and*
- *Any "classified" documents would have to be removed and reviewed by the classifying agency. If the document were cleared*

as having been declassified, it would be marked accordingly and returned. If not cleared, it would be retained.

2. Did you ever discuss the reporter's privilege or the prosecution of journalists and their sources with your father?

Yes. While I was in law school at Georgetown University Law Center (1978-81), I recall several detailed discussions I had with dad about this topic when the First Amendment and shield laws came up in course readings and classroom discussions. More recently, during my monthly visits with dad, up to and including the week of his death, I purposely discussed current events with dad to regularly gauge his mental health. We discussed some of the more recent events, such as the Judith Miller case.

- What were his views – Did he see a potential chilling effect?

Certainly since the arrest of dad's chief investigative reporter, Les Whitten, in 1973, he viewed the prosecution of reporters as a tactic used by the government to deal with difficult reporters. He also commented regularly on the chilling effect not only that this would have, but was intended to have on other reporters. For example, in his book, The Anderson Papers, he stated:

> *So what if the case is ultimately thrown out of court? In the meantime, they have arrested a troublesome reporter, clapped him in jail, threatened him with ten years in prison, flushed out some of his sources, and in doing so, reminded other troublesome reporters that the same thing could happen to them. [The White House] had already won [its] victory the moment the headlines hit the streets announcing the arrest of another reporter. It was a victory that will bear fruit every day, whenever any reporter holds back for fear of getting into trouble, whenever a source fears to come forward lest he be exposed, whenever an editor "goes easy" for fear of government retaliation . . . whenever a citizen anywhere can be influenced to think of reporters as lawbreakers, the kind of people who have to be arrested.*

Jack Anderson & George Clifford, The Anderson Papers (1973), at 241-42.

Dad was the subject of 11 investigations by government agencies trying to uncover his sources – including an illegal CIA domestic surveillance effort: "Operation Mudhen," which used as many as 16 agents and eight automobiles to shadow dad and his associates.

While these investigations were unsuccessful in their efforts to discover dad's confidential sources, dad always felt there was some negative effect on reporters and sources. One of the reasons he sued the Nixon Administration for its illegal investigation was to send a reassuring message to his sources, both current and potential, and the political leaders of the time, that he would not be so intimidated.

We have been concerned that the current FBI and DOJ efforts to review and seize dad's documents could have a chilling effect on national security journalists of this generation and their sources. A deliberate decision was made to instigate the review of his papers after his death. This sends a message to people in the journalism profession that the government will not only harass you, but your widow and children as well.

The family hopes by its resistance to the current FBI and DOJ efforts to declare to today's investigative reporters, past sources of dad's and potential sources for others, that dad's steadfastness will be carried on and should be an example for others.

- For example, what were your father's views of the prosecution of Daniel Ellsberg?

I know that dad did not view the publication of the Pentagon Papers as a national security threat and opposed both the efforts to block their publication and the criminal prosecution of Daniel Ellsberg. He often referred to Daniel Ellsberg as a true American patriot. One of the points dad used to make to his government sources to get them to provide important information of wrongdoing was that they did not work for their boss in the bureaucracy, they did not even work for the President of the United States; they work for the American people, and their job, their obligation, their moral duty is to the American people. And when the bureaucrats and politicians above them deceive the public and deceive the Congress, they have a moral duty to share this with the American people, regardless of whether someone has labeled the lie a "secret."

Dad also referred to Daniel Ellsberg and the Pentagon Papers as examples on the importance of getting documents, as opposed to

verbal reports. Dad even credited Dr. Ellsberg with helping him earn the Pulitzer Prize. Dad's source on the government's Pakistan tilt had given information before then, but never documents because they were more easily traced to the source. Dad said that his source told him it was because of the Pentagon Papers, and the difference that he saw documents made, that lead him to give dad documents. It was the documentary proof that rebutted the administration's denials and made the story.

3. How do you think that your father would have responded to the FBI's request had he been alive when the FBI made its request?

First, and foremost, I believe that dad would have been deeply troubled by the prosecution of Messrs. Rosen and Weissman. The government's reading of the national security laws in that case can be applied to journalists. In fact, this now appears to be actively under consideration in connection with stories written by the New York Times.

Secondly, I believe dad would have been concerned that any FBI review of his papers might uncover the identity of sources of the Washington Merry-Go-Round. This could potentially expose dad's sources to harassment or retaliation. To do so, would obviously be contrary to dad's wishes.

Finally, the scope of the government's proposed review is overly broad. The "duty" to remove all material marked as "classified" that the FBI agents expressed would be contrary to dad's stated wish to have his papers available at some appropriate juncture to future generations for their historic, political and cultural value.

4. This situation brings up a number of unexplored issues, such as reporter-source privilege. Any classified documents that are in your father's files could be used to identify the individuals who provided them. Do you think that this type of information ought to be protected by statute?

Yes. Dad tended to rely exclusively on the text of the First Amendment, rather than any statutory protection. He believed that a reporter had a constitutional right to have a confidential relationship with his source. The right to publish means there is a right to gather news. The full and free flow of information to the public was basic to the Constitution's protection of a free press. This protection would be meaningless if the process by which news is assembled and disseminated is not protected.

This being said, I believe dad would now advocate a baseline level of statutory protection. This is especially true since even the courts now appear to be showing less concern for First Amendment freedoms. Judicial protection is no longer an adequate assurance of a press that is truly free and untrammeled in the fullest sense of the Constitution.

Similar to the attorney-client privilege, which belongs to the client, not the attorney, the protections of a reporter-source privilege should be sufficiently broad to protect the beneficiary of the privilege. This is not the reporter; not the source; but the public interest in the First Amendment freedoms. The First Amendment guarantees are "not for the benefit of the press so much as for the benefit of all of us." Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). This, too, transcends the life of both journalist and source. Any statutory protection obviously needs to survive not only the death of the reporter, but even the death of the source.

Dad would encourage Congress not to be concerned with the circumstances of particular newsmen or informants. But to focus instead on the broader public interest. Congress should seek to create conditions in which information possessed by news sources can reach public attention. An informed citizenry is the basic ideal upon which an open society is premised. A free and unfettered press is indispensable to a free society.

Senator Specter
"Examining DOJ's Investigation of Journalists Who Publish Classified Information: Lessons from the Jack Anderson Case"
June 6, 2006
Mark Feldstein
Questions

1. In your written testimony, you referenced Department of Justice Guidelines, which require investigators to use reporters and their sources only as a last resort in an investigation. Yet you also note that the FBI may have been in the initial stages of its investigation when it sought Mr. Anderson's files. If you had believed that the FBI had exhausted all alternatives in its investigation before turning to Mr. Anderson's files, would you have been more inclined to grant the FBI access to those files?

I did not and do not possess the personal authority to grant access to the Anderson papers. My understanding is that the collection is owned by the Anderson family and that therefore only they have the legal authority to grant access to the papers. In any case, while George Washington University has physical custody of the collection, I do not speak for the university on this issue.

That said, I would have been more inclined to recommend to the university and the Anderson family that they grant the FBI access to this collection if the FBI had exhausted all alternatives before approaching us. At least this would have been evidence that the FBI was engaged in a good faith effort to track down the information on its own rather than turning to journalists to do the work for them—trying to cut corners by deputizing the media as an arm of law enforcement, as it were.

Still, there are also other compelling reasons to warrant skepticism of the FBI's actions in this case:

- **Neither I nor my students who have looked through our files have seen any of the documents that the FBI maintains are located there.**

- **The FBI's claim that our files contain these documents is apparently based on the word of an informant of dubious credibility—a man who was imprisoned for sodomizing a boy under 13 and who has admitted having a history of mental illness and fabricating stories.**

- **By the FBI's own account, the documents it seeks are more than 20 years old, placing them outside the statute of limitations in this case. (This also suggests that it is unlikely Anderson received such material in the first place since he had been sick with Parkinson's disease since 1986 and did little original investigative reporting after that.)**

- **FBI agents demonstrated bad faith by trying to trick Olivia Anderson, the ailing and elderly widow of the columnist, and myself into turning over documents after Kevin Anderson, the columnist's son and lawyer, had already emphatically rejected this request.**

- **Perhaps most importantly, the FBI request was overly broad and appeared to be a fishing expedition. Agents said they wanted to search *all* of the nearly 200 boxes of our collection without restriction and made clear that they would remove even papers unrelated to the specific case at hand if they felt it was appropriate.**

2. You have suggested that the way in which the Anderson case is resolved will have a lasting impact on the field of journalism, by affecting both the sources who leak information and the journalists who publish that information. As you explain in your written testimony, journalists serve an important oversight function which we as policymakers should be hesitant to chill.

    - If the FBI is allowed to view Jack Anderson's files, do you believe reporters and officials will be deterred from donating their documents to universities or archivists for fear that their documents will not be kept private?

Yes. Before donors turn over their papers to universities and other archives, they sign a written document specifying materials they want withheld from public inspection. They do so for a variety of reasons: to protect their own privacy or that of family members; to prevent the disclosure of sensitive personal or medical secrets; or, in the case of doctors, lawyers and journalists, to protect the identities of (respectively) patients, clients and confidential sources.

However, the Jack Anderson files have not yet been catalogued and thus none of this sensitive information has yet been segregated and withdrawn. So having the FBI view the Anderson papers now would send a message to potential donors everywhere that their desire for privacy cannot be guaranteed. Under these circumstances, many potential donors would decide it's not worth the risk and simply keep their papers private or destroy them—a potentially incalculable loss to history.

    - Will granting the FBI access to Jack Anderson's papers significantly increase the concern of journalist's sources that their anonymity is not guaranteed?

I believe so. For more than a generation, confidential news sources have operated under the presumption that their identities would be protected at least until their death, if not afterwards. However, the Anderson case raises the possibility that whistleblowers may be exposed while they are still alive if they are unlucky enough to have the journalist to whom they provided information die before them.

In addition, because of Anderson's unusual background as an investigative reporter who battled the FBI and other agencies for decades, this high-visibility case could particularly chill news sources because of the perception that the government is misusing its power here to try to punish confidential news sources from Anderson's past—thus deterring whistleblowers from coming forward in the future.

3. Certain privileges extend into death, such as the confidentiality agreement between attorney and client. Is extending into death the agreed confidentiality between reporters and their sources essential to maintaining freedom of the press and journalistic integrity, and allowing reporters to maintain the trust of their sources?

I wouldn't go so far as to say it is "essential" since hopefully such fact situations will be relatively rare but giving reporter's privilege comparable legal protections as the attorney-client privilege would definitely be a positive step toward preventing what the FBI wanted to do in this case: rifling through journalistic files even past the grave.

4. In a *Washington Post* Article you wrote last July, you said that leaks by government officials are often strategic moves made to "manipulate the agenda."

    - In your experience, to what extent are leaks by government officials made in an attempt to inappropriately manipulate the agenda, and to what extent are the leaks legitimate whistle-blower attempts to raise and rein in abuses of power?

Difficult to say since journalists can never know for certain what motivates news sources who leak to them. Government officials, like other news sources, often have *multiple* reasons for leaking, both good and bad—altruism, revenge, ego, ambition. They may be motivated by ideology, bureaucratic turf battles, or the desire to ingratiate themselves with a reporter for their future benefit. Or any combination of the above.

    - Do reporters generally have the information needed to distinguish between the two?

It varies considerably. Sometimes a source's "spin" is obvious, sometimes not. Reporters can make educated guesses as to what motivates a source but journalists are inevitably limited in what they know about the often complicated goals of sources. Occasionally reporters only discover a source's true underlying motive after the passage of time, too late to influence their story. Even then, motivation is always open to interpretation. Just as one person's terrorist is another person's freedom fighter, so one reporter's idealistic whistleblower is another's manipulative ideologue.

5. Your written testimony notes that reporters often have access to sensitive, classified material, causing them to have to decide what information they may and may not publish.

    - Do you as a journalist believe that journalists generally have the tools to determine what should be published?

While a select group of journalists frequently get access to sensitive or classified material—usually investigative reporters or journalists who specialize in national security issues—most reporters go their entire careers without receiving such leaks. Government officials who provide such classified material are usually exceedingly careful to trust only reliable journalists with proven track records. As a result, reporters who get such sensitive material usually do have the background to handle the responsibility that goes with it. For the most part, journalists who specialize in this area tend to be seasoned veterans who work for leading media outlets that have multiple layers of editorial and legal review that makes them pretty careful about what they publish or broadcast.

    - Given that reporters may face criminal sanctions for inappropriately publishing classified information, what policies might you suggest to alleviate this burden in a way that allows reporters to freely do their jobs, but that also accounts for the need to keep certain sensitive national security information classified?

- ***Reform the government's classification system.*** **If only genuine national security secrets were classified, journalists would have a simple standard to follow about what they can safely report and what they cannot. However, the government has cried wolf so often by excessively over-classifying information that journalists have rightly come to distrust these government claims. Congress could help generate faith in the system by restoring sanity to the classification process--requiring federal agencies to have a presumption of openness not secrecy (especially with historical records and other documents that obviously have no current national security ramifications) and by appropriating funds so that agencies could implement the release of these documents without delay.**

- ***Request an investigation by the Justice Department inspector general of possible FBI misconduct in the Jack Anderson case.*** **While this will not solve the larger issues raised above, such oversight could at least explain what happened in this case and serve as a deterrent to similar behavior in the future.**

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 1, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Criminal Division Chief of Staff and Principal Deputy Assistant Attorney General Matthew W. Friedrich, following Mr. Friedrich's appearance before the Committee on June 6, 2006. The subject of the Committee's hearing was the unauthorized disclosure of classified information by the press. We apologize for the length of time our response has required.

You also requested the Department's views on S. 2831, the "Free Flow of Information Act of 2006." On June 20, 2006, the Department provided the Committee with a letter setting forth its views in opposition to this legislation. For your convenience, we have enclosed a copy of the letter for the hearing record.

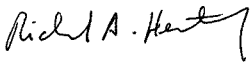
Senator Leahy also requested the Department's views on data retention by Internet service providers. The Attorney General has commissioned a panel of experts within the Department to examine this issue and provide him with recommendations. That panel's work is ongoing. Therefore, I respectfully request that you allow the Department additional time to finalize its own inquiry before we respond to the Committee's request.

We hope that this information is helpful to you. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us. The

The Honorable Patrick J. Leahy
Page 2

Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



Richard A. Hertling
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Responses to Questions for the Record
Matthew W. Friedrich
Chief of Staff and Principal Deputy Assistant Attorney General
Criminal Division

"Examining DOJ's Investigation of Journalists Who Publish Classified Information: Lessons from the Jack Anderson Case"

Committee on the Judiciary
United States Senate
June 6, 2006

Senator Specter:

1. *Last Month Attorney General Gonzales made a series of statements on ABC's This Week program to suggest that DOJ would consider prosecuting a journalist or news organization for publishing classified information.*

   - *To which statutes was he referring when he said, "There are some statutes on the book, which if you read the language carefully, would seem to indicate that [prosecution of journalists] is a possibility."?*
   - *Does the Department of Justice share the views of Benno Schmidt and Harold Edgar, who wrote in 1973 that the Espionage Act does not apply to journalists, or the views of Justices White and Stewart, who wrote in the 1971 Pentagon Papers case that the Act does apply to journalists?*
   - *Title 18, United States Code, Section 798, which bars the willful publication of communications intelligence, appears to apply to journalists. Was this the statute Attorney General Gonzales was discussing?*

Answer: The statutes to which the Attorney General was referring were 18 U.S.C. §§ 793 and 798. These two provisions, on their face, do not provide an exemption for any particular profession or class of persons, including journalists. Many judges (including Justices of the United States Supreme Court) and commentators have examined these statutes and reached the same conclusion. In his concurring opinion in the Pentagon Papers case, for example, Justice White wrote, "from the face of [the statute] and from the context of the Act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793(e) if they communicate or withhold the materials covered by that section." *New York Times v. United States*, 403 U.S. 713, 740 (1971). We agree with Senator Specter, who stated on May 2, 2006, in a hearing with FBI Director Mueller, "the White-Stewart opinions" from the Pentagon Papers case "are pretty flat out that there is authority under those statutes to prosecute a newspaper, [and] inferentially [to] prosecute reporters."

In *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988), the United States Court of Appeals for the Fourth Circuit explicitly rejected a defendant's assertion that the First Amendment barred his prosecution under § 793 for

unauthorized disclosures of classified information. The Fourth Circuit did so over the objections of numerous news organizations that had filed amicus briefs in the case to press the First Amendment defense against prosecution. Further, several legal commentators have concluded, with respect to §§ 793 and 798, that journalists are not exempt from the reach of these statutes if their elements are otherwise met.

It bears emphasis that the Attorney General has made clear that the Justice Department's primary focus has been and will continue to be investigating and prosecuting leakers, not members of the press. The Department strongly believes that the best approach is to work cooperatively with journalists to persuade them not to publish classified information that can damage national security.

2. *How do you square the Attorney General's public comments on the prosecution of journalists with Department of Justice regulations (28 C.F.R. § 50.10) that say that "the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues"?*

Answer: In his "This Week" appearance, the Attorney General was addressing the potential reach of 18 U.S.C. §§ 793 and 798 on their face. The Attorney General's comments are consistent with the Department of Justice's policy, as expressed in 28 C.F.R. § 50.10. Strictly speaking, the provisions of 28 C.F.R. § 50.10 are not "regulations," but a statement of policy that does not "create or recognize any legally enforceable right in any person." *See id.* at 50.10(n); *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046-47 (D.C. Cir. 1987). As set forth in 28 C.F.R. § 50.10, the policy seeks to "balanc[e] the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice." The Department recognizes the vital role that a free press plays in our society. Accordingly, the Department's voluntarily adopted internal policy requires a rigorous internal review – culminating with the Attorney General himself – of not only decisions to prosecute members of the press but also subpoenas aimed at the press, even in cases where the press itself is not the target of the investigation. The policy demonstrates the Department's ongoing commitment to striking a balance between the public's interest in the free dissemination of ideas and its interest in effective law enforcement and the fair administration of justice.

3. *The Department of Justice argued at this Committee's October 2005 reporters' privilege hearing that reporters' privilege legislation is not necessary because Department of Justice regulations, namely 28 C.F.R. § 50.10, set forth safeguards and a framework for evaluating requests for journalists' testimony and documents.*

   - *Do these regulations apply to requests for records of deceased journalists, like Jack Anderson?*
   - *Does the Department of Justice believe that there should be the same level of First Amendment protection of the notes and confidential sources of deceased journalists?*

- *Don't some of the national security concerns about the publication of national secrets diminish when a journalist dies? Dead journalists don't publish anymore, after all. Accordingly, doesn't the government's interest in and concern about such materials diminish?*

Answer: At the time of my testimony, the Department was reviewing the applicability of 28 C.F.R. § 50.10 to circumstances involving deceased journalists. Subsequent to my testimony, the Department revised the United States Attorneys' Manual to make it clear that "[t]he Department considers the requirements of 28 C.F.R. § 50.10 applicable to the issuance of subpoenas for the journalistic materials and telephone toll records of deceased journalists." United States Attorneys' Manual § 9-13.400.

Separate and apart from the applicability of the Department's policy to deceased journalists, it is the Department's view that, as a legal matter, the treatment of notes and sources of deceased journalists should be the same as that of living journalists. The courts, including the United States Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), have held that journalists have no First Amendment privilege against disclosing their sources in response to a grand jury subpoena.

With respect to the Department's views on the effect a journalist's death may have on any national security concerns regarding the journalist's sources or records, such a determination is highly fact-specific and would need to be evaluated on a case-by-case basis.

4. *Courts, including the Supreme Court in Swidler & Berlin v. United States, 524 U.S. 399 (1998), have said that testimonial and production privileges, like the attorney-client privilege, apply after the death of the privilege holder.*

   - *If courts are willing to extend privileges beyond the grave when policy supports it, wouldn't a reporter's privilege better safeguard the First Amendment interests of deceased reporters and their sources?*

   - *If the attorney-client privilege, marital privilege, psychiatric privilege, and even executive privilege can survive the death of one of the privilege holders, why shouldn't the same thing apply to reporters? What is the policy difference? For instance, is the First Amendment protection of the press any less than the Sixth Amendment right to counsel?*

Answer: As noted above, the Department has revised the United States Attorneys' Manual to make it clear that "[t]he Department considers the requirements of 28 C.F.R. § 50.10 applicable to the issuance of subpoenas for the journalistic materials and telephone toll records of deceased journalists." United States Attorneys' Manual § 9-13.400.

As a broader matter, the same courts, including the Supreme Court, that have consistently held that the marital, psychiatric, and attorney-client privileges extend beyond the grave also

have consistently held that journalists possess no First Amendment privilege to avoid testifying in response to a valid grand jury subpoena. As the Supreme Court stated in *Branzburg*, "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." *Branzburg*, 408 U.S. at 691.

The Department remains committed – as it always has been – to striking an appropriate balance between the public interest in the free dissemination of ideas and the public's interest in effective law enforcement and national security. Accordingly, the Department believes that, as a legal matter and as a policy matter, legislation in this area is both unnecessary and unwise.

5. *The Department of Justice has procedures and regulations in place to address subpoenas to journalists.*

   - *What similar procedures are in place to ensure that a decision to prosecute a journalist is carefully considered and the First Amendment interests properly weighed. Shouldn't this be a higher standard than the one that applies to subpoenas?*

Answer: The Department of Justice takes seriously any investigative or prosecutorial decision that implicates – directly or indirectly – members of the news media, whether it be the issuance of a subpoena or the filing of an indictment. The seriousness with which the Department approaches these decisions is reflected in the Department's governing policy, 28 C.F.R. § 50.10, which is reiterated in the United States Attorneys' Manual.

As is noted in the Department's policy, "the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." The Department has never in its history prosecuted a member of the press under section 793, section 798, or any other statute relating to the protection of classified information, even though, as a legal matter, such a prosecution is possible under the law.

The Department's policy requires the express authorization of the Attorney General for any decision to prosecute a member of the news media for an offense committed during the course of, or arising out of, the news gathering or reporting process. In authorizing any such decision, the Attorney General would necessarily seek to "balanc[e] the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice." 28 C.F.R. § 50.10.

6. *Section 798 of the Criminal Code was enacted in 1950 in response to a June 7, 1942* Chicago Daily Tribune *article that disclosed during wartime that the United States had obtained advanced intelligence of the Japanese navy's attack plans at Midway. This information was later revealed to have come from communications intelligence, specifically intercepted wires and a cracked Japanese code. Section 798 is now being*

discussed as a potential tool for prosecuting journalists who willfully publish communications intelligence.

- *What level of national security threat does the Department of Justice believe is needed for prosecution under section 798? Does the threat need to be imminent? Do we need to be at war?*

Answer: As to the requirements of the law, section 798 does not, by its terms, require a showing either that the disclosure of classified communications information resulted in an imminent threat to the United States or that the nation was at war when the disclosure was made. No court has interpreted section 798 as requiring a showing that the disclosure resulted in an imminent threat or occurred in a time of war, nor does the Department believe that such an interpretation would be warranted in light of the clear wording of the statute.

Senator Leahy:

1. *You testified that the Department of Justice has never prosecuted a member of the press under 18 U.S.C. § 793 for the publication of national defense information, but believes that such a prosecution could be possible.*

   (a) *Could section 793 be used to prosecute a journalist for publishing national defense information for the purpose of promoting public debate or selling newspapers?*

   (b) *What about conduct that is incidental to a journalist publishing a story, such as retaining classified documents that may be used later in a story, or communicating such information to a publisher or other reporters in the course of writing a story? Does the Department believe that section 793 also reaches this type of conduct?*

Answer: As the Attorney General has indicated, while there are statutes on the books (including, most notably, 18 U.S.C. §§ 793 and 798) that do not appear to exempt any profession or class of persons from their scope, the Department's "primary focus" is on the leakers of classified information and not the media recipients of that information. Having said that, a leading case in this area, *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988), holds that section 793 makes no distinction between the motivations of those who illegally disclose national defense information to someone not authorized to receive it.

In *Morison*, the defendant claimed that, because he leaked classified national defense information to the news media and not to a foreign power, his actions did not constitute "classic spying" and therefore did not run afoul of section 793. The Fourth Circuit rejected this contention, noting that the language of the statute "includes no limitation to spies or to 'an agent of a foreign government,' either as to the transmitter or the transmittee of the information, and they declare no exemption in favor of one who leaks to the press. It covers 'anyone.' It is difficult to conceive of any language more definite and clear." *Morison*, 844 F.2d at 1063.

To be clear, the defendant in *Morison* was not a member of the news media, although he did work part time for a defense publication, and no court has had occasion to consider the application of section 793 to a member of the news media.

With regard to conduct that is incidental to a journalist publishing a story, whether such conduct falls within section 793 will depend on the particular facts and circumstances. Therefore, it would be inappropriate to offer an advisory opinion about the legality of such conduct.

2. *Section 798 of title 18 prohibits unauthorized disclosure of classified information pertaining to communications intelligence. Like section 793, section 798 has never been used to prosecute a journalist.*

(a) *Without getting into the details of any ongoing investigations, has the Department ever considered prosecuting a journalist for publishing classified information under this provision?*

(b) *Do you believe there is a legally significant difference between the act of publishing a story that reveals only the existence of a classified program involving communications intelligence, and the act of publishing a story that discloses specific details about the program?*

Answer: Respectfully, it would be inappropriate to comment upon whether the Department is now considering the prosecution of journalists for publishing classified information. As to whether such prosecutions have ever been considered, my understanding is that there are historical examples where such prosecutions were considered by the Department. *See* Gabriel Schoenfeld, *Has the* New York Times *Violated the Espionage Act?*, Commentary (Mar. 2006), at http://www.commentarymagazine.com/Production/files/schoenfeld0306advance.html.

With regard to whether there is a legally significant difference between publishing the existence of a classified program and the details of such program, the answer would likely depend on the particular facts and circumstances, including the extent to which the existence of the program is classified information.

3. *You testified that you think improper classification might be a proper defense to certain statutes involving the dissemination of classified information. Specifically, do you believe that improper classification could be a defense to a case brought under section 798? What about a prosecution under section 793?*

Answer: As I stated in my testimony before the Committee on June 6, 2006, improper classification "might be a defense to certain statutes," but it is "not certain" that this defense is available for sections 793 and 798. Some commentators have argued that improper classification could be a defense to prosecution under the Espionage Act. Professors Edgar and Schmidt, for example, in their 1973 article argued that the language of the Espionage Act "suggests that the appropriateness of the classification is a question for the jury." However, in *United States v. Boyce*, 594 F.2d 1246 (9th Cir. 1979), the Ninth Circuit considered and rejected a defendant's challenge to his conviction under sections 793, 794, and 798 for disclosing communications intelligence to the Soviets. The Ninth Circuit specifically held that "[u]nder section 798, the propriety of the classification is irrelevant. The fact of classification of a document or documents is enough to satisfy the classification element of the offense."

Beyond this Ninth Circuit case, the Department is unaware of any case law that addresses the issue of improper classification as a defense, and we are aware of no case that affirmatively holds that such a defense is available to defendants in Espionage Act cases.

4. *Besides sections 793 and 798, are there any other legal authorities that the Justice Department believes could be used to prosecute journalists for publishing classified information?*

Answer: Sections 793 and 798 are the two statutes that are most relevant to the vast majority of crime reports the Department receives from Intelligence Community members relating to the unauthorized disclosure of classified information. Depending on the facts and circumstances of any particular case, there may be other statutes of potential applicability.

5. *What is the Department's position on whether Congress should enact a new law to criminally punish leaks?*

Answer: The Department is prepared to work with the Congress both on crafting new legislation and improving the existing statutory tools at the Department's disposal to combat illegal leaks of classified information.

6. *Other than the Jack Anderson case, has the Department made any attempts over the past 5 years to search the files of journalists, either living or deceased?*

Answer: I am informed that over the past five years, the Department has approved search warrants for materials related to the news gathering process pursuant to the Privacy Protection Act, 42 U.S.C. § 2000aa *et seq.*, in four cases. The Department also issues subpoenas to reporters pursuant to the policy embodied in 28 C.F.R. § 50.10.

7. *You testified that the Department is reviewing its policy for seeking information from the estates of deceased journalists. Is that review complete and, if so, what is the new policy?*

Answer: As noted above, this review is complete and the Department has changed its policy. The Department has revised the United States Attorneys' Manual to make it clear that "[t]he Department considers the requirements of 28 C.F.R. § 50.10 applicable to the issuance of subpoenas for the journalistic materials and telephone toll records of deceased journalists." United States Attorneys' Manual § 9-13.400.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 20, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 2831, the "Free Flow of Information Act of 2006." S. 2831 would create a "journalist's privilege" to be asserted in a number of circumstances by a covered journalist or "communication service provider" against the compelled disclosure of either a source who provided information under a promise or agreement of confidentiality, or of information obtained while acting in a professional capacity. The Department opposes this legislation because it would subordinate the constitutional and law enforcement responsibilities of the Executive branch — as well as the constitutional rights of criminal defendants — to a privilege favoring selected segments of the media that is not constitutionally required.

Constitutional Concerns

The leading authority on the constitutional status of a journalist's privilege is *Branzburg v. Hayes*, 408 U.S. 665 (1972), which rejected arguments asserting the privilege on First Amendment grounds in the grand jury context. A recent Federal court of appeals decision on the issue, *In re Grand Jury, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006), dismissed arguments questioning the force of *Branzburg*'s holding and applied *Branzburg* to reject the assertion of a First Amendment journalist's privilege. While some Federal courts have recognized a First Amendment-based journalist's privilege in civil cases — where the Government's law enforcement responsibilities are not directly affected, *see Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) — the privilege proposed in the bill would extend to criminal proceedings, including grand jury investigations, and to the national security context.

In addition, the bill's definitions of privileged "journalist[s]" and "communication service provider[s]" do not exclude the agents and media outlets of hostile foreign entities, and therefore extend protection to these agents against the law enforcement efforts of the United States. For example, the definitions appear to encompass entities such as *Al-Manar* and its

reporters and cameramen. *Al-Manar* is the media outlet and television station of the terrorist organization Hezbollah. *Al-Manar* was placed on the Terrorist Exclusion List by the State Department in 2005 and more recently was designated a specially designated global terrorist by the Treasury Department pursuant to Executive Order 13224.

Because the broad privilege established by the bill is not grounded on a constitutional right, we object to any provision that subordinates to the privilege recognized constitutional imperatives, such as Presidential responsibilities under Article II and a defendant's rights under the Sixth Amendment.

President's Authority to Control Classified Information

Section 7 of the bill would permit disclosure where the information or record in question was obtained by the journalist as a result of his eyewitness observation of criminal conduct or the committing of criminal or tortious conduct by the journalist himself. There is an "exception to the exception," providing: "This section does not apply if the alleged criminal or tortious conduct is the act of communicating the documents or information at issue." As we understand it, this latter provision appears to apply to eyewitness or perpetrator information concerning a criminal disclosure of classified national security information, including, for example, the provision of such information to a journalist for an entity such as *Al-Manar*. Therefore, its effect would be to extend the protection of the privilege to this criminal disclosure of classified national security information. This provision could interfere with the President's constitutional authority to control classified national security information. *See generally Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) (acknowledging the compelling nature of the President's constitutional authority to classify and control access to information bearing on the national security).

National Security and Law Enforcement Responsibilities of the Executive Branch

Section 9(a)(1) of the bill would permit the Executive branch to obtain a journalist's testimony and information involving source identification only if the Government could demonstrate to a court, by "clear and convincing evidence," that the disclosure is "necessary to prevent an act of terrorism or to prevent significant and actual harm to the national security" *and only if* "the value of the information that would be disclosed clearly outweighs the harm to the public interest and the free flow of information that would be caused by compelling the disclosure." Similarly exacting standards are required to bypass the privilege under section 9(a)(2) in criminal prosecutions or investigations of unauthorized disclosure of classified information by a Federal employee. The conditions this provision requires the Government to satisfy in order to obtain information critical to national security place impermissible burdens on

the constitutional responsibilities of the President and the Executive branch.[1] *See generally Haig v. Agee*, 453 U.S. 280, 307 (1981) (stressing that "It 'is obvious and unarguable' that no governmental interest is more compelling than the security of the Nation" in rejecting former CIA agent's claim that passport revocation violated First Amendment rights).

Sixth Amendment

Under subsection 5(b) of the bill, defendants could obtain a journalist's testimony or evidence only if they proved to a court by clear and convincing evidence that, *inter alia*, the information sought was (1) "directly relevant" to guilt or innocence or to a "critical" sentencing fact; (2) "essential"; and (3) non-"peripheral"; and that failure to provide the information sought "would be contrary to the public interest." Thus, a defendant who established that the information or testimony sought was essential information that was directly relevant to innocence still could not obtain it if he could not also persuade a court, by clear and convincing evidence, that nondisclosure of the information would be "contrary to the public interest." This provision is inconsistent with the requirements of the Sixth Amendment.

The Sixth Amendment provides in relevant part: "In all criminal proceedings, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . [and] to have compulsory process for obtaining witnesses in his favor." As the Supreme Court has recognized, "This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Although this right is not absolute, the government bears a heavy burden when it seeks to limit it by statute. As the Second Circuit has explained: "While a defendant's right to call witnesses on his behalf is not absolute, a state's interest in restricting who may be called will be scrutinized closely. In this regard, maximum 'truth gathering,' rather than arbitrary limitation, is the favored goal." *Ronson v. Commissioner of Correction*, 604 F.2d

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[1] In *Branzburg*, the Supreme Court described the relative weight to be accorded to law enforcement and national security interests in conflict with an asserted journalist's privilege:

> Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

408 U.S. at 690.

176, 178 (2d Cir. 1979) (State court's refusal to call psychiatrist to testify in support of prisoner's insanity defense violated Sixth Amendment right to compulsory process).

The conditions of subsection 5(b) exceed the standards imposed by courts that have given considerable deference to a reporter's privilege, based upon their view that the privilege is constitutionally required. *See, e.g., In re Shain*, 978 F.2d 850 (4th Cir. 1992) (reporter's privilege against compelled testimony in a criminal case rejected in the absence of government harassment or bad faith); *United States v. Criden*, 633 F.2d 346, 358-59 (3d Cir. 1980) (constitutional reporter's privilege can be overcome if the movant "demonstrates" and "persuades the court" that the information could not be obtained from other sources and such information is "crucial to the claim"; privilege claim rejected and testimony compelled). A district court recently described the balance to be struck between a constitutionally based journalist's privilege and a defendant's Sixth Amendment rights: A defendant's "Sixth Amendment right to prepare and present a full defense to the charges against him is of such paramount importance that it may be outweighed by a First Amendment journalist privilege *only* where the journalist's testimony is cumulative or otherwise not material." *United States v. Lindh*, 210 F.Supp.2d 780, 782 (E.D. Va. 2002) (emphasis added). Last month, the United States District Court for the District of Columbia held that a defendant's Sixth Amendment right to obtain relevant and admissible evidence for his criminal trial could not be subordinated to an asserted reporter's privilege. *See United States v. Libby*, 2006 WL 1453084 (D.D.C., May 26, 2006).

Based upon the continuing validity of *Branzburg* and ensuing opinions such as *Miller*, we conclude that the reporter's privilege described in the bill is not required by the First Amendment. Moreover, on the contrary assumption that the asserted privilege has some constitutional underpinning, the bill's current subordination of criminal defendants' Sixth Amendment rights to the privilege is unsustainable.

Other Concerns

Section 3

The bill's critical definition of "journalist" may be challenged legitimately as both overinclusive and underinclusive. It is overinclusive because, as indicated above, it includes hostile foreign entities as well as a wide-ranging category of entities whose ability to invoke the privilege would present obstacles to efficient law enforcement. However, from the standpoint of free speech principles, the definition could also be considered underinclusive because its discrimination between those who write and disseminate news for financial gain and pursuant to an employment or contractual relationship, on the one hand (the protected segment); and those who do so on an uncompensated or unaffiliated basis, on the other (the unprotected segment), is not rationally related to the purpose of the bill. We question whether a definition that effectively reconciles these conflicting considerations is possible as a practical matter.

We also recommend that section 3 define a "promise or agreement of confidentiality" to mean an assurance of confidentiality granted only upon a journalist's reasonable belief that the assurance is essential to gather news that is of significant public interest and for which reasonable alternative sources do not exist. This definition should exclude an assurance given to a source where the journalist has reasonable cause to believe (1) that the disclosure of the information is itself a crime; or (2) that the information being disclosed will place individuals in significant risk of serious bodily injury or will pose a significant risk to national security if not provided to law enforcement or other proper authorities without further delay.

Section 4

Section 4 of the bill ("Compelled Disclosure at the Request of Attorneys for the United States in Criminal Proceedings") would require the Department of Justice to demonstrate to a court "clear and convincing evidence" of a number of factors before it could compel disclosure in Federal criminal proceedings. Initially, we note that there is no evidence that the Department of Justice has abused its subpoena power to obtain source information. Indeed, since 1991, only 4.9% of the media subpoena requests that the Department's Criminal Division has processed were for source information, and only 12 such subpoenas have been issued in the last 14 years.

Additionally, the "clear and convincing" standard is a challenging one to meet, more rigorous than a "preponderance of the evidence," though less rigorous than "beyond a reasonable doubt." *See, e.g., Addington v. Texas*, 441 U.S. 418, 431-32 (noting that the clear and convincing evidence standard is a "middle level of burden of proof"). The bill would make source information more difficult to obtain than, for example, evidence of governmental misconduct sought to be protected by the deliberative process privilege. *See United States v. Lake County Bd. of Com'rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005) (explaining that the deliberative process privilege can be overcome by a "sufficient showing of a particularized need to outweigh the reasons for confidentiality").

This standard might severely restrict our ability to gain access to the information. It would require the Department to establish that there were reasonable grounds, based upon information from an alternative, independent source, to believe that a crime had occurred. If knowledge of the crime came from only a single source, we might not be able to compel disclosure.

Section 4 also severely conflicts with statutory, court-imposed, and operationally essential protections for sensitive grand jury and other criminal investigative information, by replacing confidential internal Department of Justice reviews of investigative background information (*i.e.*, the Attorney General's guidelines for the use of compulsory process against the news media) with public adversarial judicial proceedings.

Section 4 explicitly should permit compelled disclosure where the source waives the privilege.

We also note that paragraph 4(b)(2) of the bill would require that the Government demonstrate to a court, by clear and convincing evidence "to the extent possible, that the subpoena avoids requiring production of a large volume of unpublished material and is limited to the verification of published information and surrounding circumstances relating to the accuracy of the published information." Depending on how courts applied this provision, it could induce individuals to use journalists to shield documents from production.

Further, paragraph 4(b)(3) would require the Government to give reasonable and timely notice of its demand for documents. While this generally may not be problematic, the provision makes no allowance for exigent circumstances making such notice unworkable.

Finally, we note that subsection 4(a) of the bill states that it applies to "a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider." However the exception provided in section 4(b) omits "communication service provider." This may be a drafting oversight.

Section 5

The provision in section 5 of the bill governing disclosure at the request of a criminal defendant is notably more lenient in favor of disclosure than that in section 4 governing disclosure at the request of attorneys for the United States in criminal proceedings. Specifically, section 5 omits two criteria applicable to requests by Government attorneys. If the intent is to balance the interests of the criminal justice system against the public interest in a privilege against disclosure, we believe that whatever standard is to apply should apply both to defendants and to the attorneys for the Government.

Section 6

Section 6 would create a privilege in civil litigation for journalists to refuse to divulge confidential sources, except upon a showing by a "clear and convincing evidence" standard of certain factors listed in subsection 6(b) of the bill. The statutory criteria for the civil privilege in section 6 of the bill ("Civil Litigation") appear to have been modeled in large part on the criteria contained in the Attorney General's guidelines for the use of compulsory process against the news media. *Cf.* 28 C.F.R. § 50.10(f)(2)-(4) and (6) with D.R. 850, § 6(b)(1)-(2) and (4)-(6). However, there are several potentially important differences, all of which are troubling.

First, the administration of the Attorney General's guidelines is not subject to judicial review, leaving the application of these criteria to the considered judgment and expertise of the Attorney General himself. By contrast, under section 6, the criteria would be applied by the

courts, and the Attorney General's judgment about, for example, the need for the information would receive no deference. We see no reason to displace the Attorney General's judgment with that of the judiciary in this fashion.

Second, section 6 would require the district court to find that all of the designated criteria were established by "clear and convincing evidence." That evidentiary standard compounds our first concern by placing an unduly heavy burden of justification on the Government.

Third, even after all of the criteria that derive from the Attorney General's guidelines were met, section 6 would require an additional showing — again, under the "clear and convincing evidence" standard — that "nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering." *See* §6(b)(3). This public-interest criterion is not found in the Attorney General's guidelines because the existing criteria are designed to limit the use of compulsory process to cases where the public interest so demands. Adding an additional public-interest hurdle is at best superfluous and at worst harmful, since it could lead a court to deny disclosure even when the information was essential to the successful completion of the case and the information could not be obtained from other sources. Indeed, the breadth of the criterion might authorize courts to act upon undisclosed and potentially irrelevant factors (as opposed to the more specific considerations set forth in the Attorney General's guidelines).

Fourth, it is unclear whether the exception for cases in which the journalist is an eyewitness or a participant in criminal or tortious conduct, *see* § 7, actually would limit the scope of the privilege in section 6. The section 6 privilege is confined to the identity of confidential sources and the contents of confidential information, and it is hard to imagine how that kind of information would be at issue when a journalist was being asked to testify about what he himself saw or did.

Fifth, the exception for prevention of death or substantial bodily harm (*see* § 8) would require a showing that death or harm was otherwise "reasonably certain" to result. "Reasonable certainty" seems an extraordinarily and unduly demanding standard for the prospective loss of life or prospective serious injury.

The foregoing discussion relates to the application of section 6 to civil litigation involving the Federal government. The statutory privilege also would apply to civil suits between private parties. We note that most Federal courts have recognized a qualified common law reporter's privilege in civil cases, *see, e.g., Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), and it is not obvious that the common law privilege has proven inadequate to protect legitimate newsgathering interests.

Section 7

Section 7 of the bill ("Exception for Journalist's Eyewitness Observations or Participation in Criminal or Tortious Conduct") would create an exception from the shield for crimes witnessed by the journalist. According to this section, the exception "does not apply if the alleged criminal or tortious conduct is the act of communicating the documents or information at issue." Therefore, if the crime at issue was the disclosure of the information to the journalist, then the shield would attach and the journalist would not have to disclose the source unless the Government satisfied the requirements of section 4 ("Compelled Disclosure at the Request of Attorneys for the United States in Criminal Proceedings").

This provision would virtually immunize a journalist from performing the civic duty that every other citizen is required to perform: serving as a witness to crime. Further, by excepting "disclosure" crimes, the provision would permit the journalist to participate intentionally in a violation of the criminal laws of the United States — indeed, as the recipient of the disclosure, to cause the crime to occur — with impunity. Even the more highly recognized and protected attorney-client privilege does not apply where the attorney participates in crime. We note specifically that this provision would hinder investigations of leaks of classified information.

Section 8

Section 8 of the bill ("Exception to Prevent Death or Substantial Bodily Injury") provides that a journalist has no privilege against disclosure to the extent the information is "reasonably necessary to stop or prevent reasonably certain (i) death or (ii) substantial bodily harm". We believe that the standard of "reasonably certain" death or substantial bodily harm is unreasonably difficult to meet.[2] We also believe that the exception should apply not only to information necessary to prevent death or bodily harm, but to prevent property damage as well.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us

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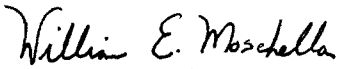
[2]We recognize that this is the standard used in Rule 1.6 of the ABA Model Rules of Professional Conduct.

that from the perspective of the Administration's program, there is no objection to submission of this letter and enactment of this legislation would not be in accord with the President's program.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Commentary

165 East 56 Street
New York, New York 10022
(212) 891-1400
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June 21, 2006

Senator Arlen Specter
Chairman
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Dear Senator Specter:

Thank you for the supplementary questions, which have proved to be a useful opportunity to further clarify my thinking about the thorny issues involved in balancing the maintenance of a vigorous free press and the imperatives of national security in wartime.

On the attached sheets, I have answered the questions sequentially.

Sincerely,

Gabriel Schoenfeld
Senior Editor

Enclosure

GS/sr

1. Do you believe that all leaks of classified information should be prosecuted?

a. Do you believe that the government should prosecute journalists with the same frequency as those who leak classified information?

b. How should the Department of Justice distinguish between the two? More laws appear to prohibit government employees from leaking classified information than prohibit the press from publishing classified information.

There is an obvious tension between the imperatives of national security and freedom of the press. It is indisputable that leaks, including leaks of classified information, contribute to an informed discussion of public affairs. But they also can weaken our national security, tipping off adversaries in ways that may enable them to overcome our defensive efforts. Even if one recognizes the value of leaks to an open society, our democracy has an overriding interest in preventing government employees from taking the law into their own hands and unilaterally deciding what should and should not be secret. Government employees who are entrusted with classified information voluntarily sign an oath not to disclose it. The terms of that agreement make clear that the government can and will prosecute violations. No one who signs this oath is compelled to do so. Those who violate it should be prosecuted to the full extent of the law.

It is impossible to specify a frequency ratio regarding prosecutions of government officials versus prosecutions of journalists. The general principle of a well-ordered society is that when laws are broken, prosecutions should result. But we have far fewer laws on the books that would allow for successful prosecution of journalists than we have laws that would allow for successful prosecution of government officials who leak. I would expect that even if all current laws were vigorously enforced in every case, prosecutions of journalists would remain relatively rare. The Justice Department, in general, should not have difficulty distinguishing the two types of prosecutions. It is a matter of reviewing the statutes, reviewing the relevant conduct of both government officials

and journalists, and seeing whether the statutes apply in each case.

2. You refer to the Espionage Act as a "law that was designed for special circumstances that are very dangerous but also very rare. Those special and rare circumstances appear to be upon us now." I assume that by this, you mean the War on Terror requires us to prosecute violations of this law. If this is indeed what you mean:

a. Given that the War on Terror is a non-traditional war, how do we determine when these circumstances will end?

b. Why should this law be used now, when it was not used during the Korean War, the Vietnam War, or the Cold War in general? Is the War on Terror a more significant struggle than these previous conflicts.

First, I must clarify. The quote drawn from my article in your question #2 referred not to the Espionage Act but to Section 798 of Title 18. As your question indicates, we are engaged in a non-traditional war. It is also a war, unlike Korea, Vietnam or the Cold War, in which we have been hit on our homeland. In the age of nuclear, biological, and chemical weapons, we cannot afford to leave ourselves vulnerable to another such blow, potentially an even more lethal one. Given the nature of our adversary--radical Islamists, operating in small cells, sometimes acting autonomously--this is likely to be a protracted conflict without a clear end point. Countering this unprecedented threat will entail some degree of restrictions in the freedoms that we have hitherto enjoyed. We have already seen the price tag in, for instance, the heightened security checks we now must endure at our airports and borders. We also need to see a similar tightening in the way critical counterterrorism secrets are handled. Just because the peril is protracted and undefined, we cannot ignore it or wish it away; indeed, we urgently need to adapt to the war that we are in. Enforcing existing laws governing secrecy is not a radical measure that threatens to upend our constitutional order. On the contrary, it is common sense.

3. You have advocated for, or at least discussed, the prosecution of the New York Times and James Risen for publicly revealing the NSA Terrorist Surveillance Program.

a. You say such a prosecution should proceed under Section 798 of the 1950 Amendment to the Espionage Act. How does such a prosecution square with the legislative intent behind that Section?

The New York Times' decision to publish details of the NSA Terrorist Surveillance Program in the face of a presidential admonition not to do so is precisely the kind of behavior Congress had in mind when it passed Section 798. The legislative record may be sparse but it is not bare. The two committee reports accompanying passage of the law make it unequivocally clear that Congress aimed, as the statute itself says, to enjoin the publication of classified communications intelligence information.

The legislative intent behind Section 798 can be discerned from the quite similar reports from the House and Senate committees that issued the bill. A relevant portion of the Senate report (No. 111, 81st Congress, 1st Session, March 11, 1949) states:

> The need for protection of this sort is best illustrated by an account of the very circumstances which surrounded the enactment of the act [a previous law banning unauthorized disclosures of government secrets] of June 10, 1933. In 1931 there had been published in the United States a book which gave a detailed account of United States successes in breaking Japanese diplomatic codes during the decade prior to publication. In 1933 it was learned that the same author had already placed in the hands of his publisher the manuscript of another book which made further detailed revelations of United States success in the breaking of foreign diplomatic codes. Immediate action secured the passage by the Congress of the measure of June 10, which effectively stopped publication of the second book. Unfortunately, the first book had done, and continued to do, irreparable harm. It had caused a furor in Japanese Government circles, and Japanese diplomatic codes had been changed shortly after its appearance. The new codes were more complex and difficult to solve than the old ones, and throughout the years from then until World

> War II not only the Japanese diplomatic cryptographers but the military and naval cryptographers as well were obviously devoting more study to cryptography than they ever had done before. In 1934 they introduced their first diplomatic machine cipher. Year by year, their codes and ciphers improved progressively by radical steps, and United States cryptanalysts had more and more difficulty and required more and more time to break them. It can be said that United States inability to decode the important Japanese military communications in the days immediately leading up to Pearl Harbor was directly ascribable to the state of code-security consciousness which the revelations of a decade earlier had forced on Japanese officialdom.

Reading this highly germane passage, there can be no doubt about what Congress intended, and why it intended it, when it passed Section 798. A leak of classified information pertaining to communications intelligence in 1931 led directly to a successful surprise attack on the United States. Congress was acting to avoid a repetition of these events.

Yet it is precisely the dangerous prospect of such a repetition that we are now confronting once again. In the case of the New York Times and James Risen, private persons have taken it upon themselves to publish communications-intelligence secrets. This breach has made it far more difficult to track the operations of a deadly adversary. Prosecution of the Times and James Risen would not only punish this wrongdoing but, more importantly, would deter future such violations both by the Times and more generally by the media.

4. Let us assume that the facts of the Terrorist Surveillance Program were exactly the same, but instead the Administration was implementing the program solely to chill legitimate activities or to trample "on civil liberties for personal or political gain or other nefarious purposes" (and not for a national security purpose).

a. Would you still want to prosecute the Times for its publication of this classified information?

b. If not, how would distinguish this decision legally?

c. Should it matter if the government "over-classified" the information at issue?

If the Times were, in your hypothetical scenario, to be prosecuted under Section 798 for revealing the existence of a national-security program that trampled on civil liberties for nefarious purposes, it could offer as its defense at trial that the information at issue was improperly classified. Admittedly, the language of Section 798 leaves open the question of whether improper classification is in fact available as a defense. I am unaware of any case law on this question. But there is reason to believe that Congress intended to establish improper classification as a defense. As Harold Edgar and Benno Schmidt, Jr., note in their classic study, "The Espionage Statutes and Publication of Defense Information" (Columbia Law Review, Vol. 73, May 1973 No. 5), "both the Senate and House Judiciary Committee Reports state: '[t]he bill specifies that the classification must be in fact in the interests of national security'" (emphasis in Edgar and Schmidt).

Over-classification would present a similar set of issues. A newspaper indicted for disclosing classified information could presumably argue in court that the information it disclosed was improperly classified.

5. Attorney General Gonzales stated two weeks ago on ABC's This Week program, "There are some statutes on the book, which if you read the language carefully, would seem to indicate that [prosecution of journalists] is a possibility." You appear to defend this notion in connection with the prosecution of journalists under Section 798. Do you believe that every law that is "on the books" should be enforced?

Undoubtedly, there are some arcane federal laws on the books that are no longer enforced and should not be enforced. But if the imputation of this question is that Section 798 has also lapsed into desuetude, that would be regrettable. Section 798 was passed, as I indicated above, in response to circumstances that led directly to Pearl Harbor, the worst attack on American territory until September 11, 2001. A model of legislative clarity and modest in its objectives, Section 798 carves out only a narrow area of sensitive secrets for special protection.

If the Justice Department fails to prosecute the Times under its provisions, inaction would effectively turn a statute essential to our national security into a dead letter. Such a result would have the most doleful consequences. In the middle of a war in which we have been attacked on our own soil, we would be taking the power to classify or declassify vital secrets away from elected officials acting in accord with laws set by Congress and bestowing that power on a private institution accountable to no one but itself. At stake here, in other words, is not only our right to defend ourselves from a third Pearl Harbor but also one of the basic principles our soldiers are fighting for overseas: namely, the rule of law.

6. In your testimony, you state that "...the provisions of the Espionage Act (Section 793) that the AIPAC men are charged with violating is notoriously vague and--when applied to non-governmental persons, as in this instance--subject to legitimate challenge on constitutional grounds."

a. Are you saying that you believe that this law is unconstitutional?

b. If so, could you explain why it is unconstitutional?

c. Would you favor the drafting of a new, tighter version of this law, or the repealing of this statute, or simply not enforcing this law.

Section 793 is clearly not unconstitutional. There have been numerous successful prosecutions under its provisions that have been upheld on appeal. But just because a law is constitutional does not mean that there could not be unconstitutional applications of it in some circumstances. If the facts are as the defense has stated them, the AIPAC case is a prime example of a misguided and unconstitutional application of a law. The defendants assert that they did not know, among other things, that the government official providing them with national defense information, Larry Franklin, was not authorized to purvey that information. Because the transmissions from Franklin were all oral and did not bear classification stamps, the defendants also did not know what was sensitive and what was not in the information they received and then retransmitted. These circumstances raise basic questions of

due process, in particular whether the defendants received constitutionally adequate notice that their conduct ran afoul of the law.

On the whole, the Espionage Act of 1917, even if constitutional, is notoriously ambiguous at points. Edgar and Schmidt go so far as to call portions of it incomprehensible. At the same time, they argue that the "benign indeterminacy" it creates with respect to the publication of secrets has mostly served our country well. I would largely concur. But times have changed. In the middle of a dangerous unconventional war, the ambiguities in the statute are now beginning to pose real dangers as the press acts to publish secrets without regard for the national security implications. Congress may wish to revisit these statutes and better define the reach of the espionage statutes with respect to the publication of national defense information.

Additional Written Responses of Rodney A. Smolla
Hearing of the United States Senate Committee on the Judiciary

Examining DOJ's Investigation of Journalists
Who Publish Classified Information

At the Committee's request, I am pleased to submit these written responses to the additional written questions submitted to me by members of the Committee.

Response to Question 1:

There clearly are circumstances in which protection of national security must trump the First Amendment rights of reporters and whistleblowers. The First Amendment is not an absolute, and the Constitution is not a suicide-pact. Moreover, as I stated in my original written testimony, current First Amendment doctrine does, in my view, permit the government to protect our national security by making it a crime for any citizen (including any journalist) in *some circumstances* to publish, broadcast or disseminate classified national information when the citizen knows it is classified and knows that it has been illegally leaked.

The debate on this boils down to the question: *What are the circumstances* in which the Constitution permits the government to hold a citizen criminally liable for disseminating (or more extremely, for merely continuing to possess) classified national security material that the citizen knows is classified and has been illegally leaked?

There are two "extreme" or "absolute" answers to this question, both of which I urge the Congress, the Executive, and ultimately the Courts, to reject.

The first "absolute" answer, the one that would protect national security the most, is "*always*." That is to say, there are some who appear to be arguing that national security *always* trumps the First Amendment in this context, and that *any time* the government wishes to prosecute a citizen for disseminating or continuing to possess classified national security material that the citizen knows is classified and has been illegally leaked, it *may*, with no First Amendment constraints. Under this view, all that matters is that the material is legally classified and has been illegally leaked, and the citizen knows it—period. If this view is constitutionally sound, there would be no constitutional impediment to aggressive prosecution of journalists and other citizens who publish such leaked material.

The opposite "absolute" answer is "*never*." That is to say, there are some who appear to be arguing that national security *always* trumps the First Amendment in this context, and that the government simply *may never* prosecute a citizen for disseminating or continuing to possess classified national security material that the citizen knows is classified and has been illegally leaked, without violating the First Amendment. If this view is constitutionally sound, then the Executive Branch should give up any contemplation of prosecuting journalists for publishing such leaked material, and Congress should give up contemplation of legislating in the area, for the First Amendment would be understood to prohibit such prosecutions.

I believe that both positions are flawed and should be rejected. The soundest understanding of existing constitutional doctrines, and the soundest application of our cherished constitutional principles, counsel that the constitutional line should be drawn mid-way between these two positions.

As with any attempt to construct a legal standard that mediates between two vital constitutional interests, the articulation of the "mid-point" will pose some challenges. I do not purport to have the answers to all of those challenges, but here are some guiding principles:

The mere fact that the national security material is "classified" ought not be enough *in itself* to trump the First Amendment. Not all classified material is of equal weight in the constitutional balance. Sometimes material should never have been classified in the first instances. Sometimes material should have already been de-classified. Sometimes material, while classified, does not in any palpable, concrete sense endanger or compromise American military or intelligence operations, but is merely an embarrassment. As was expressed in the hearing on this matter, Jack Anderson would at times refer to "political security secrets" rather than "national security secrets." The *Pentagon Papers Case* is a prime example of leaked material that may have, in some respects, embarrassed our government but that could not, in any concrete sense, be deemed to have placed in jeopardy any ongoing or future operations.

To distil these considerations into a workable legal standard, I would borrow from the tests used under the First Amendment "strict scrutiny" and "prior restraint" standards to craft legislation that limited criminal liability to the dissemination of classified national security information in circumstances in which the government's interests are "compelling" or of the "highest order" and the legislation is "narrowly tailored" to serve those interests. Specifically, my recommendation is to require:

- That the citizen knew that the material was classified
- That the citizen knew that its release was not legally authorized.
- That disclosure of the material would *directly* harm the national security of the United States by *directly* endangering the lives of American citizens, or by *directly* compromising an ongoing or planned military or intelligence or counter-terrorism operation or investigation.
- In addition, I would create an affirmative defense to prosecution that would protect the dissemination of information revealing illegal or unconstitutional activity by government officials.

Response to Question 2:

The question suggests that the Fourth Circuit's decision in *United States v. Morison* may resolve the issues addressed above in Response 1, regarding the extent to which the First Amendment prevents the prosecution of journalists for the publication of classified material. The question relies on a quotation attributed to the Fourth Circuit

in *Morison*; "[i]t would be frivolous to assert-and no one does in these cases-that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws."

The first thing to point out is that this language from *Morison* does *not* come from the Fourth Circuit itself. Rather, it is a quotation repeated in *Morison* from Justice White's opinion for the United States Supreme Court in *Branzburg v. Hayes*. Moreover, the language noted in Question 2 is only part of a larger block of quoted material in which *Morison* was quoting *Branzburg*. The full quotation (as it appears in *Morison*) is:

> It would be frivolous to assert-and no one does in these cases-that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons. To assert the contrary proposition "is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends···· It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing."

United States v. Morison, 844 F.2d 1057, 1068-69 (4th Cir. 1988) quoting *Branzburg v. Hayes*, 408 U.S. 665, 691-92 (1972) and *quoting in turn Toledo Newspaper Co. v United States*, 247 U.S. 402 (1918).

More importantly, *Morison* dealt *only* with the question of whether a *government employee*, Morison, who leaked material *to* the press was immune from prosecution under the section of the Espionage Act under which he was charged *because he leaked material to the press, and not a foreign government*. The decision in *Morison* is replete with language framing the question in those terms. The case did not pose the question and did not reach the question of whether the *press* could be prosecuted for what it does with the leaked material. It dealt only with whether the government employee could be prosecuted for leaking to the press, as opposed to leaking to a foreign government, the type of leak that would constitute "classic espionage." It was in this context that *Morison* quoted and relied upon *Branzburg*. If, as *Branzburg* held, a reporter has no special First Amendment right to refuse to disclose the source of a leak, it must follow, *Morison* reasoned, that the source has no special First Amendment immunity in leaking material to the press.

Indeed, *Morison* made it *explicit* that it was dealing with the rights of the *informer who broke the law* and not with a *newsman*. In discussing the language quoted above, *Morison* noted that there was some ambiguity as to whether *Branzburg* might be understood to create a balancing test, given Justice Powell's concurring opinion. And then, in a critical quote for the purposes at issue here, *Morison* stated:

> *None of these comments is relevant here, since it is the right of an informer, who had clearly violated a valid criminal law, and not a newsman in issue.* What is in issue here is precisely what Justice White declared in the quoted language, i.e., that the First Amendment, in the interest of securing news or otherwise, does not "confer a license on either the reporter or his news source to violate valid criminal laws."

United States v. Morison, 844 F.2d 1057, 1069, n.18 (4th Cir. 1988) quoting *Branzburg v. Hayes*, 408 U.S. 665, 691-92 (1972)

Looked at most broadly, decisions such as *Morison* and *Branzburg* are certainly good authority for the general proposition that the press is not above the law, and that the First Amendment does not carve out for the press exemptions from generally applicable criminal laws.

But *Morison* and *Branzburg* do not resolve the more difficult question, which in both my original testimony and in these supplemental responses I have shown remain unsettled in constitutional doctrine, of when the press may be prosecuted for printing truthful material that was obtained through the "passive receipt" of an illegal leak, but not through any active criminal wrongdoing by a journalist.

In this regard I stick firmly to my original testimony, which demonstrated that the decisions in the *Daily Mail* line of cases, and most prominently, the decision in *Bartnicki v. Vopper*, establish that there are serious First Amendment constraints on the power of the government to render such receipt and subsequent publication of leaked material a criminal act.

Response to Questions 3 & 4:

Both of these questions deal with issues germane to the possible enactment of a federal shield law. I will not go into an exhaustive legal and policy analysis here, but I do wish to volunteer my efforts and assistance in any capacity that the Committee might find useful as the Committee continues to contemplate this legislation. My positions, in a nutshell, are:

- I support enactment of a federal shield law for journalists.
- I believe the privilege should be qualified, not absolute, and should borrow from the rich body of case law and statutory experience with the statutory and common-law balancing tests that have been employed by many state and federal courts. I believe the privilege should not be confined to "mainstream" "professional" journalists, but should extend more broadly to others (such as Internet bloggers) who gather information from confidential sources for the purpose of disseminating news or commentary on issues of public concern to

the general public. In short, I would include language that would encompass those who engage in the "functional equivalent" of traditional journalism, even though we would not consider them part of the mainstream or traditional press.

- I believe the legislation should contain an explicit provision that extends the privilege after the death of journalist, following the model in *Swidler & Berlin v. United States.*

- The "overwhelming need" that is asked about in Question 4 does indeed exist. We live at a time in American history in which the watchdog role of a free and aggressive press is more vital than ever, and that watchdog role *must* above all include the vital and historic role of the press as a check and balance on the actions of the national government in matters relating to national security and foreign affairs. The delicate balance between the compelling interest in protecting our national security and the preservations of civil liberty that rests at the very heart of the American identity and our constitutional system is best preserved by granting to citizens qualified protection for promises of confidentiality extended in the process of newsgathering. Debate over how to strike this balance is one of the profound issues of our times. A newsgathering privilege ensures that this debate will be a "fair contest" between the role of the press as a watchdog ferreting out wrongdoing and abuses, and the right and duty of the government to protect truly important national security secretes.

- I would not carve out a blanket exception for all national security matters, but would instead include national security within the general balancing test. In most instances national security interests would trump the invocation of the privilege, but I would retain the possibility that the invocation of the national security interest would be overridden by courts when it is a sham.

- To extend a newsgathering privilege to our federal court system is not a radical proposition. The fact that 49 states and the District of Columbia have extended some form of newsgathering privilege to citizens is a "national referendum" attesting to this country's sense of the critical role that a vibrant press plays in a free society. Federal legislation would simply put the federal court system, and most importantly, the federal government itself, within the rubric of the same balance that has been struck by most states.

Respectfully submitted,

Rodney A. Smolla
Dean, University of Richmond School of Law
University of Richmond, Virginia 23173

SUBMISSIONS FOR THE RECORD

BEFORE THE

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

HEARING ON

EXAMINING DOJ'S INVESTIGATION OF JOURNALISTS WHO PUBLISH CLASSIFIED INFORMATION: LESSONS FROM THE JACK ANDERSON CASE

SCHEDULED FOR TUESDAY, JUNE 6, 2006 AT 9:30 A.M.

Chairman Specter, distinguished members. Thank you for the opportunity to address the events surrounding the FBI's efforts to gain access to my father's papers and whitewash the record of history.

I will address two issues. First, the events surrounding the FBI's request to have access to my father's journalistic work papers gathered during his sixty-plus years as a reporter. Second, I will present my family's view of how our father and husband would have reacted to a government investigation of journalists who publish classified information.

About six weeks after my father passed away, FBI Agent Leslie Martell contacted my mother and requested to meet regarding Dad's papers. As the attorney in the family, Mom asked me to contact Agent Martell. During that call, I made it clear I was acting as counsel for my mother and the family. Agent Martell told me that the FBI had information that there might be "classified" documents in Dad's papers that would help the government with a criminal investigation involving a Middle Eastern country. I was left with the impression that the FBI's investigation concerned terrorism. Agent Martell assured me that neither Dad, Mom nor any member of the family was the target of the investigation.

As several of the Committee members are personally aware, Dad often cooperated with criminal investigations, where it would not violate the confidentiality of his sources. I told Agent Martell that she could meet with Mom.

When I talked to Mom after the meeting, she was anxious to tell me that Agent Martell's family had roots in West Virginia, where my mother was born and raised, and might be related to us. This information was of more interest to Mom, an avid genealogist, than what the FBI wanted. All she said about that was that it involved some of Dad's papers from the 1970s.

My Mom, who actually worked for the FBI in the 1940s, cooperated with the FBI's investigation. She told them that the boxes were at the Gelman Library at The George Washington University and how to get in touch with Dr. Mark Feldstein at GW and Dr. Tim Chambless in Utah, both of whom had reviewed the contents of the boxes. With the family's blessing, Dr. Chambless even sent Agent Martell a 12 page inventory of the 80 boxes he had reviewed.

Several weeks later, Agent Martell called and asked about the ownership of the documents. In light of concerns we had about exactly what the FBI was after, I told her that the family would need more information regarding what the FBI wanted from the documents. Shortly after this second conversation, I received a call from GW. I was told that the FBI claimed they had a "consent" to review the papers signed by Mom. This was the first I had heard about a "consent." I immediately called Agent Martell. I was upset that I was not told about the "consent." She was very apologetic and a conference call was arranged for the following week.

That call was with Agent Martell, her Division Chief and one of the U.S. Attorneys General handling the criminal case. I was told that access to Dad's papers was in connection with the prosecution of Steven Rosen and Keith Weissman, American citizens who had worked as lobbyists for the American Israel Public Affairs Committee (AIPAC). The FBI said it had information about "classified" materials being passed to or from Dad or one of his reporters in the early 1980s. They said they wanted access to Dad's documents to see if either Rosen's or Weissman's fingerprints were on any government documents. I told the agents that it was extremely unlikely that Dad's papers contain material relevant to that case.

I was troubled that the FBI's request related to the AIPAC prosecution and concerned that the government could try to apply the 1917 Espionage Act to journalists. Dad would have vigorously opposed such an effort. The FBI and Department of Justice representatives assured me that they were not after Dad's sources, family members or George Washington University for possession of "classified" documents.

In discussing the potential scope of a review of Dad's papers, assuming the family were willing to cooperate, the agents made it clear that they intended to review all of Dad's papers, regardless of their relevance to the AIPAC case. In addition, they repeatedly stated that they would be "duty bound" to remove any and all material they suspected might be "classified" and either permanently retain them or return them in some redacted or edited form. This would destroy the historic, political and cultural value of Dad's papers.

My efforts to limit the scope of the intrusion were rejected. In fact, when I offered to review the papers personally to locate anything that related to the AIPAC case, I was told that because I did not have security clearance, I could not review the documents.

In early April, I attended a meeting with the FBI, Dad's former First Amendment attorney, Michael Sullivan, and an attorney for GW. I came to believe that the AIPAC "investigation" was at best a broad fishing expedition. At worst, I saw it as a pretext for the FBI to learn what it could not discover about his sources when he was alive. The family met and instructed Mr. Sullivan to reject the FBI's request. A copy of his letter is attached. We have publicly stated, and reiterate here, that we would oppose the efforts of the government to review Dad's papers, even to the point of going to prison.

I would like to explain why we feel that the government's review of Dads papers and removal of any documents would be contrary to Dad's wishes.

He taught us that the press had a constitutional role to keep an eye on those who govern us. The press was not to be a bulldog or a lapdog, but a watchdog. He used to say that our Founding

Fathers understood that government by its nature tends to oppress those it has power over. There is nothing in the Constitution about freedom to practice law; freedom to practice medicine; freedom to become a teacher. But there is something in the Constitution about freedom of the press. He was fond of quoting Thomas Jefferson – who was vilified and abused more by the press than any recent politician: "[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to prefer the latter."

For more than a generation, Dad and his mentor, Drew Pearson, were among the most significant journalistic checks in the nation's capital. At a time when members of Congress and even the White House were afraid to take on J. Edgar Hoover, Dad had his staff openly rifle through Hoover's trash to give the former FBI Director a taste of his own medicine.

Dad often said that documents would come across his desk classified as a "national security" secrets, but which really involved what he called "political security" secrets. They showed the misdeeds and manipulations of government employees who had abused the public trust, and then tried to sweep the evidence under the secrecy stamp. Such information should not be hidden from the people. After all, the government releases "classified" information in its own interest all the time.

Ours is a government of the people. Dad taught us that the people are the sovereigns; those who work in government are our servants. We the people have the right to know what our servants are doing when they act in our name. The secrecy stamp must not shield the actions of our officials from scrutiny. The press, as the watchdog, must be free to criticize and condemn, to expose and oppose the government.

Finally, concerning the reporter's shield law being considered by this Committee, Dad would have insisted that the First Amendment provides the best shield. He believed that the United States Constitution is a divinely inspired document and that the First Amendment itself was a divinely inspired charter that sanctioned his journalistic mission.

I know that Dad was concerned with protecting his sources. This concern is real. After the recent publicity over Dad's papers, I have been contacted by several of Dad's sources. Some are still in positions where their identification would result in political, financial and even physical harm. The FBI's efforts have underscored the pressing need for protection of journalists, their sources and, in this case, their families.

Again, thank you for this opportunity.

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April 18, 2006

VIA FACSMILE AND REGULAR U.S. MAIL

Mr. Keith Salette, Supervisory Special Agent
Mr. Robert J. Porath, Special Agent
Ms. Leslie G. Martell, Special Agent
Federal Bureau of Investigation
601 Fourth Street, N.W.
Washington, D.C. 20535

Re: Request by the Federal Bureau of Investigation to Review the Newsgathering Materials of Journalist Jack Anderson

Dear Messrs. Salette and Porath and Ms. Martell:

As you know, this firm represents the family of Jack Anderson in connection with the above referenced request. This letter follows up on our discussions during the meeting at my offices on April 5, 2006 at which you, on behalf of the Federal Bureau of Investigation ("FBI"), requested that the family of Jack Anderson permit the FBI to have access to Mr. Anderson's journalistic work papers gathered during his more than six decades as a reporter for and the author of the *Washington Merry-Go-Round*. You represented that the FBI was seeking access to Mr. Anderson's newsgathering materials in connection with its investigation of Messrs. Rosen and Weissman, two former officials of the American Israel Public Affairs Committee ("AIPAC"). Specifically, if we understood you correctly, you represented (1) that you had information to suggest that Messrs. Rosen and Weissman had met with Jack Anderson and/or one of his reporters and had shared classified materials; and (2) that you had information to suggest that "some other individual" met with Jack Anderson and/or one of his reporters and that this individual could accurately be characterized as an agent of a foreign intelligence service. You represented that these contacts may "go back to the early 1980s." Finally, although you indicated that you had not reviewed past *Washington Merry-Go-Round* columns for the period in which you purport to be interested to determine whether Mr. Anderson ever even wrote about subjects pertinent to your inquiry, you nevertheless represented that you were seeking "reporter's notes" and source materials for the period from 1980 through the present that might be contained in Mr. Anderson's newsgathering materials.

After giving the matter careful consideration, Mr. Anderson's family wishes to inform you that it cannot accede to your request. The family has met and discussed this matter at some length and feels that it has a duty to act in a manner that is wholly consistent with the wishes and intent of their deceased father and husband. In order that you might better understand the family's position, it wishes to inform you of the following:

Jack Anderson was a patriot with a deep and abiding love for his country and its people. While he firmly believed in the essential goodness and wisdom of its people, he was often critical of those in government who wield power. He felt strongly that the role of a free press was to stand as sentinel, ready to sound the alarm when government overstepped its bounds. In Jack Anderson's view, a journalist's sacred duty was to criticize government when appropriate in the hope that it might do better. The press was certainly never intended to serve as the government's handmaiden.[1] As Mr. Anderson explained regarding his reporting on the Nixon Administration: "I have always published what I thought the American people ought to know.... Occasionally the decisions have been agonizing ones. But usually, when something has come across my desk classified as a national security secret, it has involved the misdeeds and manipulations of people who had abused the public trust, and then had swept the evidence under the secrecy stamp." Similarly, he wrote about the fundamental precepts he learned from his mentor Drew Pearson who "took pains to inculcate his convictions on the moral objectives of the newspaper column and the just society: to champion the cause of the voiceless instead of the dominant, the dissenter as well as the organization, the helpless against their exploiters, the small enterprise over the octopus, *the public's right to know and control rather than the official's prerogative to conceal and manipulate*." In short, his views can best be summed up as follows: Ours is a government of the people. The people are the sovereigns; those who work in government are our servants. We the people have the right to know what our servants are doing when they act in our name. In Mr. Anderson's view, this bedrock principle could not be otherwise; for, as he emphasized repeatedly: "The stakes are too high in a democracy where *everything* rests on an informed people."

Indeed, Jack Anderson wrote about what drove him as an investigative journalist: "I have tried to break down the walls of secrecy in Washington. But today the walls are thicker than ever. More and more of our policymakers hide behind those walls. Only the press can stand as a true bulwark against an executive branch with a monopoly on foreign policy information. It has all the

[1] As Jack Anderson emphasized over the years: The press was intended by the founders "to serve as the government's *watchdog*, not its *lapdog*." Accordingly, Mr. Anderson believed that journalists should resist government efforts to obtain their work product, lest they be seen as an investigative arm of the system. In his view, such a perception would severely compromise journalists' integrity and independence, qualities that are indispensable to the ability to gain the trust of news sources, and thus to effectively investigate and report the news. At the end of the day, he feared that sources who might otherwise be willing to speak to reporters will likely refuse if they perceive reporters not as independent journalists but as mere research tools of the government.

authority it needs in the First Amendment." Lastly, please understand that Jack Anderson was a deeply religious man who viewed investigative reporting as a noble calling from God. He believed that life is an eternal struggle between good and evil, and that the United States Constitution was "a divinely inspired document." For Jack, the First Amendment itself was a divinely inspired charter that sanctioned his journalistic mission.

With the benefit of this background, the family hopes you will appreciate that when they turn to the present matter, they cannot help but think that Jack Anderson would have been troubled by the present prosecution of Messrs. Rosen and Weissman. Indeed, for anyone who believes in the fundamental importance of robust public debate to our American system, this prosecution is troubling. While Messrs. Rosen and Weissman find themselves in the dock today, there is no reason under the government's reading of the law, that journalists will not find themselves facing similar charges tomorrow. Rather than supporting such a prosecution, it is more likely that Jack Anderson would have used the *Washington Merry-Go-Round* to criticize this effort as a dangerous departure and government overreaching.

After much discussion and due deliberation, the family has concluded that were Mr. Anderson alive today, he would not cooperate with the government on this matter. Instead, he would resist the government's efforts with all the energy he could muster. To honor both his memory and his wishes, the family feels duty bound to do no less.

In addition, we note that the scope of the government's proposed review is overly broad. The duty you feel as agents of the FBI to remove ***all*** material marked as "classified" in any form and either permanently retain them or return them in some redacted or edited form would destroy the historic, political and cultural value of Mr. Anderson's papers. In addition, the family is concerned that your review might uncover the identity of sources of the *Washington Merry-Go-Round.* As the family understands the government's interpretation of existing laws, this could potentially expose Jack Anderson's sources to criminal prosecution. To do so, would obviously be contrary to Mr. Anderson's wishes.

Finally, as a practical matter, the family notes that it is extremely unlikely that Mr. Anderson's journalistic work product contains material that may be pertinent to your inquiry in any event. First, the relevant time period specified in the indictment of Messrs. Franklin, Rosen and Weissman is from April 1999 until August 27, 2004. *See* Indictment, *United States v. Franklin*, No. 05-225 (E.D. Va. Aug. 4, 2005). Due to his failing health, Mr. Anderson was no longer actively engaged in reporting during the relevant period. Second, because you represented that Mr. Anderson and/or his reporters had contacts with Messrs. Rosen and Weissman[2] that "go

[2] Your representation regarding Mr. Weissman appears to be contradicted by the indictment which reflects that Mr. Weissman was not hired by AIPAC until 1993. Indictment, paragraph 7.

back to the early 1980s," the family undertook to contact all the eminent journalists who shared the by-line with Jack Anderson during the period from 1980 to 1999: Dale Van Atta[3] from 1985 to 1991; Michael Binstein from 1992 to 1996; and Jan Moeller from 1996 to July 1999. None of Mr. Anderson's co-authors were aware of any significant contacts with AIPAC or its lobbyists Rosen or Weissman during those years. What is more, in an effort to be thorough, the family also contacted over 45 former Washington Merry-Go-Round reporters who worked on the column since the late 1960s and none were aware of significant contacts with AIPAC or its employees. Indeed, it appears from the reporters that the contacts with AIPAC were minimal at best and involved routine newsgathering; for example, to get updates on the hunt for Nazi war criminals or to obtain information for news stories on anti-Semitism in the United States and abroad. Last, as we explained to you during our meeting, the notion that Mr. Anderson would have maintained "reporter's notes" that might be of use to you, flies in the face of his general reporting practices, i.e., he took and maintained very few handwritten notes. Indeed, his co-authors confirm that he took few notes and those that he did take were sparse and taken in his own self-styled "shorthand," which was almost impossible for others to decipher.

We hope the foregoing has been helpful to you in understanding the family's views regarding this matter. If there is something you feel the family has overlooked in its deliberations or that you wish the family to consider further, please do not hesitate to contact me.

Very truly yours,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By Michael D. Sullivan /pks
Michael D. Sullivan

MDS:pks

cc: Ann Adams, Esq.

[3] Mr. Joseph Spear also shared the *Washington Merry-Go-Round* by-line during this period, but he died in the late 1990s.

Associated Press

FBI Wants Access to Dead Writer's Papers
By MARK SHERMAN
Associated Press Writer
788 words
18 April 2006
07:20 PM
Associated Press Newswires
English
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WASHINGTON (AP) - Not long after columnist Jack Anderson's funeral, FBI agents called his widow to say they wanted to search his papers. They were looking for confidential government information he might have acquired in a half-century of investigative reporting.

The agents expressed interest in documents that would aid the government's case against two former lobbyists for the American Israel Public Affairs Committee, or AIPAC, who have been charged with disclosing classified information, said Kevin Anderson, the columnist's son.

In addition, the agents told the family they planned to remove from the columnist's archive -- which has yet to be catalogued -- any document they came across that was stamped "secret" or "confidential," or was otherwise classified.

"He would be rolling over in his grave to think that the FBI was going to go crawling through his papers willy-nilly," the younger Anderson told The Associated Press in an interview Tuesday.

His account is similar to conversations described by Mark Feldstein, a George Washington University journalism professor and Anderson biographer. Feldstein said he was visited by two agents at his Washington-area home in March.

"They flashed their badges and said they needed access to the papers," said Feldstein, a former investigative reporter. Anderson donated his papers to the university, but the family has not yet formally signed them over.

FBI Special Agent Richard Kolko, a spokesman in Washington, confirmed that the bureau wants to search the Anderson archive and remove classified materials before they are made available to the public. "It has been determined that, among the papers, there are a number of U.S. government documents containing classified information," Kolko said, declining to say how the FBI knows.

The documents contain information about sources and methods used by U.S. intelligence agencies, he said.

"Under the law, no private person may possess classified documents that were illegally provided to them. There is no legal basis under which a third party could retain them as part of an estate. The documents remain the property of the U.S. government," Kolko said.

Anderson died in December at age 83 after a career in which he broke several big scandals and earned a place on President Nixon's "enemies list." Authorities on several occasions tried to find the source of leaked information that became a staple of his syndicated column.

Given his history, Anderson's family might already have been skeptical when the FBI came calling.

The timing only deepened suspicion. The AIPAC investigation dates back at least five years.

"And right after he dies, they contact his widow," Kevin Anderson said.

Still, when the FBI first called Olivia Anderson and said it was a matter of national security, the family was willing to consider the request. Jack Anderson himself cooperated with the FBI from time to time, his son said.

The more the Andersons learned, however, the less willing they were to help. Lawyers for the family are preparing a letter to the FBI declining to cooperate, Kevin Anderson said. The story was first reported by the Chronicle of Higher Education.

"We don't think there's anything related to the current investigation there, based on the time frame and dad's poor health," he said. "They made it clear they want to look at everything and by the way, if we find anything classified, we'll have to remove it. I suspect that's their real intention, to get through these papers before they become public."

Feldstein, who is writing a book about Anderson's relationship with Nixon, said the attempt is part of the "greatest assault on the news media since the Nixon administration."

The AIPAC case itself has raised questions about press freedoms because the former lobbyists, Steven Rosen and Keith Weissman, are accused of sharing information with reporters, among others.

At the same time, journalists have been questioned or subpoenaed in the investigation of who in the Bush administration leaked a CIA officer's identity and the Justice Department is probing who revealed the existence of the National Security Agency's warrantless eavesdropping program.

The agents who went to Feldstein's home asked if he had seen any classified documents, wanted the names of all graduate students who had looked through the papers and questioned him about where the documents are housed and who controls access to them.

"On the one hand, I think it's really disturbing to have the FBI come knocking at your door, demanding to look at things you've been reading. It smacks of a Gestapo state. On the other hand, it's so heavy handed to be almost ludicrous," Feldstein said.

14A THURSDAY 04.20.2006

EDITORIAL

THE SUN

A Tribune Publishing Company

Settling old scores

MIXED WITH THE OUTRAGE and incredulity at reports that FBI agents want to paw through the papers of a long-retired and now-deceased muckraking reporter is the obvious question: Don't they have anything better to do?

The investigative agency that was so antiquated in its methods and hidebound in its bureaucracy that it ignored clues its agents found before 9/11 still seems misdirected.

It's almost as though J. Edgar Hoover is still in charge and so obsessed with columnist Jack Anderson that he swooped in shortly after Mr. Anderson died last year to try and bust the folks who gave the reporter scoops.

Most troubling, of course, is the proposition that the FBI has the right — its spokesman would say, the duty — to reclaim classified papers, no matter how old or innocuous, that may have been passed along illegally.

Recent revelations about President Bush's handling of Iraq intelligence and of a program to reclaim public documents from the National Archives made clear that information is classified, declassified and reclassified arbitrarily. Those familiar with Mr. Anderson's at least 15-year-old files say he didn't save anything the government would find useful. But that's not the point. Whatever he got, he got. It all belongs to historians now.

Ostensibly, the FBI's interest in the 200 boxes of papers Mr. Anderson bequeathed to George Washington University was to search for fingerprints that might help the government prosecute two pro-Israel lobbyists charged with passing defense information to the press, according to *The Chronicle of Higher Education*, which first reported the story.

The Anderson family decided to fight the request after agents said they would be obligated to claim any other classified documents they found among the files.

The FBI contends it has to protect "sources and methods" of gathering intelligence. But the real purpose seems to be thwarting whistle-blowers and turning reporters into spies. That's a far graver threat to national security than telling the American people what their government is up to.

Aren't there some real terrorists the FBI could go after? And maybe do its own investigative legwork for a change?

baltimoresun.com

FBI is accused of 'trickery' in spy case: Lawyers for ex-lobbyists seek dismissal of charges
By Nick Madigan, The Baltimore Sun
Knight Ridder/Tribune Business News
725 words
22 April 2006
The Baltimore Sun (KRTBN)
English
Copyright (C) 2006 KRTBN Knight Ridder Tribune Business News

Apr. 22--Citing what they said was "outrageous" conduct by the FBI, lawyers representing two former lobbyists for the American Israel Public Affairs Committee urged a federal judge yesterday to dismiss spying charges against the defendants, who are due to stand trial next month.

Attorneys for Steve J. Rosen and Keith Weissman, who stand accused of discussing U.S. government secrets about Iran as part of their work for the lobby, said FBI agents acted improperly in their investigation of the case.

In particular, they said agents "engaged in a shocking degree of trickery" in their attempt to gain consent from the family of the late investigative reporter Jack Anderson for a search of the voluminous archives he left behind when he died in December.

Rosen and Weissman are to stand trial May 23, but the case could be derailed by a demand by the trial judge, T.S. Ellis of the U.S. District Court in Alexandria, Va., that the Justice Department explain why the two men are being charged under the 1917 Espionage Act for conversational exchanges of information that should ordinarily be protected by the First Amendment.

The hiccup in the case comes just as the Bush administration is under increasing scrutiny for what civil libertarians believe is a heavy-handed obsession with secrecy. Bowing to criticism, the National Archives recently put a stop to a covert arrangement under which the CIA reclassified thousands of documents that had been made public years ago.

In their motion yesterday, attorneys John N. Nassikas III and Erica E. Paulson said FBI agents contacted Anderson's relatives after his death and "demanded access to the materials" in his files "as part of an investigation of Dr. Rosen and Mr. Weissman."

The agents called on Anderson's widow, Olivia, 78, at her home in Bethesda and, while her daughter Tanya was briefly out of the room, "obtained Mrs. Anderson's signature on a consent form to search the files."

"The agents hid the form from view and did not tell Mrs. Anderson's child what they had done in her absence," the motion said. "The agents then left the meeting."

While the FBI has yet to gain access to the approximately 200 boxes containing Anderson's files - they are in an undisclosed location, known only to their custodians at **George Washington University** - Anderson's associates assert that his widow was not aware she was giving consent to search them and that she had been tricked into doing so.

Using the signed form, the FBI agents then approached Mark Feldstein, director of the journalism program at **George Washington University**, for help in accessing the documents, saying they had the family's permission to see them. He balked.

"Professor Feldstein contacted the Anderson family thereafter and learned that the family was entirely unaware of the 'consent' form," the lawyers' motion said.

Feldstein, in a phone conversation yesterday, confirmed the account in the motion. He said that in a visit last month to his house, the agents "flashed their badges" and spoke darkly of "violations of the Espionage Act," although they later acknowledged, he said, that they were after material related to the American Israel Public Affairs Committee regardless of whether it was classified.

They also said they wanted to see what else of interest the files might contain, no matter the subject. To Feldstein, it smacked of a "fishing expedition," he said, especially given that Anderson stopped writing his column long before the lobby became an issue.

"I told the agents that the only thing in the files that looked sensitive was Anderson's own FBI file, which was, ironically, heavily redacted," said Feldstein, a former reporting intern for Anderson and later an investigative television reporter. He is writing a book on the columnist's heyday titled Poisoning the Press: Richard Nixon, Jack Anderson and the Rise of Washington's Scandal Culture.

Anderson's syndicated column, Washington Merry-Go-Round, specialized for "muckraking" journalism.

He was known for exposing corruption and nefariousness in Washington, and was in the cross hairs of the Nixon White House during the Watergate years.

CBS NEWS

> BACK > PRINT

Columnist's Family Outraged At FBI

WASHINGTON, April 19, 2006

(CBS/AP) Not long after columnist Jack Anderson's funeral, FBI agents called his widow to say they wanted to search his papers. They were looking for confidential government information he might have acquired in a half-century of investigative reporting.

The agents expressed interest in documents that would aid the government's case against two former lobbyists for the American Israel Public Affairs Committee, or AIPAC, who have been charged with disclosing classified information, said Kevin Anderson, the columnist's son.

In addition, the agents told the family they planned to remove from the columnist's archive - which has yet to be catalogued - any document they came across that was stamped "secret" or "confidential," or was otherwise classified.

"He would be rolling over in his grave to think that the FBI was going to go crawling through his papers willy-nilly," said the son of the legendary investigative journalist.

Anderson built a 50-year career largely on government leaks, and many of his secrets may have died with him. But he helped expose the Iran-Contra scandal and a CIA plan to assassinate Fidel Castro, **CBS News correspondent Bob Orr** reports. A paper trail might remain — he once posed on the cover of Parade Magazine clutching secret government papers.

In an interview with The Washington Post, Anderson also says the family is outraged at what it calls government overreaching and "a dangerous departure" from First Amendment press protections and believes that if Jack Anderson were alive "he would resist the government's efforts with all the energy he could muster."

Anderson's relatives are not the only ones hearing from FBI agents interested in the personal papers of the Pulitzer Prize-winning columnist.

Mark Feldstein, a George Washington University journalism professor and Anderson biographer, says he was visited by two agents at his Washington-area home in March.

"They flashed their badges and said they needed access to the papers," said Feldstein, a former investigative reporter. Anderson donated his papers to the university, but the family has not yet formally signed them over. In a statement, the FBI said: "These documents contain information, such as sensitive sources and methods."

But that's exactly why a friends, family and journalists say Anderson wouldn't give them up.

The government snooping comes as the Bush Admninistration is pushing leak investigations involving reporters covering the CIA and the National Security Agency, **Orr** reports. "It's really just a small part of a much broader assault that this administration has been conducting on the news media," Feldstein said.

FBI Special Agent Richard Kolko, a spokesman in Washington, confirmed that the bureau wants to search the Anderson archive and remove classified materials before they are made available to the public. "It has been determined that, among the papers, there are a number of U.S. government documents containing classified information," Kolko said, declining to say how the FBI knows.

The documents contain information about sources and methods used by U.S. intelligence agencies, he said.

"Under the law, no private person may possess classified documents that were illegally provided to them. There is no legal basis under which a third party could retain them as part of an estate. The documents remain the property of the U.S. government," Kolko said.

Anderson died in December at age 83 after a career in which he broke several big scandals and earned a place on President Nixon's "enemies list." Authorities on several occasions tried to find the source of leaked information that became a staple of his syndicated column.

Given his history, Anderson's family might already have been skeptical when the FBI came calling.

The timing only deepened suspicion. The AIPAC investigation dates back at least five years.

"And right after he dies, they contact his widow," Kevin Anderson said.

Still, when the FBI first called Olivia Anderson and said it was a matter of national security, the family was willing to consider the request. Jack Anderson himself cooperated with the FBI from time to time, his son said.

The more the Andersons learned, however, the less willing they were to help. Lawyers for the family are preparing a letter to the FBI declining to cooperate, Kevin Anderson said. The story was first reported by the Chronicle of Higher Education.

"We don't think there's anything related to the current investigation there, based on the time frame and dad's poor health," he said. "They made it clear they want to look at everything and by the way, if we find anything classified, we'll have to remove it. I suspect that's their real intention, to get through these papers before they become public."

Feldstein, who is writing a book about Anderson's relationship with Nixon, said the attempt is part of the "greatest assault on the news media since the Nixon administration."

The AIPAC case itself has raised questions about press freedoms because the former lobbyists, Steven Rosen and Keith Weissman, are accused of sharing information with reporters, among others. Two two are being prosecuted in federal court in Alexandria, Va.

At the same time, journalists have been questioned or subpoenaed in the investigation of who in the Bush administration leaked a CIA officer's identity and the Justice Department is probing who revealed the existence of the National Security Agency's warrantless eavesdropping program.

The agents who went to Feldstein's home asked if he had seen any classified documents, wanted the names of all graduate students who had looked through the papers and questioned him about where the documents are housed and who controls access to them.

"On the one hand, I think it's really disturbing to have the FBI come knocking at your door, demanding to look at things you've been reading. It smacks of a Gestapo state. On the other hand, it's so heavy-handed to be almost ludicrous," Feldstein said.

Steven Aftergood, director of the Federation of American Scientists' Project on Government Secrecy, finds the situation "profoundly dangerous."

"It is both ironic and somehow fitting that Jack Anderson should again be at the center of a controversy like this," Aftergood told The Washington Post. "What the FBI couldn't do during his lifetime, they're now seeking to do after his death, and I think many Americans will find that offensive."

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CBS News Transcripts

SHOW: CBS Evening News 6:30 AM EST CBS

April 19, 2006 Wednesday

LENGTH: 428 words

HEADLINE: FBI and family of reporter Jack Anderson fighting over rights to go through private papers

ANCHORS: RUSS MITCHELL

REPORTERS: BOB ORR

BODY:

RUSS MITCHELL, anchor:

The family of the late investigative report Jack Anderson is squaring off against the FBI, trying to stop the bureau from seizing his files. The issue here is secrecy. Anderson's specialty was exposing the inner workings of government, often using leaked documents. But Anderson's family says agents have no right to dig through his private papers looking for them. Bob Orr reports.

BOB ORR reporting:

Many of his secrets died with muckraking newspaper columnist Jack Anderson when he passed away in December. But the FBI believes these nearly 200 boxes, holding Anderson's notes and papers, may contain leaked, classified documents. Now, the government wants them back, but Anderson's family is fighting the FBI's demand to search his private files.

Mr. KEVIN ANDERSON (Son): I don't think that he would go along with it. I think that the thought of FBI agents, you know, rifling through his papers unrestrained would be very abhorrent to him.

ORR: Anderson built a 50-year career largely on government leaks. He helped expose the Iran-Contra scandal and a CIA plan to assassinate Fidel Castro. He once posed on the cover of Parade magazine clutching secret government papers.

Mr. MARK FELDSTEIN: These are summaries of all of his public columns that...

ORR: But Mark Feldstein, who worked with Anderson, and who now oversees his archives at George Washington University, says government agents are on a fishing expedition.

Mr. FELDSTEIN: This is utterly unprecedented. Never before in government

history, that I'm aware of, has the FBI or the federal government tried to go into the archives of a dead reporter looking for classified documents from decades ago.

ORR: The FBI insists it's a matter of national security, and wants to confiscate any secret documents among Anderson's papers before they're put on public display. This government snooping comes as the Bush Administration is pushing other leak investigations involving reporters covering the CIA and the National Security Agency.

Mr. FELDSTEIN: By itself this is a pretty tiny case, but it's really just a small part of a much broader assault that this administration has been conducting on the news media.

ORR: While the FBI says it's not interested in reading Anderson's notes or uncovering his sources, it is still pushing for access to the documents, but CBS News has learned even some justice officials privately say the effort is too heavy handed. Bob Orr, CBS News, at the FBI.

MITCHELL: Up next on the CBS EVENING NEWS, they are literally turning up the heat in the fight against cancer.

April 20, 2006

Chicago Tribune

FOUNDED JUNE 10, 1847

SUNDAY
APRIL 23, 2006

WHY YOU SHOULD CARE ABOUT PRESS FREEDOM

Nation needs an unfettered press

By Mark Feldstein

Last month, as part of an ongoing criminal investigation, two FBI agents showed up at my home in suburban Washington, D.C., and waved their government-issued badges to demand access to decades-old historical archives that I have been reading.

Why? Because they say these documents may—or may not—shed light on alleged leaks to a dead investigative reporter that may—or may not—have occurred more than 20 years ago.

This inept fishing expedition would be laughable if it were not part of a larger and more serious government assault on freedom of the press, the most systematic attack on free expression and the public's right to know waged by any presidential administration since the infamous days of Richard Nixon.

In my case, the FBI claims it is entitled to rummage through the notes of columnist Jack Anderson, who donated his papers to my university before he died in December.

PLEASE SEE **FREEDOM**, PAGE 2

Mark Feldstein is director of the journalism program at George Washington University.

FREEDOM: Censorship now is more dangerous

CONTINUED FROM PAGE 1

The FBI agents who interviewed me said they want to confiscate any classified government documents that might be in the Anderson collection and prosecute whoever leaked them more than two decades ago. The agents even demanded the names of graduate students who might have looked at these records while helping with my research.

My university and the Anderson family are resisting this government intrusion into our files. Ultimately, the courts may have to decide the outcome.

Regardless, this heavy-handed action is troubling because the FBI has already violated the Justice Department's own guidelines that for the past three decades have set limits on such fishing expeditions into reporters' notes.

The media as a target

Worse still, it is just one of many efforts hatched by the Bush administration to target journalists who have criticized the government, and it would have the effect of criminalizing the kind of press leaks that have been a regular part of politics since the presidency of George Washington.

Media censorship always increases in wartime, in the U.S. and everywhere else. Abraham Lincoln shut down newspapers that sympathized with the Confederacy during the Civil War, and Woodrow Wilson did the same to leftist and German-American periodicals during World War I. In wartime, truth is notoriously the first casualty.

While we are now at war just as surely as we were then, our current enemy makes censorship more dubious and dangerous than it was in the past. America's battle against terrorism could well last decades and has no obvious end in sight. Are we to live under a kind of undeclared and unofficial martial law until all potential threats can be stamped out?

That may sound like hyperbole, but the Bush administration is now dusting off the antiquated Espionage Law of 1917, designed to jail dissidents during World War I, as a way to prosecute journalists who disclose information that the government deems a threat to America's war on terror. The president's congressional allies are considering even more disturbing legislation that would further criminalize leaks of classified information to reporters, action that even Bush's conservative former attorney general, John Ashcroft, opposed.

In addition, the CIA director has testified that he hopes reporters will soon be forced to reveal under oath to criminal grand juries the identities of their confidential sources. Judith Miller is only the most prominent of several journalists jailed in the past few years because of government efforts to uncover anonymous sources.

President Bush himself contributed to this climate of intimidation in December when he said whoever leaked the information to the press about the domestic spying operation was "helping the enemy" in "a shameful act."

In response to all of this, the international watchdog group Reporters Without Borders has rated the United States behind 43 countries when it comes to press freedom—just ahead of Bolivia and just behind Macedonia.

Thomas Jefferson and the other constitutional framers who enshrined press freedom in our 1st Amendment would not be proud.

Choking off information

Unfortunately, the administration has not targeted only reporters. Equally important, federal officials are now trying to choke off the flow of information to the public right from the source.

As part of ongoing leak investigations, numerous government employees have had to undergo lie-detector tests. Although the polygraphs have not turned up any known cases of law-breaking, such harassment has undoubtedly discouraged politically embarrassing whistle-blowing.

Other government investigators have been poring through university archives around the country as part of a larger effort to reclassify historical documents previously made public.

The Pentagon now is enforcing long-established restrictions that limit how close journalists can get to the funerals for American personnel killed in Iraq who are being buried at Arlington National Cemetery. Press photographs of coffins arriving at military bases are also prohibited for fear of undermining public support for the war.

All of this has led media outlets to censor themselves lest they run afoul of the administration. According to correspondent Christiane Amanpour, even the mighty CNN was intimidated by the administration's "climate of fear," leading to "self-censorship" in its coverage of the war in Iraq in 2003.

Why does any of this matter?

Because a free society depends on democratic decision-making by an informed public. And an informed public depends on a free and independent press.

Ironically, dictatorships around the world are now using America's crackdown on journalists to justify their own repression.

As I learned all too clearly when the FBI came calling at my door, we cannot stifle freedom at home and have any hope of spreading it abroad.

Mark Feldstein's "Poisoning the Press: Richard Nixon, Jack Anderson, and the Rise of Washington's Scandal Culture," will be published next year.

CNN

SHOW: LIVE FROM... 1:31 PM EST

April 20, 2006 Thursday

HEADLINE: Battle Over Secrets

BYLINE: Carol Lin, Michael Holmes, John Roberts

GUESTS: Kevin Anderson

HIGHLIGHT:

The late Washington columnist Jack Anderson made a career out of exposing government secrets. Now the FBI wants to seize classified documents Anderson obtained and his family continues to hold.

BODY:

CAROL LIN, CNN ANCHOR: Well, the late Washington columnist Jack Anderson made
a career out of exposing government secrets. Now the FBI wants to seize classified documents Anderson obtained and his family continues to hold. It's classic confrontation between the government and the media.

CNN's senior national correspondent John Roberts has more.

(BEGIN VIDEOTAPE)

JOHN ROBERTS, CNN SR. NATIONAL CORRESPONDENT (voice over): It's the kind of story Jack Anderson, Washington's legendary muckraker journalist, would have loved to chase himself. The FBI wants to comb through his records of decades of work, looking for old classified documents he may have obtained before his death in December of last year.

In a letter this week, Anderson's family told the FBI, "Not a chance are you getting your hands on those documents."

KEVIN ANDERSON, JACK ANDERSON'S SON: If we are ordered by a court, we would not comply. And if that results in jail time, both my 79-year-old mother and I are prepared to sit in jail.

ROBERTS: The FBI claims the documents are government property in a statement, saying, "No private person may possess classified documents that were illegally provided to them. There is no legal basis under which a third party could retain them as part of an estate."

"Washington Post" reporter Howard Kurtz, who once worked for Anderson, believes the documents issue is part of a broader government agenda.

HOWARD KURTZ, "WASHINGTON POST": The Bush administration seems to be taking its aggressive policy against the press one step further, now going after a dead
journalist.

ROBERTS: Anderson's archives, nearly 200 boxes worth, are being donated to George Washington University, kept in this warehouse outside the nation's capital. They document an aggressive style of journalism that earned Anderson exclusives and enemies.

UNIDENTIFIED MALE: The CIA's trying to botch up Australia (ph) now?

ROBERTS: President Richard Nixon and former FBI director J. Edgar Hoover both had it in for him. But G.W. professor Mark Feldstein, who is overseeing the archive, is surprised how far the FBI is going now.

MARK FELDSTEIN, GEORGE WASHINGTON UNIV. PROFESSOR: Jack Anderson made sport of the FBI for five decades. The irony that they would pursue him now, even past his grave, is something that even J. Edgar Hoover didn't try.

ROBERTS: Anderson's family claims the FBI was devious in trying to obtain access to the archives. Agents claim they were looking for information on a lobbying scandal and convinced Anderson's 79-year-old widow to sign a release.

ANDERSON: If they wanted her to sign something, she signed it. And like I said, she did not understand that it would have led to papers being removed from the collection.

ROBERTS: The FBI wouldn't comment on the accusation. But just like the family, George Washington University officials vow, in the spirit of Jack Anderson, the FBI will get nothing from them.

FELDSTEIN: I think they didn't come after him while he was alive, because he would have died rather than give it to them.

ROBERTS (on camera): A government official says the FBI has it on good authority that there are numerous classified documents that Jack Anderson had in his possession. The family doesn't dispute that -- in fact, confirms to CNN that, yes, there are classified documents in the archive, but the FBI still can't have them.

The FBI could subpoena the archive, but Justice Department officials are worried about the appearance of being heavy-handed with the family.

John Roberts, CNN, Washington.

(END VIDEOTAPE)

LIN: Let's talk more about the battle over government secrets. Jack Anderson's son, Kevin Anderson, joins me from Salt Lake City and former federal prosecutor Gerald Walpin is in New York.

Good afternoon, gentlemen.

UNIDENTIFIED MALE: Good afternoon to you.

Kevin, let me begin with you. If, let's say, national security is at stake, and there are classified documents in that collection of papers, would you liken this to being the receiver of stolen goods? And if so, isn't it your obligation to give them back to the government?

KEVIN ANDERSON, JACK ANDERSON'S SON: A lot of "ifs" in that. And I think that if your statements were all true, the family would be inclined to cooperate. In fact, when we were first approached by the FBI, they categorized it along those lines, and we told them that we likely would cooperate. It was only subsequently that we found out the scope of what they were after.

LIN: And the scope would be what?

ANDERSON: The scope is they want to go through all of his papers, all of the 188 boxes, and they want to remove each and every classified document in there, regardless of what it relates to whether it's the pending criminal investigation that they initially contacted us about.

LIN: But your father used that as his resource and his reporting. He's reported what he needed to report. What would be the harm in giving those documents back?

ANDERSON: Well, if they wanted to have access to them, that would be fine, but the reason we gave them to the G.W. library is so that they would be preserved for historians and academians to do research about what was actually happening in the government during the 1970s and 1980s.

LIN: So, Gerald, has a crime been committed here?

GERALD WALPIN, FMR. FEDERAL PROSECUTOR: Well, I don't know if a crime has been committed. But what is a fact, then and as the lawyer for Jack Anderson's estate says in his letter, and I note, Jack Anderson was a great believer in the United States Constitution. The United States Constitution provides for a rule of law with no one, no reporter, no lawyer, above the law. And the law is clearly that if someone has received stolen goods, goods that they are not entitled to under the law, the FBI has a right to get it back.

LIN: Well, wait a second, wait a second -- the law applies to federal employees, not necessarily civilians, like Kevin Anderson.

WALPIN: No, that's not true. If somebody is a recipient of stolen goods...

LIN: So you're saying a crime has been committed. You're saying that there was a theft.

WALPIN: If there was -- I don't know if there are any illegal documents, or documents that were subject to classification that were in his possession. If there was, then, of course, he had no right to them.

LIN: Well, then fine, then let the government get a search warrant, but they

haven't produced one.

WALPIN: That's what I was going to say. All that the FBI has done so far in a very diplomat way, apparently, is to say, we request access to them. Now the family can say, no. At that point, the FBI has the responsibility of going to the U.S. attorney and seeing if they can get a search warrant or a grand jury subpoena for those documents. At that point the family, if it's served with that, can go to court and object, and then the court will determine whether there's a reasonable basis for the government believing that there are stolen or classified documents within their possession. LIN: So, Kevin, would you be willing then to sit down with the FBI, have the papers all presented before you, they not take documents, but you have a discussion over what is in fact there? Would you be willing to do that?

ANDERSON: Very likely, yes. And you know, like I said, we plan on having these documents available to other researchers. The FBI could go through the papers at that point in time and look at the historic -- see what historic value there is.

LIN: So, Gerald, would that be acceptable then?

WALPIN: Well, that is not acceptable. Because if they are stolen goods, classified documents, then the public as a whole is not entitled to them. The law applies to reporters, too. And if those documents -- and I don't know that they are there, don't get me wrong. If those documents would hurt security in any way, and give names of people who were supposed to be classified, then of course the government has an obligation to try and get them back and...

LIN: And, Kevin, you're not standing in the way of national security, are you? I mean, that is not your intent here.

ANDERSON: That's not our intent. And these documents don't have that type of information.

LIN: You're sure of that?

ANDERSON: I'm positive of that.

And I would point out that the law of this country includes the constitution, which includes the first amendment. And whether Congress passes a statute or some FBI agent interprets a statute to think that they're entitled to these documents, I think that the first amendment trumps those laws.

WALPIN: I don't disagree that the first amendment is involved, but the thing about the First Amendment and the Constitution is that no individual can decide for himself or herself. It has to go to court. Let the court decide. And the Constitution does not provide any immunity for a reporter.

LIN: But for all we know Jack Anderson didn't go into the government offices and steal these papers out of a file, someone in the government gave them to Kevin's father.

WALPIN: Carol, if somebody stole a piece of jewelry from your grandmother, who I don't know -- I don't mean to say anything if she's deceased -- and you're holding it and they can proven it was stolen from her, don't they have a right, and somehow somebody received those stolen goods, doesn't the FBI have a right to try and get it back for you?

Of course. And the government is in the same position. And the government is in the same position. LIN: It depends what the rules are when it applies to journalists, journalists just doing their job, which Jack Anderson did so well, Kevin.

Appreciate the time. Gerald, appreciate you representing...

WALPIN: I agree Jack Anderson did a great job, too.

LIN: That can all agree! Kevin, Gerald, thank you so much. All right. Because, Kevin, what are we going to do if your 79-year-old mother goes to jail? I'm going to have to interview her from behind bars. Let's hope it doesn't come to that.

ANDERSON: I hope that you will interview her if she does.

WALPIN: I hope it doesn't come to that.

LIN: Jack Anderson would marry a spunky women, I'm sure.

All right, fellas. Well, I want to invite you to watch the rest of the show, too, because the waters are rising, and we are hearing word that people are on the run, as farmland and villages are overrun.

LIVE FROM brings you the dangers along the Danube River, straight ahead

EDITOR & PUBLISHER

Jack Anderson's Family Fighting FBI Effort to See the Late Columnist's Papers

By E&P Staff

Published: April 18, 2006 11:45 AM ET

NEW YORK The Federal Bureau of Investigation wants to see Jack Anderson's papers before anyone else does, reports The Chronicle of Higher Education. The family of the late investigative journalist plans to fight that FBI request.

Anderson, who died last December at age 83, wrote the "Washington Merry-Go-Round" column that United Media syndicated to hundreds of newspapers. His papers are contained in about 200 boxes held by George Washington University's library, according to Scott Carlson's Chronicle article.

"During his life and career as a muckraking journalist in Washington, Jack Anderson cultivated secret sources throughout the halls of government -- sources who passed on information that allowed Anderson to investigate and write about Watergate, CIA assassination schemes, and countless scandals," wrote Carlson, adding that the late columnist's archive "could be a trove of information about state secrets, dirty dealings, political maneuverings, and old-fashioned investigative journalism, open for historians and up-and-coming reporters to see."

But FBI agents, the article added, have told university officials and members of the Anderson family that they want to go through the archive and remove any items they feel are confidential or top-secret.

Were he alive today, Anderson "would probably come out of his skin at the thought of the FBI going through his papers," said Kevin Anderson, the journalist's son, as quoted by the Chronicle. Taking papers would "destroy any academic, scholarly, and historic value" of the archive, he added.

Observers said the FBI's request is part of a renewed emphasis on secrecy in government. Tracy Mitrano, an adjunct assistant professor of information science at Cornell University, told the Chronicle that the case is "utterly alarming." She added: "Once you begin taking records out of library archives that researchers rely on for free inquiry and research purposes, it would be very difficult not to see it as a slippery slope toward government controlling research in higher education and our collective understanding of American history."

The FBI declined to comment for the article.

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON DC

SCHOOL OF MEDIA AND PUBLIC AFFAIRS

Examining DOJ's Investigation of Journalists Who Publish Classified Information:

Lessons from the Jack Anderson Case:

Written Testimony of Prof. Mark Feldstein
Senate Judiciary Committee
226 Dirksen Office Bldg.
Tuesday June 6, 2006
9:30 a.m.-noon

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify and for the important oversight role you play keeping the government accountable to the people.

My name is Mark Feldstein. I am an associate professor of media and public affairs and director of the journalism program at George Washington University.

I am here today wearing two hats: First, as someone with first-hand experience who was recently visited at home by two FBI agents seeking access to archival records donated to my university by the late columnist Jack Anderson. Second, as a scholar who can offer some perspective on the larger issues raised by this case—as a journalism historian not an attorney or spokesman for George Washington University.

Jack Anderson Case

First, my own personal experience here:

I am writing a book titled *Poisoning the Press: Richard Nixon, Jack Anderson and the Rise of Washington's Scandal Culture* that will be published next year by Farrar, Straus & Giroux. In the course of my research for this book, I persuaded Anderson to donate his archives to George Washington University, which took custody of his papers in the summer of 2005. In December, Anderson died. His papers are not yet catalogued—the university is still trying to raise the money to do that—and as such these archives have not yet been made available to the public.

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Approximately ten weeks after Anderson's death, I received a phone call from FBI Special Agent Leslie Martell. On March 2 of this year, after trading phone messages, Agent Martell told me she needed to talk to me about the Anderson papers but that the subject was too sensitive to discuss on an "open line." She suggested interviewing me at my home—she already knew the address—the next morning. I agreed.

At 9:15 a.m. on March 3, Agent Martell and a colleague, Special Agent Marcelle A. Bebbe, came to my house and showed me their FBI badges. Agent Martell informed me that the FBI needed to go through the Anderson papers in search of documents more than a quarter of a century old, going back to the early 1980s. I was surprised by the FBI's sudden interest in journalism history. I asked what crimes the agents were investigating. "Violations of the Espionage Act," Agent Martell replied. She assured me that this was *not* part of the federal government's controversial re-classification program but rather a separate criminal probe involving lobbyists for AIPAC, the American Israel Public Affairs Committee.

I told the FBI agents that the Anderson papers in our collection were "ancient history," literally covered in dust. That didn't matter, Agent Martell replied. Even though she acknowledged that the statute of limitations had expired on any possible crimes committed that long ago, she said the FBI still wanted to root through our archives because even such old documents might demonstrate a "pattern and practice" of leaking.

As bizarre as it sounded, I could only conclude that the Justice Department had decided that it wanted to prosecute people who might have whispered national security secrets decades ago to a reporter who is now dead.

The FBI agents asked me if I had seen any classified government documents in the nearly 200 boxes of materials the Anderson family had donated to my university. I replied that I had seen some government documents—reports, audits, memos—but didn't know what their classification status was. "Just because the documents aren't marked 'classified' doesn't mean they're not," Agent Leslie Martell suggested helpfully. But I was unable to give her the answer that she wanted: that our collection housed classified records.

Later, after I thought about it, I could recall seeing only one set of papers that might once have been classified: the FBI's own documents on Jack Anderson. But our version of those papers was heavily censored, unlike the original FBI file already in their own office.

Ironically, for the past five years the FBI and other federal agencies have refused to turn over such documents to me under the Freedom of Information Act, even though almost all the people named in them are now dead. The government claims it would violate their privacy, jeopardize national security or — in the most absurd argument of all — compromise "ongoing law enforcement investigations."

The FBI agents also wanted the names of graduate students who had worked with me on my book to discover if any had seen classified government documents. They hadn't, but the FBI agents didn't seem to believe our denials and wanted to know where the Anderson archives are housed and who controlled custody of the papers.

In addition, the federal agents requested that I inform them of the names of former Jack Anderson reporters who were pro-Israel in their views or who had pro-Israeli sources. I told them I felt uncomfortable passing on what would be secondhand rumors. If I didn't want to name names, Agent Martell said, she could mention initials and I could nod yes or no. That was a trick Robert Redford and Dustin Hoffman used in the movie "All the President's Men." I didn't name any initials, either.

Agent Martell told me that Olivia Anderson, the ailing 79-year-old widow of the columnist, had signed a consent form giving the FBI permission to search through her late husband's papers. I expressed surprise because I had not heard that before and felt certain that would not have been what Anderson himself would have wanted. But Agent Martell explained to me that she was able to persuade Mrs. Anderson to sign the consent form because she had bonded with her based on their common family roots in West Virginia—to the point that she and Mrs. Anderson called each other "cousin." Mrs. Anderson later said she felt the FBI agent tricked her into signing the document.

I felt a bit tricked myself since it turned out that Kevin Anderson, a lawyer who is the columnist's son and executor of his papers, had already told the FBI it could *not* have permission to go through the archives—which is evidently why they subsequently approached the Anderson widow to get a more congenial answer.

So Agent Martell's suggestion to me that the Anderson family had agreed to let the FBI go through the archives was misleading. I suspect that was deliberate and designed to get me into turning the papers over to the FBI.

In fairness to Agent Martell, she was unfailingly courteous at all times during her interview with me. So was her partner. She was probably only doing what she was told to do by her supervisors.

I should point out that despite my concerns about this case, I am acutely aware that the FBI is filled with thousands of brave men and women who do their jobs superbly and often risk their lives on behalf of their country. I have known a number of fine FBI agents and supervisors and have lectured at the FBI training academy in Quantico, Virginia.

In any case, I tried to explain to the FBI agents who visited me at home why it was extremely unlikely there could be anything in our files relevant to their criminal case: Jack Anderson had been sick with Parkinson's disease since 1986 and had done very little original investigative reporting after that.

If the agents had done even rudimentary research, they would have known that. The fact that they didn't was disquieting, because it suggested that the Bureau viewed reporters' notes as the first stop in a criminal investigation rather than as a last step reluctantly taken only after all other avenues have failed. That's the standard the FBI is supposed to use under Justice Department guidelines designed to protect media freedom. These guidelines were first drawn up under the Nixon administration and have worked well for the past generation.

I reminded the FBI agents about my background as a journalist. "We're not after the reporters," Agent Martell replied. "Just their sources." I didn't find that a comforting response.

I am also not comforted by the contradictory and in some cases apparently false information the FBI has provided to the public. For example, FBI spokespersons have claimed that they were informed that the Anderson papers contain classified documents by (variously) myself,[1] by graduate students working for me, by Anderson family members, and/or by Dr. Timothy Chambless, a political science professor at the University of Utah who has perused some of the Anderson papers. Yet all of these parties emphatically deny any such knowledge, let alone passing on such misinformation to the FBI. In my own case, I very clearly told FBI agents that I had no knowledge of any classified documents in the Anderson archives, despite the agents' efforts to push me to say the opposite. I wonder what FBI records (302 reports and the agents' original handwritten notes) indicate. Perhaps this Committee—or the Justice Department Inspector General—can find out.

Also, while the two FBI agents who visited my home told me this is all part of the AIPAC case and was not part of the government's larger reclassification program, FBI spokesman John Miller publicly suggested the opposite. Miller claimed that the real reason the FBI wants the Anderson papers is to prevent classified documents from getting into the hands of enemies hostile to the U.S.[2] Which explanation is the truth?

In the same remarks, FBI spokesman Miller also asserted that universities have less First Amendment rights than the press. Is this the view of the Justice Department as a whole? Is DOJ creating a new free speech hierarchy where academics or lobbyists are entitled to less free speech than others?

Why did the FBI wait until now—decades after Jack Anderson supposedly received these secret documents but just weeks after his death—to try to obtain them? The two FBI agents who visited me at home did not tell me what triggered their investigation of Anderson's papers. But they named a former Anderson reporter and implied that he was their informant in the case—a man who was imprisoned for sodomizing a boy under 13 and admitted having a history of mental illness and fabricating stories. When the agents asked me about this man, I cautioned them about his past and explicitly warned them that this prior history made him a source of questionable credibility. Was the FBI's rationale for conducting such a fishing expedition into the Anderson archives based on the word of this former prison inmate? What do FBI records and notes indicate? Again, perhaps staff for the Committee or the Justice Department's Inspector General can find out.

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[1] See, for example, Mark Thompson and Brian Bennett, "A Reporter's Last Battle," *Time* (May 1, 2006), p. 29—see attachments.

[2] See John Miller interview with NPR's David Folkenflik, which is posted online at www.npr.org/templates/story/story.php?storyId=5353604www.npr.org/templates/story/story.php?storyId=5353604

There are other questions the Anderson case raises:

- Who authorized the FBI's attempt to pour through the Anderson archives? Were Justice Department prosecutors, intelligence agencies or other branches of the government involved? What program or policy guidelines—with what parameters and objectives—were FBI agents executing when they sought these records?

- What other papers of living or deceased journalists have similarly been sought by the federal government? Have congressional archives been targeted? What is the underlying program and rationale for these efforts?

- During the Nixon administration, the Justice Department issued guidelines to prevent harassment of journalists by government fishing expeditions. These guidelines, which are still on the books today, require "the express authorization of the Attorney General" before the Justice Department can subpoena reporters, and only then if the information is "essential to a successful investigation" where "a crime has occurred" and the government cannot first obtain information "from non-media sources."[3] Do these guidelines apply to the papers of dead journalists like Anderson? Should the reporter-source privilege extend past the grave the same way that privileges for attorneys and their clients, psychiatrists and their patients, and spouses do? Perhaps Justice Department guideline and media shield laws should be amended accordingly.

Despite FBI director Robert Mueller's pledge to this Committee last month to provide information about this case, to date many of the questions raised above remain unanswered. Perhaps the Committee—or the Justice Department's Inspector General—can make further inquiry to resolve these issues.

Larger Issues Raised

The Anderson case also raises some larger and more important First Amendment issues involving academic and press freedom.

For academics, at the most mundane level, archival records may be lost or destroyed if police paw through them before they can be catalogued for posterity. Universities like my own may find it more difficult to persuade officials to preserve or donate their papers because of concern about government fishing expeditions. Freedom of inquiry and the public's ability to know the truth about its history could be weakened.

For journalists, whistle-blowing sources—the kind of idealistic truth-tellers that Senator Grassley and other Committee members have championed—may be scared off from confiding in reporters about abuses of power if they have reason to fear that the

[3] See Adam Liptak, "The Hidden Federal Shield Law," *Annual Survey of American Lawyer* (1999), pp. 227+.

government will find out about it by rifling through journalistic files even past the grave. At a minimum, targeting dead reporters could serve as a back door approach to chipping away at the legal concept of journalistic privilege that has been afforded the press for decades.

And the public understandably won't trust the press if it's turned into an arm of law enforcement.

I am not alone in these concerns. Editorials in dozens of newspapers—*USA Today, The Chicago Tribune, The Times-Tribune* (Scranton, Pennsylvania), *The Kansas City Star, The Miami Herald, The Baltimore Sun, The New York Times, The Washington Post, The New Jersey Star Ledger, The Seattle Post-Intelligencer, The Salt Lake Tribune,* and *The Deseret News,* among others—and remarks by such television pundits as Joe Scarborough and Tucker Carlson have also been critical of the FBI in this case. In an age of terrorism with genuine and immediate national security threats, many wonder why the FBI is wasting its time trying to go through old archives of a dead reporter. More ominously, *The New York Times* warned that the Anderson case "sounds as though some in the administration are trying to turn the old and ambiguous Espionage Act into something approaching an official secrets act."[4]

By itself, what happened with the Anderson papers is a small and I think extreme case. But it is troubling because it appears to be part of a larger effort by the government to crack down on the media and the public's right to know: from firing suspected whistleblowers to withdrawing old historical records from archives to barring the press from photographing returning caskets of U.S. soldiers for fear of undermining wartime morale.

The international watchdog group Reporters Without Borders now rates the United States behind 43 other countries around the world when it comes to press freedom—just ahead of Bolivia and just behind Macedonia. I do not think that Thomas Jefferson and the other constitutional framers who enshrined press freedom in our First Amendment would be proud.

I recognize, of course, that media censorship always increases in wartime, in the U.S. and everywhere else. As Senator Hiram Johnson famously said, war's first casualty is truth. While we are now at war just as surely as we were in these earlier struggles, our current (virtually invisible) enemy makes a clampdown on the media more dangerous than in the past. America's battle against terrorism could well last decades and has no obvious end in sight. How much of our freedom must we suspend until all potential threats can be stamped out?

To be sure, there is always a tension between liberty and order, and our society needs both. Liberty without order is anarchy. Order without liberty is dictatorship. Freedom of the press is not absolute and must be carefully weighed against genuine threats to national security. A delicate balance is required.

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[4] "The Anderson Files," *New York Times* (April 24, 2006), p. A-18.

But now we are hearing proposals to criminalize such leaks and imprison reporters by dusting off the Espionage Act of 1917, which was passed in the midst of the hysteria of World War I and used to imprison dissidents—and then strengthened in 1950, when Senator Joseph McCarthy began his witch hunt.

Prosecuting the press for espionage reeks of McCarthyite madness—the kind of tactics used in dictatorships not democracies. Indeed, authoritarian regimes are already using America's crackdown on the media to justify their own repression. Reporters are not spies. They are patriotic Americans just like everybody else. Around the globe, dozens of them die every year, giving their lives to document the truth.

Journalists are imperfect, to be sure. They make mistakes, can be arrogant, give too much attention to trivia and sensation. But if you study the history of journalism, the instances of true harm to national security caused by reporters have been miniscule to non-existent.

Indeed, I would argue that far more damage to national security has been caused over the years by government secrecy and deceit than by media reporting of classified information.

History shows that government often exaggerates the damage to national security from news reporting. During the Vietnam War, Presidents Lyndon Johnson and Richard Nixon railed against classified information that came out in the press. Now it's President Bush's turn.

If anything, the problem isn't that the press is too aggressive in national security reporting, it is that it is too timid. To cite but one example: At President Kennedy's request, the *New York Times* held back reporting about the pending Bay of Pigs invasion—and JFK later admitted it would have been better for the country if the newspaper had revealed it.

All too often, administrations blame the messenger for the message. In the national security arena as in all areas, leaks increase when governmental abuses increase because whistleblowers turn to the press to get the truth out. This is a healthy and self-correcting mechanism in a democracy.

In fact, national security leaks to the media are as old as the Republic itself. In 1796, a newspaper called *Aurora* published verbatim excerpts of President George Washington's confidential communications to his Cabinet involving secret negotiations with Britain. The disclosure created a furor in international relations and was viewed by some as damaging the national security. Who leaked this national security secret? Thomas Jefferson, the secretary of state, was the number-one suspect.[5]

[5] Margaret A. Blanchard, "Freedom of Expression in the United States through the Civil War," 1991, p. 52.

Similarly, in the 1840s, the press published President James Polk's secret diplomatic plans during the Mexican War. Historians suspect the secret national security information was leaked by then-Secretary of State James Buchanan.[6]

That's the way the system works. And it does work: we had the freest press in the world during our first two centuries. Our democracy survived two world wars and a war between the states. Our open society thrived because the framers of our Constitution guaranteed press freedom as an independent check on government wrongdoing.

But if you start prosecuting reporters for revealing secrets, all of that could be jeopardized. If the Espionage Act is turned into a veritable sword of Damocles hanging over the head of journalists, many would inevitably shy away from informing the public about important national security issues—and abuses. Public discourse would be constricted as journalists err on the side of self-censorship instead of on the side of freedom.

Either that, or Congress is going to have to spend a lot more money for prisons because you're going to have a lot of journalists going to jail. Neither choice is palatable in a democracy.

History has shown that all too often, when the government complains about the release of classified information, it is really concerned about political embarrassment not national security. Over the past half-century, the federal government has over-classified so many records that journalists are justifiably suspicious when national security is invoked to restrict information—especially when government officials themselves are so willing to leak classified information when it is in their own interests to do so. Indeed, if the government was as careful protecting classified information as journalists are protecting their confidential sources, we might not have this problem in the first place.

The solution to this is not to prosecute journalists under the Espionage Act but to have a more sane system so that only truly legitimate national security secrets are classified. Otherwise, the burden is effectively placed on reporters to figure out which information is legitimately classified and which is not. This is not the job of journalists and it is a recipe for trouble.

Even merely *threatening* to jail journalists—under the Espionage Act or any other law twisted in such a fashion—sends a chilling message. Allow me to quote from what one journalist said about such a possibility:

> So what if the case is ultimately thrown out of court? In the meantime, they have arrested a troublesome reporter, clapped him in jail, threatened him with ten years in prison, flushed out some of his sources, and in doing so, reminded other troublesome reporters that the same thing could happen to them. [The administration has] already won…a victory that will bear fruit every day, whenever any reporter holds back for fear of getting into trouble, whenever a

[6] Ibid., p. 96.

> source fears to come forward lest he be exposed, whenever an editor "goes easy" for fear of government retaliation . . . whenever a citizen anywhere can be influenced to think of reporters as lawbreakers, the kind of people who have to be arrested.[7]

That journalist was Jack Anderson, writing about the Nixon administration's abuses during Watergate. Unfortunately, his words appear to be equally relevant today.

I commend the Committee for your inquiry, recognizing that you have a full plate with many other important subjects. I hope that you and the Justice Department's Inspector General will continue to follow up on the serious oversight issues raised here today.

Thank you.

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[7] Jack Anderson and George Clifford, The Anderson Papers (New York: Ballantine Books, 1973), pp. 241-2.

Max Frankel
15 West 67th Street + New York, N.Y. 10023-6226

June 5, 2006

Hon. Arlen Specter
Chairman, Senate Judiciary Committee
United States Senate
Washington, D.C. 20515

Dear Chairman Specter:

It was 35 years ago this month that the Pentagon Papers case was litigated--probably the most significant conflict ever between the American Government and press. I enclose my affidavit in that case because I believe it still bears vitally on the topic now before your Committee.

A review of the affidavit shows that while all the names have changed, the way Washington works has not. Neither have the principles that should govern the relationship between Government and press. Leaks of secrets and of classified information have been and continue to be routine, for a wide variety of reasons. They are essential to what I called the "cooperative, competitive, antagonistic and arcane relationship" between Washington reporters and American officials. The press plays a vital role in educating the public through the use of so-called secret information, much of it intentionally disclosed by honorable government servants. They may be floating trial balloons, sending messages to foreign governments, waging internecine battles against other government departments, illuminating or attacking government policies. Their motives are as numerous as their disclosures.

I have served as diplomatic correspondent and White House correspondent of The New York Times as well as Washington bureau chief at the time of the Pentagon Papers case, and I was executive editor of The Times from 1986 to 1994. In all these positions, I came to the firm conclusion that mature reporting of national security affairs depends vitally on the free flow of information, unimpeded by any threats of government censorship or censure. I respect the occasional need for temporary secrecy in Government, but once information is lost it cannot simply be returned or suppressed. Most disclosures are oral and cannot be "returned," nor can the knowledge thus gained be erased from the minds and writings of reporters.

Any attempt to prosecute the press for its reporting would be a radical departure from the constitutional tradition that has successfully guided our country and secured our freedoms for more than two centuries. I hope my passionate statement of 35 years ago will bring you to the same conclusion.

Respectfully,

Max Frankel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

Plaintiff, :

-v- : 71 Civ. 2662

NEW YORK TIMES COMPANY, et al., :

Defendants. :

----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MAX FRANKEL, being duly sworn, deposes and says:

1. I am the Washington Bureau Chief and the Washingtc correspondent of The New York Times. I have been a reporter on The Times for 20 years, including 5 years as a foreign correspondent, mostly in Moscow, and 10 years in Washington. In our capital, I have been successively The Times' diplomatic correspondent, White House correspondent and, currently, chief correspondent, supervising the work of 35 editors and reporters, including most of those who prepared the disputed series of articles.

2. I submit this affidavit in opposition to the pending motion by the United States for an injunction barring The Times, among other things, from printing further documents relating to its current series of articles on the Vietnam war.

"Secrecy" in Washington

3. The Government's unprecedented challenge to The Times in the case of the Pentagon papers, I am convinced, cannot be understood, or decided, without an appreciation of the manner in which a small and specialized corps of reporters and a few hundred American officials regularly make use of so-called classified, secret, and top secret information and documentation. It is a cooperative, competitive, antagonistic and arcane relationship. I have learned, over the years, that it mystifies even experienced professionals in many fields, including those with Government experience, and including the most astute politicians and attorneys.

4. Without the use of "secrets" that I shall attempt to explain in this affidavit, there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington and there could be no mature system of communication between the Government and the people. That is one reason why the sudden complaint by one party to these regular dealings strikes us as monstrous and hypocritical--unless it is essentially perfunctory, for the purpose of retaining some discipline over the Federal bureaucracy.

5. I know how strange all this must sound. We have been taught, particularly in the past generation of spy scares and Cold War, to think of secrets as secrets--varying in their

"sensitivity" but uniformly essential to the private conduct of diplomatic and military affairs and somehow detrimental to the national interest if prematurely disclosed. By the standards of official Washington--Government and press alike--this is an antiquated, quaint and romantic view. For practically everything that our Government does, plans, thinks, hears and contemplates in the realms of foreign policy is stamped and treated as secret--and then unraveled by that same Government, by the Congress and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information

6. The governmental, political and personal interests of the participants are inseparable in this process. Presidents make "secret" decisions only to reveal them for the purposes of frightening an adversary nation, wooing a friendly electorate, protecting their reputations. The military services conduct "secret" research in weaponry only to reveal it for the purpose of enhancing their budgets, appearing superior or inferior to a foreign army, gaining the vote of a congressman or the favor of a contractor. The Navy uses secret information to run down the weaponry of the Air Force. The Army passes on secret information to prove its superiority to the Marine Corps. High officials of the Government reveal secrets in the search for support of their policies, or to help sabotage the plans and policies of rival departments. Middle-rank officials of government reveal secrets so as to attract the attention of their superiors or to lobby against the orders of those superiors. Though not the only vehicle for this traffic in secrets--the

Congress is always eager to provide a forum--the press is probably the most important.

7. In the field of foreign affairs, only rarely does our Government give full public information to the press for the direct purpose of simply informing the people. For the most part, the press obtains significant information bearing on foreign policy only because it has managed to make itself a party to confidential materials, and of value in transmitting these materials from government to other branches and offices of government as well as to the public at large. This is why the press has been wisely and correctly called The Fourth Branch of Government.

8. I remember during my first month in Washington, in 1961, how President Kennedy tried to demonstrate his "toughness" toward the Communists after they built the Berlin wall by having relayed to me some direct quotations of his best arguments to Foreign Minister Gromyko. We were permitted to quote from this conversation and did so. Nevertheless, the record of the conversation was then, and remains today, a "secret."

9. I remember a year later, at the height of the Cuban missile crises, a State Department official concluding that it would surely be in the country's interest to demonstrate the perfidy of the same Mr. Gromyko as he denied any knowledge of those missiles in another talk with the President; the official returned within the hour and let me take verbatim notes of the Kennedy-Gromyko transcript--providing only that I would not use direct quotations. We printed the conversation between the President and the Foreign Minister in the third person, even though the record probably remains a "secret."

10. I remember President Johnson standing beside me, waist-deep in his Texas swimming pool, recounting for more than an hour his conversation the day before, in 1967, with Prime Minister Kosygin of the Soviet Union at Glassboro, N. J., for my "background" information, and subsequent though not immediate use in print, with a few special off-the record sidelights that remain confidential.

11. I remember Secretary of State Dean Rusk telling me at my first private meeting with him in 1961 that Laos is not worth the life of a single Kansas farm boy and that the SEATO treaty, which he would later invoke so elaborately in defense of the intervention in Vietnam, was a useless instrument that should be retained only because it would cause too much diplomatic difficulty to abolish it.

12. Similar dealings with high officials continue to this day.

13. We have printed stories of high officials of this Administration berating their colleagues and challenging even the President's judgment about Soviet activities in Cuba last year.

14. We have printed official explanations of why American intelligence gathering was delayed while the Russians moved missiles toward the Suez Canal last year.

15. These random recollections are offered here not as a systematic collection of secrets made known to me for many, usually self-evident (and often self-serving) reasons. Respect for sources and for many of the secrets prevents a truly detailed

accounting, even for this urgent purpose. But I hope I have begun to convey the very loose and special way in which "classified" information and documentation is regularly employed by our government. Its purpose is not to amuse or flatter a reporter whom many may have come to trust, but variously to impress him with their stewardship of the country, to solicit specific publicity, to push out diplomatically useful information without official responsibility, and, occasionally, even to explain and illustrate a policy that can be publicly described in only the vaguest terms.

16. This is the coin of our business and of the officials with whom we regularly deal. In almost every case, it is secret information and much of the time, it is top secret. But the good reporter in Washington, in Saigon, or at the United Nations, gains access to such information and such sources because they wish to use him for loyal purposes of government while he wishes to use them to learn what he can in the service of his readers. Learning always to trust each other to some extent, and never to trust each other fully--for their purposes are often contradictory or downright antagonistic--the reporter and the official trespass regularly, customarily, easily and unself-consciously (even unconsciously) through what they both know to be official "secrets." The reporter knows always to protect his sources and is expected to protect military secrets about troop movements and the like. He also learns to cross-check his information and to nurse it until an insight or story has turned ripe. The official knows, if he wishes to preserve this valuable

channel and outlet, to protect his credibility and the deeper purpose that he is trying to serve.

The Role of "Classified" Information

17. I turn now in an attempt to explain, from a reporter's point of view, the several ways in which "classified" information figures in our relations with government. The Government's complaint against The Times in the present case comes with ill-grace because Government itself has regularly and consistently, over the decades, violated the conditions it suddenly seeks to impose upon us--in three distinct ways:

First, it is our regular partner in the informal but customary traffic in secret information, without even the pretense of legal or formal "declassification." Presumably, many of the "secrets" I cited above, and all the "secret" documents and pieces of information that form the basis of the many newspaper stories that are attached hereto, remain "secret" in their official designation.

Second, the Government and its officials regularly and customarily engage in a kind of ad hoc, de facto "declassification" that normally has no bearing whatever on considerations of the national interest. To promote a political, personal, bureaucratic or even commerical interest, incumbent officials and officials who return to civilian life are constantly revealing

the secrets entrusted to them. They use them to barter with the Congress or the press, to curry favor with foreign governments and officials from whom they seek information in return. They use them freely, and with a startling record of impunity, in their memoirs and other writings.

Third, the Government and its officials regularly and routinely misuse and abuse the "classification" of information, either by imposing secrecy where none is justified or by retaining it long after the justification has become invalid, for simple reasons of political or bureaucratic convenience. To hide mistakes of judgment, to protect reputations of individuals, to cover up the loss and waste of funds, almost everything in government is kept secret for a time and, in the foreign policy field, classified as "secret" and "sensitive" beyond any rule of law or reason. Every minor official can testify to this fact.

18. Obviously, there is need for some secrecy in foreign and military affairs. Considerations of security and tactical flexibility require it, though usually for only brief periods of time. The Government seeks with secrets not only to protect against enemies but also to serve the friendship of allies. Virtually every mature reporter respects that necessity and protects secrets and confidences that plainly serve it.

19. But for the vast majority of "secrets," there has developed between the Government and the press (and Congress) a

rather simple rule of thumb: The Government hides what it can, pleading necessity as long as it can, and the press pries out what it can, pleading a need and right to know. Each side in this "game" regularly "wins" and "loses" a round or two. Each fights with the weapons at its command. When the Government loses a secret or two, it simply adjusts to a new reality. Whe the press loses a quest or two, it simply reports (or misreport as best it can. Or so it has been, until this moment.

Some Examples

20. Some of the most powerful examples of the widespread traffic in secret information that I describe were found by a few colleagues in the Washington bureau in a most perfunctory search of our files. Even as I write this affidavit I can glance at the Times of June 16, 1971 and find, beside the headline of the Court's temporary restraining order in this case, a sample from our military correspondent, William Beecher:

> WASHINGTON--June 15--The Nixon Administration is engaged in a broad policy review aimed at determining courses of action that might improve South Vietnam's ability to withstand military assaults next year, after most American forces have been withdrawn...
>
> Other key developments include an estimate by the National Security Council that North Vietnam is building toward a new offensive in the South next year....
>
> Well-placed Administration sources disclose that, against the expected North Vietnamese threat, officials are focusing on the following major questions....
>
> Many planners expect President Nixon to scale down to a residual force of 30,000 to 70,000 men by July 1, 1972, but to leave enough flexibility in the pace of reductions so that many of them can be timed for May and June...

> Should this residual force include many helicopter and artillery units to "stiffen" South Vietnamese defenses....

Not a single source of that information is identified by name, either because sources are peddling information for which they have asked not to be held responsible or because they are revealing information without authorization. Either way, they are relaying secret data which we, judging by other confidential contacts, deem reasonably reliable.

21. Some of the best examples of the regular traffic I describe may be found in the Pentagon papers that the Government asks us not to publish. The uses of top secret information by our Government in deliberate leaks to the press for the purposes of influencing public opinion are recorded, cited and commented upon in several places of the study. Also cited and analyzed are numerous examples of how the Government tried to control the release of such secret information so as to have it appear at a desired time, or in a desired publication, or in a deliberately loud or soft manner for maximum or minimum impact, as desired.

22. The temporary restraining order currently in effect precludes me from citing and quoting these passages in the Pentagon study. Examples of my point are so numerous that despite the great bulk of the papers, we were able to locate more than a dozen different kinds of such passages in less than an hour.

23. Extensive samples of stories plainly based on supposedly secret information are annexed to this affidavit. They include not only regular, daily articles but also major

contemporary analyses of Government decision-making at several key stages of the Vietnam war, right after the Cuban missile crisis, and shortly after the invasion of Cambodia. They include major journalistic investigations of secret institutions, like the Central Intelligence Agency. They combine known facts, pried-out secrets and deliberate disclosures of secrets. They are recognized within the profession and among readers as the most valuable kind of journalism and have never been shown to cause "irreparable" harm to the national security. They have occasionally prompted investigations inside the Government to determine the sources of information, the possible presence of disloyal or dissenting officials or the existence of information not previously given any weight or credibility by higher authority. None of these articles could be fairly described as less "sensitive" or more innocuous than the materials now challenged. None of them ever produced a legal challenge or a request for new legislation.

24. Samples of the second kind of traffic in secrets that I mentioned--the ad hoc, de facto (but by no means authorized, official or "legal") declassification of documents--are simply too numerous and too voluminous to collect in this format and on such short notice.

25. George Christian of Austin, Tex., former press secretary to President Johnson, who had free admission to all foreign and domestic discussions involving the President, at any level and in any forum, has already published his memoir. It includes 70 pages of narrative on the decisions to end the bombing of North Vietnam in late 1968, with many direct quotations of

the President and other officials, many unflattering references to our allies in South Vietnam and a great deal of detailed information, all still highly classified, about the secret negotiations with North Vietnam in Paris. This book, entitled, "The President Steps Down," (MacMillan, 1970), actually covers a period more recent than that discussed in the Pentagon papers, and at a much higher level of government and secrecy.

M7 26. Recently, a book ~~of top~~ Contains secret documents from members of the Joint Chiefs of Staff about the very same period covered by The Times' materials was published. The book, entitled "Roots of Involvement," by Marvin Kalb and Elie Abel (pp. 208-212) includes telegram exchanges between General Westmoreland and General Wheeler in early 1968. We are advised that these texts were taken from privately circulated analyses and histories of phases of the war by leading military commanders, still on active duty!

27. Theodore C. Sorensen's "Kennedy," written within a year of the death of his President, reveals dozens upon dozens of actions, meetings, reports and documents, all still treated as "classified" by the Government and unavailable for more objective journalistic analysis. Sorensen treated the Kennedy-Khrushchev correspondence as private, to protect future channels of communication with Soviet leaders, but the most "secret" of these letters, during the Cuban missile crisis, were fully revealed in two subsequent books, one by Elie Abel and one by Robert F. Kennedy. Sorensen also observes that while Kennedy was still alive he invited Professor Richard Neustadt into

Government archives for a contemporary analysis of decision-making of the "Skybolt" affair, the secrets of which were later revealed by the professor in a public account of this minor-missile crisis with Britain.

28. Arthur Schlesinger, Jr., kept notes in the White House for his history of the Kennedy years entitled "A Thousand Days." Roger Hilsman, an intelligence officer and then Assistant Secretary of State for the Far East poured his files and secrets into a quick memoir entitled "To Move a Nation" (Doubleday 1967). John Martin, special ambassador during the Dominican Republic invasion of 1965, wrote "Overtaken by Events," (Doubleday, 1966) recounting numerous confidential messages and communications. Chester Cooper, a C.I.A. official involved in Vietnam policy for two decades left the White House to produce what was probably the most complete and best-documented history until the Pentagon papers became available to The Times. "The Secret Search for Peace in Vietnam," by David Kraslow and Stuart Loory of The Los Angeles Times, remains to this day the most thorough newspaper (and book) account of the diplomacy surrounding the war--through channels that are still deemed "live".

The Pentagon Study

29. As The Times indicated in the first of its articles about the Pentagon study that is in question here, it is a massive history of how the United States went to war in Indochina. Its 3,000-page analysis, to which 4,000 pages of official documents are appended, was commissioned by Secretary of Defense Robert S. McNamara in 1967 and completed in 1968, by which time

he had been replaced by Clark M. Clifford. The analysis covers a historical record, as The Times said, from World War II to May, 1968--the start of the peace talks in Paris, by which time President Johnson had set a limit on further military commitments and revealed his intention to retire. We said that "though far from a complete history, even at 2.5 million words, the study forms a great archive of government decision-making on Indochina over three decades." That was the most concise journalistic definition we could give to the materials. Examination of our report thus far on the study and presentation of its documentation confirms the accuracy of that definition.

30. Moreover, the material was treated by The Times as an historical record that was of importance not only to our daily readers but also to the community of scholars that we have long served with a record of events. Our presentation was subjected to the most careful editing so that our report would remain faithful to the Pentagon record itself.

31. It is difficult, while publication is suspended, to describe the content and scope of the material. But our first article has already established the framework for our readers. We said the authors of the study reached many broad conclusions and specific findings, including the following:

(a) "--That the Truman Administration's decision to give military aid to France in her colonial war against the Communist led Vietminh 'directly involved' the United States in Vietnam and 'set' the course of American policy.

(b) "--That the Eisenhower Administration's decision to rescue a fledgling South Vietnam from a Communist take-over and attempt to undermine the new Communist regime of North Vietnam gave the Administration a 'direct role in the ultimate breakdown of the Geneva settlement' for Indochina in 1954.

(c) "--That the Kennedy Administration, though ultimately spared from major escalation decisions by the death of its leader, transformed a policy of 'limited-risk gamble,' which it inherited, into a 'broad commitment' that left President Johnson with a choice between more war and withdrawal.

(d) "--That the Johnson Administration, though the President was reluctant and hesitant to take the final decision, intensified the covert warfare against North Vietnam and began planning in the spring of 1964 to wage overt war, a full year before it publicly revealed the depth of its involvement and its fear of defeat.

(e) "--That this campaign of growing clandestine military pressure through 1964 and the expanding program of bombing North Vietnam in 1965 were begun despite the judgment of the Government's intelligence community that the measures would not cause Hanoi to cease its support of the Vietcong insurgency in the South, and that the bombing was deemed militarily ineffective within a few months.

(f) "--That these four succeeding Administrations

built up the American political, military and psychological stakes in Indochina, often more deeply than they realized at the time, with large-scale military equipment to the French in 1950; with acts of sabotage and terror warfare against North Vietnam beginning in 1954; with moves that encouraged and abetted the overthrow of President Ngo Dinh Diem of South Vietnam in 1963; with plans, pledges and threats of further action that sprang to life in the Tonkin Gulf clashes in August, 1964; with the careful preparation of public opinion for the years of open warfare that were to follow; and with the calculation in 1965, as the planes and troops were openly committed to sustained combat, that neither accommodation inside South Vietnam nor early negotiations with North Vietnam would achieve the desired result."

(g) Further characterizing the materials, our introduction also indicated revelations "about the ways in which several administrations conducted their business on a fateful course, with much new information about the roles of dozens of senior officials of both major political parties and a whole generation of military commanders."

32. The Times found the history to be concerned primarily with the decision-making process in Washington and the thoughts, motives, plans, debates and calculations of the decisionmakers. I have seen no materials bearing on future plans of a diplomatic or military nature.

The Times' interest throughout, like that of the study itself, in the words of our opening line, was in "how the United States went to war in Indochina."

33. In considering the remainder of the material, in preparation for publication, it is difficult to be precise, without compromising our deep conviction that no agency of Government ought to be placed in the position of approving, or being asked to approve, prior to publication, any article or other materials that we plan to publish in the exercise of our profession.

34. But it may be helpful to affirm to the Court what is already plain from what we have published so far. The remaining articles will be of the same historical character as the first three, similarly dealing with the decision-making process and the thoughts, debates and calculations of the decision-makers.

35. Of the numbered paragraphs in our original introduction to the first article, the materials and accounts bearing on paragraphs (4) and (5) and a part of (6) -- covering the period from early 1964 to the middle of 1965 -- have already appeared in print. The remainder of that introduction was deemed by us to be a fair journalistic summary of the remainder of our story.

36. Within the limits we have set on discussion of our unpublished articles, we can state that the stories will cover, as we have indicated, the origins of the United States

involvement in Southeast Asia from World War II forward, in the broad context of our evolving policy for the Pacific, through the period of the Eisenhower Administration and the Geneva conference on Indochina. They will cover the history of policy-making inherited by President Kennedy and the Kennedy years, including the broad perspective of those years, which involved the specific problem of political stability culminating in the overthrow of President Ngo Dinh Diem. Among other things, our stories will also cover the history of other policy decisions through early 1968, including the personal disillusionment with policy felt by Secretary McNamara and the roles of other policy-makers.

37. The Pentagon papers published and to be published by the Times and a bureaucratic history and analysis of the interaction of events and policy decisions are an invaluable historical record of a momentous era in our history. We cannot believe they should or will be suppressed.

Max Frankel

Sworn to before me this
17th day of June, 1971

MARY ANN C. SIMPSON
Notary Public, State of New York
No. 41-3602775
Qualified in Queens County
Commission Expires March 30, 1973

[The following pages contain copies of exhibits submitted with Mr. Frankel's affidavit, articles copied from various publications.]

Statement of

Matthew W. Friedrich
Chief of Staff and Principal Deputy Assistant Attorney General
Criminal Division
Department of Justice

Before the

Committee on the Judiciary
United States Senate

Concerning

"Unauthorized Disclosures of Classified Information by the Press"

Presented on

June 6, 2006

Mr. Chairman and Members of the Committee, thank you for the opportunity to discuss with you today the difficult issue of unauthorized disclosures of classified information sometimes referred to as "leaks." I intend to explain the position of the Department of Justice with respect to the scope of the relevant statutes as they relate to the press and the willful dissemination of classified information. In doing so, I cannot comment on any pending investigation or litigation.

In response to recent serious leaks of classified information, President Bush has stated that such leaks have damaged our national security, hurt our ability to pursue terrorists, and put our citizens at risk. Porter Goss, then-Director of the Central Intelligence Agency, stated in February of this year that leaks have alerted our enemies to intelligence collection technologies and operational tactics, and "cost America hundreds of millions of dollars" to repair the damage

caused by leaks. Members of Congress in both the Senate and the House have repeatedly acknowledged the damage caused by leaks, particularly in this post-September 11th environment.

The Department of Justice is committed to investigating and prosecuting leaks of classified information, and Congress has given the Department the statutory tools to do so. Several statutes prohibit the unauthorized disclosure of certain categories of classified information, the broadest of which is Section 793 of Title 18, which prohibits the disclosure of information "relating to national defense." Also, Section 798 of Title 18 prohibits the unauthorized disclosure of information relating to communications intelligence activities.

On May 21st, 2006, Attorney General Gonzales was asked about the possibility of prosecuting members of the press for publishing classified information and he stated in part as follows: "There are some statutes on the books which, if you read the language carefully, would seem to indicate that that is a possibility." There has been considerable attention paid to the Attorney General's remarks. It is critical to note, however, that the Attorney General is not the first one to recognize the possibility that reporters are not immune from potential prosecution under these statutes. Many judges and commentators have reached this same conclusion. For example, in the Pentagon Papers case, the United States sought to restrain the New York Times from publishing classified documents relating to the Vietnam War. While the Supreme Court did not decide the question of whether the First Amendment immunizes the press from prosecution for publishing national defense information given to them by a leaker, five concurring Justices questioned the existence of such blanket immunity. *See New York Times v. United States*, 403 U.S. 713 (1971). In his concurring opinion, Justice White stated: "[F]rom the face of [the statute] and from the context of the Act of which it was a part, it seems undeniable

that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793(e) if they communicate or withhold the materials covered by that section." *Id.* at 740. Further, the Court of Appeals for the Fourth Circuit has affirmed that the First Amendment does not prevent prosecutions under Section 793 for unauthorized disclosures of classified information and did so over the objections of various news organizations that appeared in the case as *amici* to support the defendant's First Amendment arguments. *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988). Likewise, it is the conclusion of legal commentators, with respect to Section 798, that reporters are not exempt from the reach of this statute if its elements are otherwise met.

I would emphasize that there is more to consider here beyond the mere question of the reach of the laws as written. The Department recognizes that freedom of the press is both vital to our nation, and protected by the First Amendment.

The Department has never in its history prosecuted a member of the press under Section 793, 798, or other sections of the Espionage Act of 1917 for the publication of classified information, even while recognizing that such a prosecution could be possible under the law. As a policy matter, the Department has taken significant steps to protect as much as possible the role of the press in our society. This policy is embodied in Section 50.10 of Title 28, Code of Federal Regulations which requires that the Attorney General approve not only prosecutions of members of the press but also investigative steps aimed at the press, even in cases where the press is not itself the target of the investigation. This policy – voluntarily adopted by the Department – ensures that any decision to proceed against the press in a criminal proceeding is made at the very highest level of the Department. In a press conference last week, the Attorney General

stated that the Department's "primary focus" is on the leakers of classified information, as opposed to the press. The strong preference of the Department is to work with the press not to run stories containing classified information, as opposed to other alternatives. The Attorney General has consistently made clear that he believes the country's national security interests and First Amendment interests are not mutually exclusive and can both be accommodated.

I appreciate the opportunity to appear before you and would be happy to answer your questions.

Opening Statement of Senator Charles Grassley

Hearing Before the Senate Judiciary Committee

"Examining DOJ's Investigation of Journalists Who Publish Classified Information: Lessons from the Jack Anderson Case"

June 6, 2006

Chairmen Specter, thank you for holding this important hearing today. As you know I am a firm believer in open government. When it comes to wrongdoing, corruption, fraud, and waste, sunshine really is the best disinfectant. I also believe that there are certain secrets the government needs to keep in order to safeguard national security. When wrongdoing is alleged in the national security arena, these two values can collide. Unfortunately, certain government officials can abuse the classification process to hide their wrongdoing from public scrutiny and turn the tables on those who would seek to expose politically embarrassing truths.

Jack Anderson specialized in exposing politically embarrassing truths. Sometimes that meant writing about things that some people wanted to hide from public scrutiny by claiming it was controlled national security information. Like journalists, members of Congress and our staff often receive information from whistleblowers trying to expose waste, fraud, or abuse in government. Sometimes the whistleblowers pay a heavy price for disclosing information that others in government are trying to hide. Being willing to pay that price and disclose the information anyway is an essential safety valve in any free society. The prospect that journalists who *receive* such information may also have to pay a price threatens to shut off that safety valve.

If there is information that would really harm national security in the Jack Anderson archives, then it deserves to be protected from public disclosure. If there is really evidence of a crime in those papers, then the FBI should have access to it. However, the FBI should be willing and able to demonstrate that it has a legitimate reason to access the documents. It needs something more than just an assertion that there may be classified materials in the files.

The Anderson family claimed that rather than demonstrating a real need for the documents, the FBI tried to access them by contacting Jack Anderson's widow. They contacted her without her son (and attorney) present in order to get her signature on a consent form that she did not fully understand. When First Amendment sensitivities are involved, I don't think that kind of shortcut is appropriate. Last month, I asked Director Mueller his views on this matter, and he declined to answer, saying he first needed to learn more about the facts and circumstances of Mrs. Anderson's contacts with the FBI. Perhaps the Justice Department has a better explanation today than they have offered, so far. In any event, I look forward to hearing the testimony of all the witnesses today and hopefully learning more about what happened and whether Justice Department policies permit what the FBI did.

guardian

Guardian International Pages

Family refuses FBI access to columnist's 'legacy'

Suzanne Goldenberg Washington
284 words
21 April 2006
The Guardian
21
English
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In his heyday **Jack Anderson** broke the story of the CIA plot to assassinate Fidel Castro. Now, four months after his death, the investigative columnist apparently still has some secrets to disclose, because the FBI wants to rifle through his archives.

Amid a widening crackdown on leaks by the Bush administration, the attempt to investigate a journalist who stopped reporting in 1990 and who has been dead since December caused outrage yesterday from civil libertarians and from Ander son's family, which said it would not turn over his records.

"It's dad's legacy," the columnist's son, Kevin, told the Guardian. "His life's work was to play the role of the watchdog of the government. He felt that his job was to try to get in and document government wrongdoing."

The FBI maintains that it is unlawful for individuals to possess classified documents, and that the material belongs to the government. At the height of his 50-year career Anderson's Washington Merry-Go-Round column was carried by nearly 1,000 newspapers.

He won a Pulitzer prize in 1972 for his reporting on US relations with India and Pakistan, and also made it to the top of Richard Nixon's list of enemies. The records of his career, stored in 188 boxes, are held at George Washington University.

The FBI first demanded access to the archives in March.

The FBI maintained that it wanted access to the archives to help with the prosecution of two lobbyists for the American Israel Public Affairs Committee, who go on trial next month on espionage charges.

Statement Of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Hearing On "Examining Department Of Justice's Investigation of Journalists
Who Publish Classified Information: Lessons From The Jack Anderson Case"
June 6, 2006

Today the Committee considers the important question of how to strike the proper balance between secrecy and openness in matters that touch on national security. This is an issue of paramount concern that has vexed our nation since its founding and continues to challenge us since the world changed on September 11, 2001. I commend the Chairman for holding this important hearing.

I have long been a champion of open government and a vibrant and independent press. My commitment to preserving public debate developed honestly and early as the son of a Vermont printer from Montpelier. In my years in the Senate, I have aspired to fulfill the ideals of my father, fighting for a free press and greater transparency in government. I have long championed the Freedom of Information Act, which shines a light on the workings of government and has proven to be an invaluable tool for both reporters and ordinary citizens. Last year, I introduced legislation with Senator Cornyn to improve implementation of that critical legislation.

I also understand that the collective security of our nation is critical to sustaining our democracy, and there will always be a need to classify some information in the interest of national security. In some instances, the unauthorized release of classified information can compromise our intelligence-gathering capabilities, impede our efforts to thwart terrorism, and even jeopardize lives.

Many observers in and outside of government have also believed, often with good reason, that government too frequently is inclined to stamp too much information with the secrecy stamp, in order to limit accountability and prevent embarrassment. Congress has often struggled to find the proper balance between open public debate and secrecy when it comes to classified information. Shortly after entering into World War I, Congress passed the Espionage Act of 1917, which made it a crime for a person to convey information with the intent to interfere with the operations of our armed forces, or to help the enemies of the United States. However, Congress resisted efforts by the Wilson Administration to criminalize all leaks of government information -- essentially rejecting the notion of an Official Secrets Act.

After World War II and the publication of information about the Government=s code-breaking capabilities in the *Chicago Tribune*, Congress extended the Espionage Act to criminalize the disclosure of communications intelligence. But

once again, Congress resisted calls to enact legislation that would prohibit the publication of all classified information.

More recently -- in 2000 -- Congress did include a provision criminalizing leaks of classified material in an intelligence authorization bill. But President Clinton vetoed that legislation because it was overly broad and could chill the legitimate activities of current and former government officials.

Like most Americans, I appreciate the need to protect national defense information. But when it enacted the espionage laws in 1917, Congress clearly understood that giving the Government the authority to prosecute the press simply for publishing newsworthy government secrets would substantially chill First Amendment-protected speech -- and Congress chose not to do that.

For 90 years, there have been no prosecutions of the press under our existing federal espionage laws. Despite this long history, Attorney General Gonzales claimed during a recent interview with ABC News that the Justice Department could do just that. And according to the *Washington Times*, reporters for the *Washington Post* and *New York Times* are being investigated by the Justice Department for publishing stories about the CIA=s secret prisons in Eastern Europe and the NSA=s warrantless surveillance program.

Reasonable people can -- and do -- disagree about the legality and wisdom of such programs. But there can be no question that these award-winning reports contained newsworthy information for Americans, about questionable activities of their government. I am deeply troubled by the Attorney General's remarks and the specter of Government intimidation of the press if the espionage laws are used in ways not intended by Congress.

I am also troubled by the FBI=s request to search the files of journalist Jack Anderson shortly after his death -- reportedly to recover classified documents leaked decades ago. I fail to see what possible national security interest is served by the FBI rummaging through Mr. Anderson=s files many years after he published articles about these matters.

I am pleased that Mr. Anderson=s son, Kevin, is here with us today. I look forward to hearing his views on his father's distinguished career in journalism and the FBI=s contacts with the Anderson family. We also have a distinguished panel of legal scholars and media experts with a broad range of experience and expertise on this issue.

I look forward to a meaningful exchange.

# # # # #

LA Times, 4-19-06

THE SUN

FBI wants look at reporter's papers

Family of longtime columnist Anderson who died in Dec. resists complying

BY NICK TIMIRAOS

WASHINGTON // Jack Anderson turned up plenty of government secrets during his half-century career as an investigative reporter, and his family hoped to make his papers available to the public after his death in December — but the government wants to see and possibly confiscate them first.

The FBI believes the columnist's files might contain national security secrets, including documents that would aid in the prosecution of two former lobbyists for the American Israel Public Affairs Committee who have been charged with disclosing classified information.

Lawyers for the family are preparing a letter refusing to comply with the FBI, said the columnist's son, Kevin N. Anderson.

"He would absolutely oppose the FBI rifling through his papers at will," Anderson said.

While some of the documents might be classified, he said, they do not contain national security secrets, only "embarrassing top secrets — hammers that cost a thousand dollars and things like that."

Anderson said it was unlikely that his father had papers relevant to the AIPAC case because he had done little original reporting after being diagnosed with Parkinson's disease in 1990.

The FBI contends that the classified documents belong to the government and cannot be retained as part of a private estate.

"The U.S. government has reasonable concern over the prospect that these documents will be made available to the public at the risk of national security and in violation of the law," FBI spokesman Bill Carter said yesterday.

Anderson said the FBI would remove anything that was classified from the papers, which have not been catalogued. Confiscated documents would be reviewed by the originating federal agency before being declassified and returned to the family, which has promised the papers to the George Washington University.

The FBI's attempt to seize papers of the Washington muckraker, first reported yesterday by the *Chronicle of Higher Education*, comes as civil libertarians have decried growing limits on freedom of information since the Sept. 11 attacks. It also follows Monday's announcement by the National Archives that it would end agreements with federal agencies that want to withdraw records from public shelves.

"It's disturbing to us in higher education because it has a chilling effect on the research process," said Duane E. Webster, executive director of the Association of Research Libraries. "If you've got someone looking over your shoulder, it creates an anxiety."

At its height, Anderson's "Washington Merry-Go-Round" column appeared in nearly 1,000 newspapers with more than 40 million daily readers.

He won a Pulitzer Prize in 1972 for his coverage of U.S. relations with India and Pakistan, and his scoops included the involvement of five senators in the savings-and-loan collapse of the late 1980s, the CIA plot to use the Mafia to kill Cuban President Fidel Castro, Iran's role in the 1983 U.S. Embassy bombing in Beirut, and investigations into the Iran-contra scandal.

He was also at the top of President Richard M. Nixon's famous "enemies" list.

Nick Timiraos writes for the Los Angeles Times.

The Miami Herald
Herald.com

Posted on Mon, Apr. 24, 2006

FBI goes after dead reporter's files

OUR OPINION: A BRAZEN ATTEMPT TO UNDERMINE FIRST AMENDMENT RIGHTS

The brazen attempt by the FBI to search the voluminous files of the late Jack Anderson, a prominent Washington journalist, adds to the impression that the government has launched a no-holds-barred assault on traditional press freedoms. Mr. Anderson, who died in December, made a career out of uncovering embarrassing government secrets. The enemies he made in the Washington bureaucracy would like nothing better than to get their hands on his papers to find out what secrets still lurk therein, regardless of whether they are entitled to do so.

A fishing expedition

The pretext for this effort to rifle through Mr. Anderson's papers is an investigation into the activities of two lobbyists from the American Israel Public Affairs Committee (AIPAC). FBI agents told his widow they wanted to retrieve fingerprints from relevant documents in Mr. Anderson's files. They added, however, that they wanted to look at nearly 200 boxes of documents compiled by the journalist over 50 years and would take anything they believed to be classified.

This reeks of a fishing expedition. If national security is indeed involved, the issue should be taken before a court in order to obtain a warrant. A judge could review the FBI's request and outline the boundaries of the search. In this case, the AIPAC pretext seems terribly flimsy because Mr. Anderson apparently never wrote about it.

Mr. Anderson would never have allowed federal agents to examine his private papers without a very good reason, and the guardians of his papers are right to resist their efforts. The files were transferred to George Washington University at Mr. Anderson's request last year. They have yet to be cataloged.

The larger significance of this episode is that it represents an enlargement of the fight over government secrecy and encroachments on rights that Americans have customarily taken for granted.

Last Monday, for example, the head of the National Archives announced that he was putting an end to a secret program that allowed the CIA to withdraw from public access materials that the spy agency deemed improperly declassified. Critics said the program was an attempt to ``white-out history.''

Settling old scores

The fight over the jailing of former New York Times reporter Judith Miller and the issuance of subpoenas to journalists in the same case is also seen as one more round in the contest over First Amendment freedoms.

All of this lends urgency and importance to the dispute over Jack Anderson's papers. In life, he was the scourge of bureaucrats who sought to hide mistakes under the cloak of official secrecy. It is shameful and offensive that the government still seems to be trying to settle old scores with him even after his death.

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The Miami Herald
Herald.com

Posted on Tue, May. 02, 2006

FBI's Mueller faces sharp questioning

MARK SHERMAN
Associated Press

WASHINGTON - FBI Director Robert Mueller defended the bureau Tuesday under sharp, wide-ranging questioning from lawmakers that included the bureau's effort to access columnist Jack Anderson's files and problems with informants.

Sen. Charles Grassley, R-Iowa, who often spars with Mueller at congressional hearings, said FBI agents tried to get permission to look at Anderson's voluminous files by "tricking" his widow, Olivia, into signing a consent form that she didn't understand.

"They did this by returning to speak with Mrs. Anderson alone after her son, who is also her attorney, made it clear that any permission to take documents would have to be discussed with the entire family," Grassley said at a Senate Judiciary Committee hearing.

Mueller said the agents were doing their job in pursuing access to Anderson's papers, but did not specifically answer Grassley's claim. "I would have to go back and find out more facts," Mueller said.

Olivia Anderson told The Associated Press that she thought she was allowing the FBI to examine a limited number of files from the 1970s, not broad access to the nearly 200 boxes of her husband's papers.

Anderson, 79, said she met with FBI agent Leslie Martell twice and, indulging her passion for genealogy, determined that they could be distant cousins because they trace their families to the same vicinity of West Virginia.

"She didn't ask me to sign anything the first time. Maybe that's because I claimed her as a cousin," Anderson said.

Martell called a few days later to set up a second meeting at Anderson's home in Bethesda, Md., and said she had a form she wanted Anderson to sign.

"I don't feel like she was up front because she didn't say what they wanted to do," Anderson said. "They wanted to take all the papers, look at all the files."

FBI spokeswoman Debra Weierman said Martell never misrepresented herself and treated Anderson respectfully during both meetings.

But Kevin Anderson, a Salt Lake City lawyer, said Martell never should have asked his mother to sign the form because he had made clear to the agent that he was representing his mother.

"It's an issue of inappropriate behavior by the FBI," Anderson said, adding that the bureau has given several reasons for why it wants access to his father's papers.

On other issues, Mueller said the FBI has tightened its rules for dealing with confidential informants after recent scandals on both coasts, including a retired agent's indictment on murder charges.

The unspecified changes followed embarrassing revelations of a love affair and gangland killings that an earlier overhaul of informant guidelines was intended to prevent.

"Given the circumstance in New York, the protocols relating to our handling of informants changed dramatically," Mueller said.

Retired FBI agent R. Lindley DeVecchio was indicted in March in state court in Brooklyn, N.Y., on charges of helping a mobster - who also was an FBI informant - plot four murders in the 1990s. DeVecchio has pleaded not guilty to the

charges.

In Los Angeles, another informant, Katrina Leung, admitted in December that she lied to the FBI about her intimate relationship with her FBI handler, James J. Smith.

Last year, Justice Department inspector general Glenn A. Fine found that FBI agents frequently violate the bureau's rules on informants.

Those rules were rewritten in 2001, after celebrated cases in which FBI agents protected mobsters from prosecution or tipped them off to investigations while simultaneously using them as informants.

In one case, former FBI agent John J. Connolly Jr. tipped off Boston mobster James "Whitey" Bulger to a looming racketeering indictment, causing Bulger to flee. He remains at large.

Senators also raised questions about the government's new consolidated terrorism watch list, the National Security Agency's warrantless eavesdropping program and mistakes in fingerprint identification in a terrorism case.

Sen. Charles Schumer, D-N.Y., said it would not take a corporation five years to fix problems in the terrorist watch list, which is intended to combine lists from many government agencies.

Mueller acknowledged there are inaccuracies that would take several years to weed out, as Fine has reported.

"There are 200,000 names to be vetted," Mueller said.

Sen. Arlen Specter, R-Pa., the committee chairman, lectured Mueller at length on his belief that the eavesdropping program violates federal law. Specter also voiced irritation that Attorney General Alberto Gonzales has been unwilling to answer his questions. Gonzales has said he is constrained from answering fully because so much of the NSA program remains classified.

"We haven't found out very much because the attorney general wouldn't tell us anything," Specter said, adding that he would not call Gonzales back for another hearing because doing so would be "futile."

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The New York Times

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WEDNESDAY, APRIL 19, 2006

F.B.I. Seeking Access to Dead Columnist's Papers

By SCOTT SHANE

WASHINGTON, April 18 — The F.B.I. is seeking to go through the files of the late newspaper columnist Jack Anderson to remove classified material he may have accumulated in four decades of muckraking Washington journalism.

Mr. Anderson's family has refused to allow a search of 188 boxes, the files of a well-known reporter who had long feuded with the Federal Bureau of Investigation and had exposed plans by the Central Intelligence Agency to kill Fidel Castro, the machinations of the Iran-contra affair and the misdeeds of generations of congressmen.

The columnist's son Kevin N. Anderson said that to allow government agents to rifle through the papers would betray his father's principles and intimidate other journalists, and that family members were willing to go to jail to protest the collection.

"It's my father's legacy," said Mr. Anderson, a Salt Lake City lawyer and one of the columnist's nine children. "The government has always and continues to this day to abuse the secrecy stamp. My father's view was that the public is the employer of these government employees and has the right to know what they're up to."

The F.B.I. says the dispute over the papers, which await cataloging at George Washington University here, is a simple matter of law.

"It's been determined that among the papers there are a number of classified U.S. government documents," said Bill Carter, an F.B.I. spokesman.

"Under the law," Mr. Carter said, "no private person may possess classified documents that were illegally provided to them. These documents remain the property of the government."

The standoff, which appears to have begun with an F.B.I. effort to find evidence for the criminal case against two pro-Israel lobbyists, has quickly hardened into a new test of the Bush administration's protection of government secrets and journal-

Continued on Page A16

F.B.I., Citing Classified Data, Seeks Access to Papers of a Dead Columnist

Continued From Page A1

ists' ability to report on them.

F.B.I. agents are investigating several leaks of classified information, including details of domestic eavesdropping by the National Security Agency and the secret overseas jails for terror suspects run by the C.I.A.

In addition, the two lobbyists, former employees of the American Israel Public Affairs Committee, or Aipac, face trial next month for receiving classified information, in a case criticized by civil liberties advocates as criminalizing the routine exchange of inside information.

The National Archives recently suspended a program in which intelligence agencies had pulled thousands of historical documents from public access on the ground that they should still be classified.

But the F.B.I.'s quest for secret material leaked years ago to a now-dead journalist, first reported Tuesday in the Chronicle of Higher Education, seems unprecedented, said several people with long experience in First Amendment law.

"I'm not aware of any previous government attempt to retrieve such material," said Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press. "Librarians and historians are having a fit, and I can't imagine a bigger chill to journalists."

The George Washington University librarian, Jack Siggins, said the university strongly objected to the F.B.I.'s removing anything from the Anderson archive.

"We certainly don't want anyone going through this material, let alone the F.B.I., if they're going to pull documents out," Mr. Siggins said. "We think Jack Anderson represents something important in American culture — answers to the question, How does our government work?"

Mr. Anderson was hired as a reporter in 1947 by Drew Pearson, who bequeathed to him a popular column called Washington Merry-Go-Round.

Mr. Anderson developed Parkinson's disease and did little reporting for the column in the 15 years before his death in December at 83, said Mark Feldstein, director of the journalism program at George Washington, who is writing a book about him.

His files were stored for years at Brigham Young University before being transferred to George Washington at Mr. Anderson's request last year, but the F.B.I. apparently made no effort to search them.

"They waited until he was dead," Kevin Anderson said. He said F.B.I. agents first approached his mother, Olivia, 79, early this year.

A test of journalists' ability to report on government secrets.

"They talked about the Aipac case and that they thought Dad had some classified documents and they wanted to take fingerprints from them" to identify possible sources, he recalled. "But they said they wanted to look at all 200 boxes and if they found anything classified they'd be duty-bound to take them."

Both Kevin Anderson and Mr. Feldstein, the journalism professor, said they did not think the columnist ever wrote about Aipac, and his health was too impaired to have reported on the group in recent years.

Mr. Anderson said he thought the Aipac case was a pretext for a broader search, a conclusion shared by others, including Thomas S. Blanton, who oversees the National Security Archive, a collection of historic documents at George Washington.

"Recovery of leaked C.I.A. and White House documents that Jack Anderson got back in the 70's has been on the F.B.I.'s wanted list for decades," Mr. Blanton said.

Jack Anderson had a well-documented feud with the F.B.I. Director J. Edgar Hoover, whose trash he once searched and who once described the columnist as "lower than the regurgitated filth of vultures."

Mr. Carter of the F.B.I. declined t comment on any connection to th Aipac case or to say how the bureau learned that classified document were in the Anderson files.

Mr. Feldstein, whose book, "Poi soning the Press: Richard Nixor Jack Anderson and the Rise of Wash ington's Scandal Culture" is to b published next year, said he found "a little daunting" when F.B.I. agent came to his house last month to as about the Anderson documents. H found that they knew little about th columnist and his work.

Asked what the columnist migh make of the F.B.I.'s actions, M Feldstein said, "He'd be thunderou ly outraged, and privately bemuse by the ineptness of his old adversa ies."

FBI Seeks to Edit Journalist Anderson's Documents
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STEVE INSKEEP, host:

Some law enforcement officials want to know what memories might be refreshed by the files of muckraking newspaper columnist Jack Anderson. For decades, his name struck fear in the hearts of the corrupt, the incompetent, and the secretive who held power in Washington. He died late last year at the age of 83. Now the FBI says it wants a look at Jack Anderson's professional papers-- all 188 boxes of them. NPR's David Folkenflik has the story.

DAVID FOLKENFLIK reporting:

About six weeks ago, **George Washington University** professor Mark Feldstein received unwelcome visitors.

Mr. MARK FELDSTEIN (Associate Professor, Media and Public Affairs, **George Washington University**): Two FBI agents came by my house, flashed their badges and said they wanted--demanded really--access to the papers that Jack Anderson, the late Jack Anderson, donated to my university.

FOLKENFLIK: Feldstein was an intern for Anderson in the 1970s, and now he's writing Anderson's biography.

Mr. FELDSTEIN: And they made it clear they were after Jack Anderson's sources-- going back to the early 1980s--trying to figure out who might have leaked classified documents, government documents--to him.

FOLKENFLIK: The agents said they wanted to take fingerprints from a document to help the prosecution of pro-Israel lobbyists who allegedly received classified information from government officials. The Chronicle of Higher Education broke the story yesterday. FBI spokesman Bill Carter won't confirm prosecutors want the documents for the spying case, but Carter says the university's plans to make the Anderson archive public, could harm the country.

Mr. BILL CARTER (Spokesman, Federal Bureau of Investigation): The U.S. government has reasonable concern over the prospect that these classified documents will be made available to the public at the risk of national security, and in violation of the law.

FOLKENFLIK: And Carter says the FBI will confiscate any classified government material, agents find in Anderson's papers.

Mr. CARTER: If we have information that anyone, that any private person-- whether it be a reporter, or whoever it might be--is in possession of classified U.S. government documents that were illegally provided to them, we would want those back.

Mr. KEVIN ANDERSON (Son of Jack Anderson): Jack Anderson would not have tolerated the FBI going through his files on this pretext.

FOLKENFLIK: That's Kevin Anderson, the columnist's son. He says his father respected true national security concerns, but felt the press should serve as a watchdog over the government.

Mr. ANDERSON: If government officials were caught doing something wrong or inappropriate, oftentimes they would stamp those documents; Confidential or Classified or Top-secret, in order to hide their wrongdoing from the people.

FOLKENFLIK: The university currently holds the archives, but the Andersons haven't made the gift official. Kevin Anderson says the family rejected the FBI's request for access, yesterday.

Mr. ANDERSON: I think that it is somewhat suspicious that they would wait until after Jack Anderson passed away and essentially, you know, come after his widow--his 79-year-old widow, my mother--to try to get these documents.

FOLKENFLIK: But FBI spokesman Bill Carter says prosecutors only recently got a tip about the Anderson papers, and leak inquiries aren't unusual. The Justice Department is investigating how the New York Times learned the government is secretly wiretapping Americans at home, and how the Washington Post got evidence terror suspects were being shipped abroad for interrogations. Both stories won Pulitzer prizes for their papers earlier this week.

David Folkenflik, NPR News, Washington.

The FBI and the Anderson Papers
346 words
23 April 2006
NPR: Weekend Edition - Sunday
English
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DANIEL SCHORR reporting:

I haven't had any problems with the FBI lately that I know of, and I was hoping it would stay that way.

JACKI LYDEN, host:

NPR's senior news analyst, Daniel Schorr.

SCHORR: Back in 1971, President Nixon had J. Edgar Hoover launch an investigation of me that ended up as an item in the Bill of Impeachment as a Presidential Abuse of Power.

We in the press hoped that the FBI would learn from that experience and refrain from doing political chores. But now it seems that the FBI is back investigating what it has no business investigating. It has told the family of **Jack Anderson**, the justly celebrated investigative columnist who died last December, that it wants access to Anderson's 60 years worth of files. Why? Well, the FBI says, to remove any secret papers.

It seems to be assumed that Anderson collected a lot of secret papers in a career of baring official secrets. Like the column that won Anderson a Pulitzer Prize, revealing that in contradiction to a proclaimed Nixon-Kissinger policy of neutrality in the India-Pakistan war, the United States was actually tilting towards Pakistan.

Anderson's son, Kevin, says he won't surrender the papers, but that all his father's files will eventually be available to the public at George Washington University. The FBI seems unwilling to wait, and says that the mere possession of papers marked secret is illegal.

So there we are. I can identify with **Jack Anderson**, with whom I shared an honored place on the Nixon enemies list. But I have a more immediate concern. I don't want the Feds poking around in my files after I die. Not that they contain any great revelations. Everything I learned that was of interest, I reported. It's just the principle of the thing.

So with Kevin Anderson, I say to the FBI, why don't you go and find some terrorists and leave the files of deceased journalists alone?

This is Daniel Schorr.

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BYLINE: by Mary Lynn F. Jones
HIGHLIGHT:
As FOIA turns 40, media find increased challenges in shining light on government activity

BODY:
Each day, Russell Carollo spends up to 75 percent of his time filing freedom of information requests, reacting to federal agencies' responses to those requests, or reviewing the FOIA material he receives. All too often, he says, his requests for even basic information go unanswered or are denied for no clear reason.

"You just want to throw stuff across the room," says Carollo, special projects reporter for the Dayton (Ohio) Daily News, whose successful FOIA requests helped him and Jeff Nesmith win a Pulitzer Prize for national reporting in 1998 for a story about problems in the military health care system.

Carollo, who estimates he files at least 100 FOIA requests a year and has queries pending before some 20 federal agencies, isn't the only reporter who's frustrated. Many journalists complain that it has become increasingly difficult since the Sept. 11 terrorist attacks to access public documents, particularly on national security issues, that were readily available prior to 2001.

Worse yet, government officials and prosecutors have gone to extraordinary lengths to limit access to information, including the over-classification of documents (see chart, p. 30), forcing journalists to rely more on confidential sources, and then attempting to require reporters to divulge those sources and turn over records from their newsgathering efforts.

"There are so many attacks coming from so many different areas," says Paul K. McMasters, First Amendment ombudsman for the First Amendment Center in Arlington, Va., who calls this the most troubling period for the press since the Watergate era.

How the media industry can best strike back remains a subject of great interest to open-government advocates everywhere.

FOIA Turns 40

When President Lyndon B. Johnson signed the Freedom of Information Act into law on July 4, 1966, he wasn't exactly its biggest fan. Johnson "hated the very idea" of FOIA and "the thought of journalists rummaging through the closets of government and official archives," his former press secretary, Bill Moyers, told The National Security Archive in Washington last December. Moyers cleaned up Johnson's language when he referred to FOIA as "the damned thing."

Many journalists believe Johnson was hardly alone in his dislike for FOIA, which critics say now suffers from crippling backlogs, a lack of meaningful enforcement mechanisms, and fewer available documents.

A recent survey by the Coalition of Journalists for Open Government, a nonprofit group formed in late 2004 and based in Arlington, Va., showed that 22 federal agencies cited a FOIA exemption to withhold information 22 percent more often in 2004 than in 2000. The number of times they released all information sought fell from 55 percent in 2000 to 45 percent in 2004.

Carollo believes agencies may be more willing to thumb their noses at requestors because "they've sensed that you can't sue on every case.

"It's a luxury for a reporter to get a newspaper attorney to fight a FOIA suit," he says.

For its 2003 series on deaths, assaults and illnesses among Peace Corps members, the News filed more than 75 FOIA requests and appeals to the Corps, State Department, Drug Enforcement Agency and FBI during 20 months of reporting. The paper also filed a lawsuit in federal court, which led the Peace Corps to finally release documents that served as the basis of the series.

The cost of hiring a lawyer to pursue a FOIA lawsuit often starts at several thousand dollars, says John A. Bussian, who litigates First Amendment issues for The Bussian Law Firm in Raleigh, N.C., and provides legal counsel to the North Carolina Press Association in Raleigh and the Southern Newspaper Publishers Association in Atlanta. "That's out of the reach of most average citizens and increasingly out of the reach of the media," he says.

Another roadblock to gaining information is confusion among federal, state and local officials since Sept. 11 about what information should be made public and what needs to be kept private. Most officials tend to err on the side of secrecy, says Kathleen Carroll, executive editor of The Associated Press in New York City, which has a long history of aggressively pursuing public records.

As the 9/11 Commission concluded in its report, released publicly in July 2004, "Current security requirements nurture over-classification and excessive compartmentation of information among agencies. . . . No one has to pay the long-term costs of over-classifying information, though these costs -- even in literal financial terms -- are substantial."

The root of such secrecy, to the detriment of the public's ability to understand the workings of its government, lies within an October 2001 memo from then-Attorney General John Ashcroft. Almost one month to the day after the Sept. 11 attacks, Ashcroft assured federal agencies that the Justice Department would likely back them if they decided not to share information. His memo essentially reversed a 1993 policy by then-Attorney General Janet Reno, who favored a "presumption of disclosure."

According to a September 2003 General Accounting Office report on the effect of Ashcroft's memo, 31 percent of FOIA officers surveyed said their agencies released less information after the memo was issued, and 75 percent of those cited the memo as the top reason for the change. Last year, Attorney General Alberto Gonzales pledged to review the policy; he had not made any changes as of presstime.

President Bush did sign an executive order in December that requires federal agencies to designate a chief FOIA officer, set up at least one FOIA Requestor Service Center and choose at least one FOIA Public Liaison, and develop a plan to reduce the agency's backlog. Sen. John Cornyn (R-Texas), who sponsored three FOIA bills last year, called it an "important step toward more sunshine in government." Others are unsure what effect it will have.

"It told agencies to do what they're already required to do," says Mark Tapscott, director of the Center for Media and Public Policy at The Heritage Foundation, a think tank in Washington. And Hodding Carter III, former president and chief executive officer of the John S. and James L. Knight Foundation in Miami who served as honorary chairman of the second annual national Sunshine Week in March, calls it a "diversionary action rather than a serious attempt to undo the tendencies of the last few years."

Of the four FOIA bills introduced in the Senate last year, only one -- which would require future measures to specify FOIA exemptions and was pulled out of a broader FOIA bill to help speed passage -- has passed the chamber.

Paul Boyle, NAA senior vice president for public policy, says Congress is unlikely to act on FOIA legislation this year because Bush's order "slowed the momentum that had been building." The House Government Reform Committee is expected to hold a hearing this month to look into how federal agencies are responding to the president's directive.

Raising Flags

One challenge in passing legislation is to convince the public that FOIA isn't a special-interest media issue, says Lucy Dalglish, executive director of The Reporters Committee for Freedom of the Press, located in Arlington, Va. "These laws were written for the public."

The news media have worked hard in recent years to make that point. Approximately 1,000 news organizations participated in this year's Sunshine Week, created in 2005 to raise public awareness of the importance of open government, as did such groups as the American Library Association in Chicago and the League of Women Voters in Washington.

NAA Chairman Boisfeuillet Jones Jr., publisher and chief executive officer of The Washington Post, says it's up to the media to continue to lead the fight in challenging secrecy. "Newspapers are on the front lines here," he says. "We devote more resources, in a timely way, and have reporters and editors write in a general interest way" to help the public understand the value of open government.

Calling this administration the most secretive of the six he has worked with since joining the Senate in 1975, Sen. Patrick Leahy (D-Vt.) says the media are often more in the know than many legislators are. "It's when the press uses FOIA that we find out when we've been given inaccuracies or even lying answers," says Leahy, who is a sponsor or co-sponsor of all four Senate bills and the only current member of Congress in the FOIA Hall of Fame.

At the same time government is making less information available, prosecutors are increasingly going after journalists who publish what information they do learn. "Sometimes it's the easy course for the prosecutor to take," says Rep. Rick Boucher (D-Va.), co-sponsor of a national shield bill that would provide journalists qualified protection from having to reveal confidential sources.

Special Counsel Patrick Fitzgerald, the U.S. attorney for the Northern District of Illinois, came under fire from news organizations and media rights groups in 2004 when he subpoenaed reporter Judith Miller, then of The New York Times, and Time magazine reporter Matthew Cooper -- as well as their notes -- during his investigation into who leaked the identity of covert CIA agent Valerie Plame. The strategy also was employed by lawyers for former nuclear scientist Wen Ho Lee, who's suing the government for allegedly releasing personal information about him to the press. In February, Robert Drogin of the Los Angeles Times, H. Josef Hebert of The Associated Press and James Risen of The New York Times asked the Supreme Court to overturn an appellate court's decision that held them in contempt for refusing to reveal their confidential sources.

Given that the Supreme Court declined to hear arguments last year in the criminal cases involving Miller and Cooper, it's unlikely it will get involved in Lee's civil case, says media attorney Bussian.

The federal government also is attempting to stem the flow of information to the public by arguing that those who receive it are just as culpable as those who divulge it. In January, the government wrote in a district court brief -- concerning the oral disclosure of classified information by a Pentagon analyst to two former lobbyists for the American Israel Public Affairs Committee in Washington, who passed the information on to reporters -- that journalists and other nongovernment employees should "not be entitled to receive information related to our national defense" and can be prosecuted under the Espionage Act of 1917.

Furthermore, CIA Director Porter J. Goss warned the Senate Intelligence Committee at a February hearing that damage from leaks about secret terrorist interrogation sites "has been very severe to our capabilities to carry out our mission," and called on reporters who disclosed the information to reveal their sources in a grand jury investigation. That same month, Goss wrote an op-ed in The New York Times, attacking leakers for "committing a criminal act that potentially places American lives at risk."

That attitude is causing some CIA employees to become "nervous" about speaking with reporters, says Drogin, who covers national security for the Los Angeles Times in Washington and is currently writing a book about problems with pre-war intelligence. Late last month, the CIA even went so far as to fire a career officer for allegedly disclosing classified information to the media.

But other leakers continue to come to the press because "there's nowhere else to go anymore," Drogin adds. "Congress is not holding hearings that normally would expose these kinds of things."

Still, there are some hopeful signs that the pendulum may start to swing back. In mid-April, the Securities and Exchange Commission released new guidelines for issuing subpoenas to journalists in the course of an investigation. Those guidelines require that a subpoena can only be issued as a last resort, if the information sought is essential to the investigation, and that the SEC first negotiates with the news organization.

Last September, the House Government Reform Committee passed a bill to strengthen protections for federal whistleblowers. And in April, the committee passed a bill -- led by Reps. Tom Davis (R-Va.), Chris Shays (R-Conn.) and Henry Waxman (D-Calif.) -- eliminating the executive branch's unregulated use of pseudo-classifications, such as "for official use only," to withhold unclassified information from the public.

In addition, federal shield legislation is moving, albeit slowly, in Congress. House Judiciary Committee Chairman Jim Sensenbrenner Jr. (R-Wis.) has agreed to hold a hearing on the issue, but had not scheduled anything as of presstime. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) also is working on legislation after holding two hearings last year.

Boucher is optimistic that a federal measure can pass, even though no journalist is currently sitting in jail. "This bill was never related to Judith Miller," he says. Miller served 85 days in jail last year, after being held in contempt of court for refusing to testify before a grand jury in the Plame investigation. "When you have the major organizations that represent journalists in the United States say the time has come to do this, it creates a real difference."

But if Congress doesn't pass legislation in 2006, Pence thinks the trial of Vice President Cheney's former chief of staff -- I. Lewis "Scooter" Libby was charged with obstruction of justice, two counts of perjury and two counts of making false statements, all in connection to the Plame investigation

-- could tip public opinion. The trial is tentatively scheduled to begin in January.

"Millions of Americans will find it appalling when some of the nation's most prominent journalists are hauled into court and cross-examined," Pence says. Members of Congress and the public, he predicts, will "have a sense that something's not right with the administration of the First Amendment in this country."

Pushing the Needle

In the states, government openness remains a mixed bag. An Associated Press analysis in March showed that of 1,023 FOIA-related state laws passed between Sept. 11, 2001, and the end of 2005, 616 laws increased secrecy, while 284 laws increased public access; 123 laws had little effect on openness.

In 2005, Gov. Bob Riley of Alabama signed a bill updating the state's open meetings law, which now fines officials up to $ 1,000 plus attorneys' fees for publicly discussing homeland security plans.

At the other end of the spectrum, lawmakers in Colorado passed a measure that gives the public greater access to records regarding how it spends federal homeland security money, and the Nevada Assembly rejected a bill that would have exempted local government discussions about terrorism issues from its open meetings law.

But secrecy isn't just confined to national security issues, experts say. Vice President Cheney successfully fought to keep information private about his energy task force, which began meeting in early 2001, and a 2003 Justice Department report showed that federal agencies cited at least 140 statutory provisions under one of the nine FOIA exemption categories during the 2002 fiscal year to keep information secret.

Rebecca Carr, a national correspondent for Cox Newspapers Inc. in Atlanta who covers government secrecy as a beat in Washington, worries such problems may not get the attention they deserve if the media industry continues to lose focus. The question of why the White House waited to tell reporters that Vice President Cheney accidentally shot his friend, Harry Whittington, became a story about the national media being upset that the Corpus Christi (Texas) Caller-Times broke the news, Carr says. And the issue of whether President Bush violated the Foreign Intelligence Surveillance Act by ordering warrantless domestic wiretaps without court approval morphed into pieces about who leaked the information to The New York Times, she adds.

But Carr also sees signs that the media are becoming more aggressive in challenging government secrecy. Last year, Andy Alexander, Washington bureau chief for Cox Newspapers and chairman of the Freedom of Information Committee for the American Society of Newspaper Editors in Reston, Va., was one of seven journalists who sent an e-mail message to 40 Washington bureau chiefs, encouraging them to "make a more concerted effort" to force White House, agency and Capitol Hill briefings to be on the record.

In February, about 125 newsroom employees of the Star Tribune in Minneapolis attended at least one program in a daylong in-house training session on "FOI in the Post-9/11 World," according to Brenda Rotherham, the paper's news recruiting and training manager. The session featured experts such as The Reporters Committee for Freedom of the Press' Dalglish, who recently taught a similar workshop for staffers at People magazine in New York City. The attendance at the Star Tribune "is a demonstration that journalists are crying out for education," Dalglish says.

In March, the Defense Department released unredacted transcripts of 317 detainee hearings in Guantanamo Bay, Cuba, after a U.S. district court judge in New York City rejected the government's privacy arguments in a FOIA lawsuit filed by The Associated Press. Previously released documents did not include the names and nationalities of the detainees, who are being

held as suspected enemy combatants.

Not all of the new transcripts contained the detainee's name, however. The AP immediately filed another FOIA lawsuit against the department, demanding documents identifying all detainees held at the U.S. military base.

And in September, the Sunshine in Government Initiative, a coalition of media groups -- including NAA -- that is "committed to promoting policies that ensure the government is accessible, accountable and open," sent a letter to House Intelligence Committee members, raising concerns about possible national security leaks legislation that could chill relations between reporters and government officials. Chairman Peter Hoekstra (R-Mich.), who held two closed-door hearings on the issue last year, is planning to hold a third that will feature members of the media. The coalition and other media organizations sent a similar letter to Senate Intelligence Committee members in April.

The coalition also worked with other open-government groups to raise concerns about a bill sponsored in October by Sen. Richard Burr (R-N.C.), which would have created the Biomedical Advanced Research and Development Agency and exempted it from FOIA. Burr has indicated he wants to come up with revised provisions to address some of their concerns.

"We have shown that when we stand up individually or as owners and publishers," Alexander says, "we can push the needle back a little bit."

BY THE NUMBERS
AS GOVERNMENT secrecy increases, several surveys show that a majority of Americans support greater public access to government records. They also think the media should be able to criticize the government for its actions.
But most Americans don't really know what freedom of the press means, a problem that will likely grow worse based on recent surveys of high school students and administrators. Some examples include:

24 percent of Americans can identify the first names of all three judges on "American Idol."
22 percent of Americans can identify the first names of all five members of the Simpson family on "The Simpsons."
11 percent of Americans can identify freedom of the press as a First Amendment right.

SOURCES: 1: MCCORMICK TRIBUNE FREEDOM MUSEUM SURVEY, 2006
62 percent of Americans believe public access to government records is critical to the functioning of good government.
22 percent of Americans believe the federal government is "very secretive."

2: SCRIPPS SURVEY RESEARCH CENTER SURVEY, 2006
59 percent of Americans agree that newspapers should be allowed to freely criticize the U.S. military about its strategy and performance.
52 percent of Americans think U.S. residents have too little access to information about the federal government's war on terrorism.
39 percent of Americans think the press has too much freedom to do what it wants.

3: STATE OF THE FIRST AMENDMENT SURVEY, 2005
21 percent of U.S. high schools offer no student media programs.
49 percent of U.S. high school students think newspapers should not be allowed to publish freely without government approval.
30 percent of U.S. high school administrators say learning about journalism and the media is not a priority for their schools.

4: FUTURE OF THE FIRST AMENDMENT SURVEY, 2005

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Article Last Updated: 4/22/2006 08:44 AM

Editorial: The Anderson files

Scripps Howard News Service
Red Bluff Daily News

That the FBI is seeking to purge columnist Jack Anderson's private papers after his death would have surely gladdened the heart of the old muckraker, but for journalists still living, this attempt at post-mortem censorship seems another facet of the Bush administration's campaign to scare reporters off secret information.

While he was active, Anderson broke many stories that were intensely embarrassing to the White House, the CIA and FBI, with whose late director, J. Edgar Hoover, Anderson had a long-running feud. The Watergate tapes show President Richard Nixon and his aides spinning endless scenarios on how to get Anderson.

His private files obviously would be of considerable public interest, and 188 boxes of them were recently transferred to George Washington University in the capital for cataloguing and eventual availability to scholars and researchers.

From showing no interest in the files for years, the government is suddenly intensely interested. The FBI asked to examine the files for any documents pertaining to a criminal case against two lobbyists for the American Israel Public Affairs Committee for receiving classified information, another Bush administration prosecution that has chilling consequences for the ability to freely report on government.

The request was puzzling because Anderson, who died in December at age 83, had Parkinson's disease the last 15 years of his life and was inactive as a reporter when the AIPAC incident occurred.

Then it perhaps became clearer what the FBI really wanted. The agents said they would have to review all 188 boxes and confiscate any classified documents they came across. A spokesman explained, It's been determined that among the papers there are a number of U.S. government documents containing classified information." Note the non-reference pronoun and the passive voice, indicating that the information emanated from - maybe nowhere.

The FBI's stand is simple. Anderson's estate has government property and the government wants it back.

While the information - assuming it's there - may have been classified, it's no longer secret and, moreover, it's old; the heyday of Anderson's column was in the 1970s. What these documents may reveal is an embarrassing pattern of government deception and dissembling, perhaps with awkward parallels to today's events.

The Anderson family should remain firm in its resolve not to allow the feds to plunder his files before they become publicly available. Apparently, Bush administration efforts to go after journalists who are too nosy apply even to the dead ones.

The Salt Lake Tribune

Anderson's family bars FBI from his papers

Muckraker's files: The agency wants to search for classified documents

By Rebecca Walsh
The Salt Lake Tribune

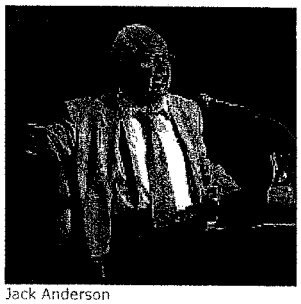
Muckraking journalist Jack Anderson would have gone to jail to avoid giving his notes to the FBI.

And his widow and children are willing to do the same.

Anderson's family has rejected the FBI's request to sift through the investigative reporter's papers, looking for government records and removing anything marked "secret" or "classified." In a letter sent to the FBI on Tuesday, the family refused to allow government agents access to 200 boxes of documents at George Washington University.

The letter cuts off three months of government investigators' attempts to search through the veteran journalist's files - and will test how far federal agents will go to search the personal files of journalists.

"We are prepared to defy the government," says Kevin Anderson, a Salt Lake City attorney and son of the Pulitzer Prize-winning journalist. "It is outrageous conduct by the government to go after documents that were turned over to a reporter in the context of doing stories - most of which were about government corruption and abuse of power, one of those abuses of power being the improper use of the secrecy stamp."



Jack Anderson
Raised in Utah

A month after Jack Anderson died in December, FBI agents contacted Anderson's widow and asked to search his papers for documents that could help in a domestic spying case involving the American Israel Public Affairs Committee. Two of AIPAC's former lobbyists are accused of sharing classified information with reporters. FBI officials told Anderson's family they believe he may have received some of those documents.

But after several conversations with the agent, Kevin Anderson concluded last month that the AIPAC trial was a pretext to edit his father's papers, "cleansing" the files of anything that might embarrass government officials before the university makes the records available to the public.

"He would be outraged that the government would be putting its resources to this end," Anderson said Tuesday in an interview with *The Tribune*.

An FBI spokesman in Washington confirmed to The Associated Press that the bureau wants to search the journalist's files.

"It has been determined that, among the papers, there are a number of U.S. government documents containing classified information," said Special Agent Richard Kolko. The documents contain information about sources and methods used by U.S. intelligence agencies, he said.

"Under the law, no private person may possess classified documents that were illegally provided to them. There is no legal basis under which a third party could retain them as part of an estate. The documents remain the property of the U.S. government," Kolko said.

A University of Utah professor who organized thousands of the documents for Anderson says none of the papers he studied merits confiscation by the government.

"There's nothing in there that's a threat to national security," political scientist Tim Chambless told *The Tribune*.

Chambless lived with Anderson while an intern in Washington and wrote his master's thesis and doctoral dissertation about Watergate, using the journalist's files for research. He got Anderson's written permission to look at the documents and was paid $1,000 to organize 85 boxes of them stored at Brigham Young University. The documents have since been transferred to George Washington University for permanent storage.

Chambless confirms the files include documents about the U.S. government's plot to assassinate Cuban dictator Fidel Castro as well as Anderson's Watergate notes.

"The general public would find it interesting. They would see how reporters gather information," Chambless said. "Jack continually pointed out that the reason why government agencies classify documents is to maintain political security, not national security."

Chambless figures the FBI's request could be part of increasing government secrecy under President Bush. The CIA recently withdrew records from the National Archives for national security reasons.

"This type of action is not generated from within the FBI," Chambless said. "This is coming from higher up."

Anderson, 83, died in his Maryland home late last year after suffering from Parkinson's disease. Born in Long Beach, Calif., but raised in Utah, Anderson started his journalism career when he edited a *Deseret News* Boy Scout column as a 12-year-old. Six years later, he took a job at the *The Salt Lake Tribune*. He briefly attended the University of Utah. After serving an LDS mission and being drafted into the Army, Anderson in 1947 applied for a job with Drew Pearson's "Washington Merry-Go-Round" column - a job he never left.

For more than five decades, he exposed government corruption and cover-ups, breaking stories about a CIA-Mafia plot to kill Castro, the Watergate break-in and the U.S. government's shift away from India to Pakistan, for which he won a Pulitzer Prize in 1972. His coverage of the Watergate scandal earned him a spot on former President Nixon's "enemies list" and a reported plot to kill him.

In 1985, Anderson shipped 85 cartons of records to BYU. But two years ago, the family consolidated those papers with an additional 100 boxes at George Washington University in Washington, D.C., where Anderson took a course in libel law.

The struggle over access to Anderson's papers first was reported Tuesday in the *Chronicle of Higher Education*.

The Associated Press quoted George Washington journalism professor Mark Feldstein, who is writing Anderson's biography, saying he also was approached by two FBI agents last month, demanding access to the papers, their location and the names of all graduate students who had looked at them. The files have been donated to George Washington University, but the family has retained ownership of them.

Feldstein calls the FBI's efforts to read the documents the "greatest assault on the news media since the Nixon administration.

"On the one hand, I think it's really disturbing to have the FBI come knocking at your door, demanding to look at things you've been reading," he told the AP. "It smacks of a Gestapo state. On the other hand, it's so heavy handed to be almost ludicrous."

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The FBI's fishing trip

Tuesday, April 25, 2006

BACK IN THE DAY, Jack Anderson was a one-man truth squad who wrote a ripsaw column carried in 1,000 newspapers. The Iran-Contra scandal during the Reagan years, Nixon administration fund-raising illegalities and other hidden trickery were daily specialties.

In today's blogosphere and news channels cycles, there's no equivalent -- and maybe even less memory of Anderson's stature.

But this amnesia shouldn't undercut the outrage due the FBI, which wants to Dumpster-dive in the late muckraker's records. It's a meritless fishing expedition that should be called off.

After retiring more than a decade ago, Anderson died last December. Two months later, the feds showed up at Anderson's Maryland home and asked to go through some 187 boxes of files and records. The family was making arrangements to donate the batch to George Washington University, located within the Beltway world that Anderson skewered for decades.

The FBI mission is, frankly, ridiculous. A tipster has the feds believing that Anderson's records may contain confidential paperwork related to a current espionage case against two staffers of the American Israeli Public Affairs Committee.

An Anderson biographer, who has combed through the papers, can't recall any secret documents on any topic. Anderson's family, naturally enough, wants no part of a rummaging search that the columnist would never have countenanced. Also, the espionage case materialized years after Anderson retired from the investigatory front lines.

This misguided FBI move should trouble anyone who values the role Anderson and his successors play in reporting government malfeasance. But it's also a further sign of a gumshoe mind set, encouraged by this White House, that wants to hunt down bad news, leaks and dissent.

Example B is the dismissal last week of a CIA higher-up, reportedly the source of a disclosure of a secret prison system in Eastern Europe used by American anti-terrorism authorities. The career officer walked the plank for informing the public, not betraying a justifiable national secret. The hidden jails were clearly chosen to evade the U.S. legal system and keep suspects hidden from view.

The FBI is also after the source of leaks about a warrantless eavesdropping program approved by President Bush. One small victory on the other side of the scale: the National Archives last month stopped a bid by intelligence agencies to restore secrecy labels on thousands of declassified documents. At a recent Capitol Hill hearing, Rep. Christopher Shays, R-Conn., declared that 50 to 90 percent of government paperwork now stamped secret shouldn't be kept off limits. It's a habit adopted by bureaucrats and political insiders insulating themselves from criticism and embarassment.

If only Jack Anderson were still around. He'd probably agree: This is no time to be a whistle-blower.

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Statement of

Gabriel Schoenfeld

Senior Editor, Commentary

Before the Senate Committee on the Judiciary

June 6, 2006

Mr. Chairman, ranking member, members of the Committee, it is an honor to be invited here to testify today on the subject of the publication of classified information by journalists.

I have been an editor on the staff of Commentary magazine for the past twelve years. For more than two decades, I have written about foreign policy and intelligence issues for a variety of publications, including Commentary, the Wall Street Journal, the Washington Post, and the New York Times.

As a journalist, I know firsthand the vital role played by a free press in our great country. Just this past week, two members of the media were killed and a third critically injured while reporting on the war in Iraq. One cannot be indifferent to the risks that journalists are taking on a daily basis to bring us the information on which we depend to keep our society free, and our debate open and well informed.

But the tragedy that befell Kimberley Dozier and her crew also serves to underscore the fact that our country is now at war. Thousands of our best young men and women are in harm's way in distant locations around the world. And on September 11, 2001, as a result of a massive intelligence failure, we found that our own homeland was also in harm's way. Three

thousand Americans paid for that intelligence failure with their lives.

Obviously, many different factors contributed to that intelligence lapse. One of them is the subject of today's hearing: namely, leaks of classified information. The Jack Anderson archive affair, a subject about which I am by no means an expert--indeed, I know little about it beyond what I have read in the press--is part of an issue whose broad ramifications I would like to discuss today.

The 9/11 Commission reports that in 1998 a leak to the press led al Qaeda's senior leadership to stop using a communications channel, which made it much more difficult for the National Security Agency to intercept Osama bin Laden's conversations. Our government's ability to gain insight into the plans of a deadly adversary were compromised by the actions by an official inside government who violated his oath of secrecy, and by journalists willing to publish what they had learned from that official, no matter what the cost to our national security.

The damage caused by that leak was not widely recognized at the time and no action was taken against the leakers or the newspaper that first published the secret information. (Contrary to the 9/11 Commission Report, it was <u>not</u> the <u>Washington Times.</u>) But the episode highlights the crucial importance of communications intelligence in the war on terrorism, and the special vulnerability of this form of intelligence to disclosure.

Indeed, this is something that Congress itself has recognized. The Espionage Act passed by Congress

in 1917 placed high barriers in the way of prosecution of journalists who disclose classified information to the public and there has never a successful prosecution of journalists under its provisions.

But during World War II, shortly after the battle of Midway, the Chicago Tribune published a story suggesting that the United States had broken Japanese naval codes and was reading the enemy's encrypted communications. Cracking JN-25, as the Japanese code was called, had been one of the major Allied triumphs of the Pacific war, laying bare the operational plans of the Japanese Navy almost in real time and bearing fruit not only at Midway but in immediately previous confrontations, and promising significant advantages in the terrible struggles that still lay ahead. Its exposure by the Tribune, a devastating breach of security, threatened to extend the war indefinitely and cost the lives of thousands of American servicemen.

Although a grand jury was empanelled to hear charges against the Tribune, the government balked at providing jurors with yet more highly secret information that would be necessary to demonstrate the damage done. Thus, in the end, the Tribune managed to escape criminal prosecution.

But Congress, in 1950, in the aftermath of that notorious press leak, and with fear of a second Pearl Harbor looming in the by-then nuclear phase of the cold war, revisited the espionage statutes, Congress added a very clear provision to the U.S. Criminal Code dealing specifically with "communications intelligence." What is now known as Section 798 of

Title 18, or the Comint Act, made it a crime to publish classified information pertaining to communications intelligence.

This law is free from all of the ambiguities and constitutional problems that beset the 1917 Espionage Act. It was passed unanimously by Congress, and won the support of, among other organizations, the American Society of Newspaper Editors.

In the years since its passage, Section 798 has also never been employed in the prosecution of a journalist. It is a law that was designed for special circumstances that are very dangerous but also very rare. Those special and rare circumstances appear to be upon us now.

On September 11, 2001, our country suffered a second and more terrible Pearl Harbor. Overnight, we were thrust into a new kind of war, a war in which intelligence is the most important front. It is also a war in which, if our intelligence fails us, we as an open society are uniquely vulnerable. If we are to defend ourselves successfully in this war and not fall victim to a third Pearl Harbor, perhaps a nuclear one, it is imperative that our government and our intelligence agencies preserve the ability to conduct counterterrorism operations in secret.

In this regard, it should be obvious that if we allow the press to announce to our terrorist adversaries exactly what methods we are using to find, track, and apprehend them, they will take countermeasures to avoid detection. Our ability to fend off future repetitions of September 11 will be gravely impaired.

I do not know what classified documents, if any, might be contained in Jack Anderson's archive. But from the press reports I have seen, they do not appear to be of recent vintage, and some of them might go back as far as the Korean war. If the FBI can demonstrate that there are documents in the archive the disclosure of which will threaten national security or bear on criminal behavior, I do not doubt that it has the statutory right to obtain a warrant to search and seize them. It would have enjoyed that right when Anderson was alive, and it certainly has it now that he is dead.

Whether it should exercise that right, today, in the middle of the war on terrorism, is another matter entirely. Unless facts come to light that alter our understanding of what is contained in the Anderson archive, this entire episode appears to be a gross misallocation of investigative resources. There are other leaks that have been far more damaging, which the FBI is evidently not yet pursuing at all.

Beginning last December 16, the New York Times published a series of articles reporting that shortly after September 11, 2001, President Bush had authorized the National Security Agency to intercept electronic communications between al Qaeda operatives and individuals inside the United States and providing details about how the interceptions were being conducted.

Before publishing the NSA story, the publisher and top editors of the New York Times visited the White House, where, according to their own account, they were directly warned by President Bush that

disclosing the NSA program would compromise ongoing operations against al Qaeda. After this warning, the New York Times decided to withhold publication and sat on the story for approximately a year. But in the end, shortly before the publication of a book containing details about the program by James Risen, one of its own reporters, the Times chose to run the story, opting to drop the revelation into print on the very day that the closely contested Patriot Act was up for a vote in the Senate.

The 9/11 Commission identified the gap between our domestic and foreign intelligence gathering capabilities as one of our primary weaknesses in protecting our country against terrorism. The NSA terrorist surveillance program aimed to cover that gap. The program, by the Times's own account of it, was one of our country's most closely guarded secrets in the war on terrorism.

I am not privy to the workings of the program. But a broad range of government officials have said that the program was vital to our security and that the New York Times disclosure inflicted significant damage on a critical counterterrorism initiative.

- John Negroponte, the National Intelligence Director, has called the NSA program "crucial for protecting the nation against its most menacing threat.
- FBI director Robert Mueller has said it has "been valuable in identifying would-be terrorists in the United States."

- General Michael Hayden, the then-director of the NSA, has said that it is his "professional judgment that if we had had this program in place [before 9/11], we would have identified some of the al-Qaeda operatives in the United States."
- Porter Goss has said that the disclosure of the NSA program caused "very severe" damage to American intelligence gathering capabilities.
- Jane Harman, the ranking Democratic member of the House Intelligence Committee, said that the disclosure of the NSA program "damaged critical intelligence capabilities."

In its own recounting of this episode, the New York Times has attempted to downplay the harm caused by its conduct. The paper has stated that the NSA program "led investigators to only a few potential terrorists in the country" whom the U.S. did not know about from other sources. But this admission serves only to highlight the damage that was done.

Three of the four planes hijacked on September 11 were commandeered by only five men; one was commandeered by four. Together, these "few" terrorists caused massive destruction and took some 3,000 lives. If, in the post-September 11 era, the NSA surveillance program enabled our government to uncover even a "few" potential terrorists in the U.S., the NSA was doing its job, doing it well, and, depending on who exactly

these few potential terrorists were, doing it perhaps spectacularly well.

Compounding the direct damage caused by the compromise of the NSA program is harm of a more general sort. In waging the war on terrorism, the U.S. depends heavily on cooperation with the intelligence agencies of allied countries. When our own intelligence services, including the NSA, the most secretive branch of all, demonstrate that that they are unable to keep shared information under wraps, international cooperation dries up.

According to Porter Goss, director of the CIA in this period, his intelligence-agency counterparts in other countries informed him that our government's inability to keep secrets had led some of them to reconsider their participation in some of our country's most important antiterrorism activities.

If Americans are still wondering why our intelligence has been as defective as it has been, leading us from disaster to disaster, one of the reasons is unquestionably the hemorrhaging of classified information into the press.

During the run-up to the second Gulf war, the United States was urgently attempting to assess the state of play of Saddam Hussein's program to acquire weapons of mass destruction. One of the key sources of information suggesting that an ambitious WMD buildup was under way was an Iraqi defector, known by the codename of Curveball, who was talking to German intelligence. But the U.S. remained in the dark about Curveball's true identity, which would have enabled us

to piece together the fact that he was a serial fabricator.

The reason why German intelligence would not tell us who he was, as we learn from the Silberman-Robb WMD Commission report, was that they refused "to share crucial information with the United States because of fear of leaks." In other words, some of the blame for our mistaken intelligence about Iraq's WMD program rests with the leakers and those in the media who rush to publish the leaks.

If counterterrorism were a parlor game--and that is how, in their recent cavalier treatment of sensitive intelligence secrets, the reporters and editors of the New York Times seem to regard it--Porter Goss's fretting about allied cooperation could be easily dismissed. But every American was made aware on September 11 of the price of an intelligence shortfall. This is no game, but a matter of life and death.

President Bush has called the disclosure by the New York Times a "shameful act." I have argued in the pages of Commentary that the decision was also a crime, a violation of the black letter law of Section 798. Today, as then, Congress sets the laws by which we live in our democracy and oversees the way they are carried out. If Congress, representing the American people, comes to believe that the executive branch is creating too many secrets, or classifying things that should not be secret, it has ample power to set things right: by investigating, by funding faster and better declassification, and/or by changing the declassification rules.

If, by contrast, a newspaper like the New York Times, a private institution representing no one but itself, acts recklessly by publishing vital government secrets in the middle of a perilous war, it should be prepared to accept the consequences as they have been set in law by the American people and its elected officials. The First Amendment is not a suicide pact.

I ask that the remainder of my remarks, which include an article I wrote on this subject for the March issue of Commentary magazine, and the critical correspondence I received in response, together with my own rejoinder to my critics, be included in the record.

Has the New York Times Violated the Espionage Act?

By Gabriel Schoenfeld

Commentary, March 2006

"Bush Lets U.S. Spy on Callers Without Courts." Thus ran the headline of a front-page news story whose repercussions have roiled American politics ever since its publication last December 16 in the *New York Times*. The article, signed by James Risen and Eric Lichtblau, was adapted from Risen's then-forthcoming book, *State of War*.1 In it, the *Times* reported that shortly after September 11, 2001, President Bush had "authorized the National Security Agency [NSA] to eavesdrop on Americans and others inside the United States . . . without the court-approved warrants ordinarily required for domestic spying."

Not since Richard Nixon's misuse of the CIA and the IRS in Watergate, perhaps not since Abraham Lincoln suspended the writ of habeas corpus, have civil libertarians so hugely cried alarm at a supposed law-breaking action of government. People for the American Way, the Left-liberal interest group, has called the NSA wiretapping "arguably the most egregious undermining of our civil liberties in a generation." The American Civil Liberties Union has blasted Bush for "violat[ing] our Constitution and our fundamental freedoms."

Leading Democratic politicians, denouncing the Bush administration in the most extreme terms, have spoken darkly of a constitutional crisis. Former Vice President Al Gore has accused the Bush White House of "breaking the law repeatedly and insistently" and has called for a special counsel to investigate. Senator Barbara Boxer of California has solicited letters from four legal scholars inquiring whether the NSA program amounts to high crimes and misdemeanors, the constitutional standard for removal from office. John Conyers of Michigan, the ranking Democrat on the House Judiciary Committee, has demanded the creation of a select panel to investigate "those offenses which appear to rise to the level of impeachment."

The President, for his part, has not only stood firm, insisting on both the legality and the absolute necessity of his actions, but has condemned the *disclosure* of the NSA surveillance program as a "shameful act." In doing so, he has implicitly raised a question that the *Times* and the President's foes have conspicuously sought to ignore—namely, what is, and what should be, the relationship of news-gathering media to government secrets in the life-and-death area of national security. Under the protections provided by the First Amendment of the Constitution, do journalists have the right to publish whatever they can ferret out? Such is certainly today's working assumption, and it underlies today's

practice. But is it based on an informed reading of the Constitution and the relevant statutes? If the President is right, does the December 16 story in the *Times* constitute not just a shameful act, but a crime?

II

Ever since 9/11, U.S. intelligence and law-enforcement authorities have bent every effort to prevent our being taken once again by surprise. An essential component of that effort, the interception of al-Qaeda electronic communications around the world, has been conducted by the NSA, the government arm responsible for signals intelligence. The particular NSA program now under dispute, which the *Times* itself has characterized as the U.S. government's "most closely guarded secret," was set in motion by executive order of the President shortly after the attacks of September 11. Just as the *Times* has reported, it was designed to track and listen in on a large volume of calls and e-mails *without* applying for warrants to the Foreign Intelligence Security Act (FISA) courts, whose procedures the administration deemed too cumbersome and slow to be effective in the age of cell phones, calling cards, and other rapidly evolving forms of terrorist telecommunication.

Beyond this, all is controversy. According to the critics, many of whom base themselves on a much-cited study by the officially nonpartisan Congressional Research Service, Congress has never granted the President the authority to bypass the 1978 FISA Act and conduct such surveillance. In doing so, they charge, the Bush administration has flagrantly overstepped the law, being guilty, in the words of the *New Republic*, of a "bald abuse of executive power."

Defenders answer in kind. On more than twelve occasions, as the administration itself has pointed out, leaders of Congress from both parties have been given regularly scheduled, classified briefings about the NSA program. In addition, the program has been subject to internal executive-branch review every 45 days, and cannot continue without explicit presidential reauthorization (which as of January had been granted more than 30 times). Calling it a "domestic surveillance program" is, moreover, a misnomer: the communications being swept up are international in nature, confined to those calls or e-mails one terminus of which is abroad and at one terminus of which is believed to be an al-Qaeda operative.

Defenders further maintain that, contrary to the Congressional Research Service, the law itself is on the President's side.2 In addition to the broad wartime powers granted to the executive in the Constitution, Congress, immediately after September 11, empowered the President "to take action to deter and prevent acts of international terrorism against the United States." It then supplemented this by authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed,

or aided the terrorist attacks." The NSA surveillance program is said to fall under these specified powers.3

The debate over the legality of what the President did remains unresolved, and is a matter about which legal minds will no doubt continue to disagree, largely along partisan lines. What about the legality of what the *Times* did?

III

Although it has gone almost entirely undiscussed, the issue of leaking vital government secrets in wartime remains of exceptional relevance to this entire controversy, as it does to our very security. There is a rich history here that can help shed light on the present situation.

One of the most pertinent precedents is a newspaper story that appeared in the *Chicago Tribune* on June 7, 1942, immediately following the American victory in the battle of Midway in World War II. In a front-page article under the headline, "Navy Had Word of Jap Plan to Strike at Sea," the *Tribune* disclosed that the strength and disposition of the Japanese fleet had been "well known in American naval circles several days before the battle began." The paper then presented an exact description of the imperial armada, complete with the names of specific Japanese ships and the larger assemblies of vessels to which they were deployed. All of this information was attributed to "reliable sources in . . . naval intelligence."

The inescapable conclusion to be drawn from the *Tribune* article was that the United States had broken Japanese naval codes and was reading the enemy's encrypted communications. Indeed, cracking JN-25, as it was called, had been one of the major Allied triumphs of the Pacific war, laying bare the operational plans of the Japanese Navy almost in real time and bearing fruit not only at Midway—a great turning point of the war—but in immediately previous confrontations, and promising significant advantages in the terrible struggles that still lay ahead. Its exposure, a devastating breach of security, thus threatened to extend the war indefinitely and cost the lives of thousands of American servicemen.

An uproar ensued in those quarters in Washington that were privy to the highly sensitive nature of the leak. The War Department and the Justice Department raised the question of criminal proceedings against the *Tribune* under the Espionage Act of 1917. By August 1942, prosecutors brought the paper before a federal grand jury. But fearful of alerting the Japanese, and running up against an early version of what would come to be known as graymail, the government balked at providing jurors with yet more highly secret information that would be necessary to demonstrate the damage done.

Thus, in the end, the *Tribune* managed to escape criminal prosecution. For their part, the Japanese either never got wind of the story circulating in the United States or were so convinced that their naval codes were unbreakable that they dismissed its significance. In any case, they left them unaltered, and their naval communications continued to be read by U.S. and British cryptographers until the end of the war.4

If the government's attempt to employ the provisions of the 1917 Espionage Act in the heat of World War II failed, another effort three decades later was no more successful. This was the move by the Nixon White House to prosecute Daniel Ellsberg and Anthony Russo for leaking the Pentagon Papers, which foundered on the rocks of the administration's gross misconduct in investigating the offense. The administration also petitioned the Supreme Court to stop the *New York Times* from publishing Ellsberg's leaked documents, in order to prevent "grave and irreparable danger" to the public interest; but it did not even mention the Espionage Act in this connection, presumably because that statute does not allow for the kind of injunctive relief it was seeking.

Things took a different turn a decade later with an obscure case known as *United States of America* v. *Samuel Loring Morison*. From 1974 to 1984, Morison, a grandson of the eminent historian Samuel Eliot Morison, had been employed as a part-time civilian analyst at the Naval Intelligence Support Center in Maryland. With the permission of his superiors, he also worked part-time as an editor of *Jane's Fighting Ships*, the annual reference work that is the standard in its field. In 1984, dissatisfaction with his government position led Morison to pursue full-time employment with *Jane's*.

In the course of his job-seeking, Morison had passed along three classified photos, filched from a colleague's desk, which showed a Soviet nuclear-powered aircraft carrier under construction. They had been taken by the KH-11 satellite system, whose electro-optical digital-imaging capabilities were the first of their kind and a guarded military secret. The photographs, which eventually appeared in *Jane's Defence Weekly*, another publication in the *Jane's* family, were traced back to Morison. Charged with violations of the Espionage Act, he was tried, convicted, and sentenced to a two-year prison term.5

Finally, and bearing on issues of secrecy from another direction, there is a case wending its way through the judicial process at this very moment. It involves the American Israel Public Affairs Committee (AIPAC), which lobbies Congress and the executive branch on matters related to Israel, the Middle East, and U.S. foreign policy. In the course of these lobbying activities, two AIPAC officials, Steven J. Rosen and Keith Weissman, allegedly received classified information from a Defense Department analyst by the name of Lawrence Franklin. They then allegedly passed on this information to an Israeli diplomat, and also to members of the press.

Both men are scheduled to go on trial in April for violations of the Espionage Act. The indictment, which names them as part of a "conspiracy," asserts that they used "their contacts within the U.S. government and elsewhere to gather sensitive U.S. government information, including classified information relating to national defense, for subsequent unlawful communication, delivery, and transmission to persons not entitled to receive it." As for Franklin, who admitted to his own violations of the Espionage Act and was promised leniency for cooperating in an FBI sting operation against Rosen and Weissman, he was sentenced this January to twelve-and-a-half years in prison, half of the maximum 25-year penalty.6

IV

Despite their disparate natures and outcomes, each of these cases bears on the NSA wiretapping story. In attempting to bring charges against the *Chicago Tribune*, both Frances Biddle, FDR's wartime attorney general, and other responsible officials were operating under the well-founded principle that newspapers do not carry a shield that automatically allows them to publish whatever they wish. In particular, the press can and should be held to account for publishing military secrets in wartime.

In the case of the *Tribune* there was no indictment, let alone a conviction; in the Pentagon Papers case, the prosecution was botched. But *Morison* was seen all the way through to conviction, and the conviction was affirmed at every level up to the Supreme Court (which upheld the verdict of the lower courts by declining to hear the case). It would thus seem exceptionally relevant to the current situation.

In appealing his conviction, Morison argued along lines similar to those a newspaper reporter might embrace—namely, that the Espionage Act did not apply to him because he was neither engaged in "classic spying and espionage activity" nor transmitting "national-security secrets to agents of foreign governments with intent to injure the United States." In rejecting both of these contentions, the appeals court noted that the law applied to "whoever" transmits national-defense information to "a person not entitled to receive it." The Espionage Act, the court made clear, is not limited to spies or agents of a foreign government, and contains no exemption "in favor of one who leaks to the press."

But if the implication of *Morison* seems straightforward enough, it is also clouded by the fact that Morison's status was so peculiar: was he convicted as a miscreant government employee (which he was) or, as he maintained in his own defense, an overly zealous journalist? In the view of the courts that heard his case, the answer seemed to be more the former than the latter, leaving unclear the status of a journalist engaged in the same sort of behavior today.

The AIPAC case presents another twist. In crucial respects, the status of the two defendants does resemble that of journalists. Unlike Morison but like James Risen of the *New York Times*, the AIPAC men were not government employees. They were also involved in a professional activity—attempting to influence the government by means of lobbying—that under normal circumstances enjoys every bit as much constitutional protection as publishing a newspaper. Like freedom of the press, indeed, the right to petition the government is explicitly stipulated in the First Amendment. Yet for allegedly taking possession of classified information and then passing such information along to others, including not only a representative of the Israeli government but also, as the indictment specifies, a "member of the media," Rosen and Weissman placed themselves in legal jeopardy.

The AIPAC case thus raises an obvious question. If Rosen and Weissman are now suspended in boiling hot water over alleged violations of the Espionage Act, why should persons at the *Times* not be treated in the same manner?

To begin with, there can be little argument over whether, in the case of the *Times*, national-defense material was disclosed in an unauthorized way. The *Times*'s own reporting makes this plain; the original December 16 article explicitly discusses the highly secret nature of the material, as well as the *Times*'s own hesitations in publishing it. A year before the story actually made its way into print, the paper (by its own account) told the White House what it had uncovered, was warned about the sensitivity of the material, and was asked not to publish it. According to Bill Keller, the *Times*'s executive editor, the administration "argued strongly that writing about this eavesdropping program would give terrorists clues about the vulnerability of their communications and would deprive the government of an effective tool for the protection of the country's security." Whether because of this warning or for other reasons, the *Times* withheld publication of the story for a year.7

Nor does James Risen's *State of War* hide this aspect of things. To the contrary, one of the book's selling points, as its subtitle indicates, is that it is presenting a "secret history." In his acknowledgements, Risen thanks "the many current and former government officials who cooperated" with him, adding that they did so "sometimes at great personal risk." In an age when government officials are routinely investigated by the FBI for leaking classified information, and routinely charged with a criminal offense if caught in the act, what precisely would that "great personal risk" entail if not the possibility of prosecution for revealing government secrets?

The real question is therefore not whether secrets were revealed but whether, under the espionage statutes, the elements of a criminal act were in place. This is a murkier matter than one might expect.

Thus, one subsection of the Espionage Act requires that the country be in a state of war, and one might argue that this requirement was not present. Although President Bush and other leading officials speak of a "war on terrorism," there has been no formal declaration of war by Congress. Similarly, other subsections demand evidence of a clear intent to injure the United States. Whatever the motives of the editors and reporters of the *New York Times*, it would be difficult to prove that among them was the prospect of causing such injury.

True, several sections of the Act rest on neither a state of war nor on intent to injure, instead specifying a lower threshold: to be found guilty, one must have acted "willfully." Yet this key term is itself ambiguous—"one of the law's chameleons," as it has been called. Does it mean merely acting with awareness? Or does it signify a measure of criminal purposiveness? In light of these and other areas of vagueness in the statutes, it is hardly surprising that, over the decades, successful prosecution of the recipients and purveyors of leaked secret government information has been as rare as leaks of such information have been abundant.

But that does not end the matter. Writing in 1973, in the aftermath of the Pentagon Papers muddle, two liberal-minded law professors, Harold Edgar and Benno C. Schmidt, Jr., undertook an extensive study of the espionage statutes with the aim of determining the precise degree to which "constitutional principles limit official power to prevent or punish public disclosure of national-defense secrets."8 Their goal proved elusive. The First Amendment, Edgar and Schmidt found, despite providing "restraints against grossly sweeping prohibitions" on the press, did not deprive Congress of the power to pass qualifying legislation "reconciling the conflict between basic values of speech and security." Indeed, the Espionage Act of 1917 was just such a piece of law-making, and Edgar and Schmidt devote many pages to reviewing the discussion that led up to its passage.

What they show is a kind of schizophrenia. On the one hand, a "series of legislative debates, amendments, and conferences" preceding the Act's passage can "fairly be read as *excluding* criminal sanctions for well-meaning publication of information no matter what damage to the national security might ensue and regardless of whether the publisher knew its publication would be damaging" (emphasis added). On the other hand, whatever the "apparent thrust" of this legislative history, the statutes themselves retain plain meanings that cannot be readily explained away. The "language of the statute," the authors concede, "has to be bent somewhat to exclude publishing national-defense material from its [criminal] reach, and tortured to exclude from criminal sanction preparatory conduct necessarily involved in almost every conceivable publication" of military secrets.

Thus, in the Pentagon Papers case, four members of the Court—Justices White, Stewart, Blackmun, and Chief Justice Burger—suggested that the statutes can impose criminal sanctions on newspapers for retaining or publishing defense

secrets. Although finding these pronouncements "most regrettable," a kind of "loaded gun pointed at newspapers and reporters," Edgar and Schmidt are nevertheless compelled to admit that, in this case as in many others in modern times, the intent of the espionage statutes is indisputable:

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

For Edgar and Schmidt, the only refuge from this (to them) dire conclusion is that Congress did not understand the relevant sections of the Espionage Act "to have these effects when they were passed, or when the problem of publication of defense information was considered on other occasions."

Edgar and Schmidt may or may not be right about Congress's incomprehension. But even if they are right, would that mean that newspapers can indeed publish whatever they want whenever they want, secret or not, without fear of criminal sanction?

Hardly. For in 1950, as Edgar and Schmidt also note, in the wake of a series of cold-war espionage cases, and with the *Chicago Tribune* episode still fresh in its mind, Congress added a very clear provision to the U.S. Criminal Code dealing specifically with "communications intelligence"—exactly the area reported on by the *Times* and James Risen. Here is the section in full, with emphasis added to those words and passages applicable to the conduct of the *New York Times*:

> §798. Disclosure of Classified Information.
>
> (a) *Whoever* knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or *publishes*, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States *any classified information*—
>
> > (1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or/
> >
> > (2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) *concerning the* communication *intelligence activities of the United States* or any foreign government; or

(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) As used in this subsection (a) of this section—
The term "classified information" means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms "code," "cipher," and "cryptographic system" include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

Not only is this provision completely unambiguous, but Edgar and Schmidt call it a "model of precise draftsmanship." As they state, "the use of the term 'publishes' makes clear that the prohibition is intended to bar public speech," which clearly includes writing about secrets in a newspaper. Nor is a motive required in order to obtain a conviction: "violation [of the statute] occurs

on knowing engagement of the proscribed conduct, without any additional requirement that the violator be animated by anti-American or pro-foreign motives." The section also does not contain any requirement that the U.S. be at war.

One of the more extraordinary features of Section 798 is that it was drawn with the very purpose of protecting the vigorous public discussion of national-defense material. In 1946, a joint committee investigating the attack on Pearl Harbor had urged a blanket prohibition on the publication of government secrets. But Congress resisted, choosing instead to carve out an exception in the special case of cryptographic intelligence, which it described as a category "both vital and vulnerable to an almost unique degree."

With the bill narrowly tailored in this way, and "with concern for public speech having thus been respected" (in the words of Edgar and Schmidt), Section 798 not only passed in Congress but, perhaps astonishingly in hindsight, won the support of the American Society of Newspaper Editors. At the time, the leading editors of the *New York Times* were active members of that society.

VI

If prosecuted, or threatened with prosecution, under Section 798, today's *New York Times* would undoubtedly seek to exploit the statute's only significant loophole. This revolves around the issue of whether the information being disclosed was improperly classified as secret. In all of the extensive debate about the NSA program, no one has yet convincingly made such a charge.

The *Times* would also undoubtedly seek to create an additional loophole. It might assert that, unlike in the *Chicago Tribune* case or in *Morison*, the disclosure at issue is of an *illegal* governmental activity, in this case warrantless wiretapping, and that in publishing the NSA story the paper was fulfilling a central aspect of its public-service mission by providing a channel for whistleblowers in government to right a wrong. In this, it would assert, it was every bit as much within its rights as when newspapers disclosed the illegal "secret" participation of the CIA in Watergate.

But this argument, too, is unlikely to gain much traction in court. As we have already seen, congressional leaders of both parties have been regularly briefed about the program. Whether or not legal objections to the NSA surveillance ever arose in those briefings, the mere fact that Congress has been kept informed shows that, whatever legitimate objections there might be to the program, this is not a case, like Watergate, of the executive branch running amok. Mere allegations of illegality do not, in our system of democratic rule, create any sort of terra firma—let alone a presumption that one is, in turn, entitled to break the law.

As for whistleblowers unhappy with one or another government program, they have other avenues at their disposal than splashing secrets across the front page of the *New York Times*. The Intelligence Community Whistleblower Protection Act of 1998 shields employees from retribution if they wish to set out evidence of wrongdoing. When classified information is at stake, the complaints must be leveled in camera, to authorized officials, like the inspectors general of the agencies in question, or to members of congressional intelligence committees, or both. Neither the *New York Times* nor any other newspaper or television station is listed as an authorized channel for airing such complaints.

Current and former officials who choose to bypass the provisions of the Whistleblower Protection Act and to reveal classified information directly to the press are unequivocally lawbreakers. This is not in dispute. What Section 798 of the Espionage Act makes plain is that the same can be said about the press itself when, eager to obtain classified information however it can, and willing to promise anonymity to leakers, it proceeds to publish the government's communications-intelligence secrets for all the world to read.

VII

If the *Times* were indeed to run afoul of a law once endorsed by the American Society of Newspaper Editors, it would point to a striking role reversal in the area of national security and the press.

Back in 1942, the *Chicago Tribune* was owned and operated by Colonel Robert R. McCormick. In the 1930's, as Hitler plunged Europe into crisis, his paper, pursuing the isolationist line of the America First movement, tirelessly editorialized against Franklin Roosevelt's "reckless" efforts to entangle the U.S. in a European war. Once war came, the *Tribune* no less tirelessly criticized Roosevelt's conduct of it, lambasting the administration for incompetence and much else.

In its campaign against the Roosevelt administration, one of the *Tribune*'s major themes was the evils of censorship; the paper's editorial page regularly defended its publication of secrets as in line with its duty to keep the American people well informed. On the very day before Pearl Harbor, it published an account of classified U.S. plans for fighting in Europe that came close to eliciting an indictment.9 The subsequent disclosure of our success in breaking the Japanese codes was thus by no means a singular or accidental mishap but an integral element in an ideological war that called for pressing against the limits.

During World War II, when the *Chicago Tribune* was recklessly endangering the nation by publishing the most closely guarded cryptographic secrets, the *New York Times* was by contrast a model of wartime rectitude. It is inconceivable that in, say, June 1944, our leading newspaper would have carried a (hypothetical) dispatch beginning: "A vast Allied invasion force is poised to cross

the English Channel and launch an invasion of Europe, with the beaches of Normandy being the point at which it will land."

In recent years, however, under very different circumstances, the *Times* has indeed reversed roles, embracing a quasi-isolationist stance. If it has not inveighed directly against the war on terrorism, its editorial page has opposed almost every measure taken by the Bush administration in waging that war, from the Patriot Act to military tribunals for terrorist suspects to the CIA renditions of al-Qaeda operatives to the effort to depose Saddam Hussein. "Mr. Bush and his attorney general," says the *Times*, have "put in place a strategy for a domestic anti-terror war that [has] all the hallmarks of the administration's normal method of doing business: a Nixonian obsession with secrecy, disrespect for civil liberties, and inept management." Of the renditions, the paper has argued that they "make the United States the partner of some of the world's most repressive regimes"; constitute "outsourcing torture"; and can be defended only on the basis of "the sort of thinking that led to the horrible abuses at prisons in Iraq." The *Times*'s opposition to the Patriot Act has been even more heated: the bill is "unconstitutionally vague"; "a tempting bit of election-year politics"; "a rushed checklist of increased police powers, many of dubious value"; replete with provisions that "trample on civil liberties"; and plain old "bad law."

In pursuing its reflexive hostility toward the Bush administration, the *Times*, like the *Chicago Tribune* before it, has become an unceasing opponent of secrecy laws, editorializing against them consistently and publishing government secrets at its own discretion. So far, there has been only a single exception to this pattern. It merits a digression, both because it is revealing of the *Times*'s priorities and because it illustrates how slender is the legal limb onto which the newspaper has climbed.

The exception has to do with Valerie Plame Wilson. The wife of a prominent critic of the administration's decision to go to war in Iraq, Plame is a CIA officer who, despite her ostensible undercover status, was identified as such in July 2003 by the press. That disclosure led to a criminal investigation, in the course of which the *Times* reporter Judith Miller was found in contempt of court and jailed for refusing to reveal the names of government officials with whom she had discussed Plame's CIA status. In the end, Miller told what she knew to the special prosecutor, leading him to indict I. Lewis "Scooter" Libby, an aide to Vice President Cheney, for allegedly lying under oath about his role in the outing of Plame.

The *Times* has led the pack in deploring Libby's alleged leak, calling it "an egregious abuse of power," comparing it to "the disclosure of troop movements in wartime," and blowing it up into a kind of conspiracy on the part of the Bush administration to undercut critics of the war. That its hysteria over the leak of Plame's CIA status sits oddly with its own habit of regularly pursuing and publishing government secrets is something the paper affects not to notice. But if

the Plame case reveals a hypocritical or partisan side to the *Times*'s concern for governmental secrecy, it also shows that neither the First Amendment nor any statute passed by Congress confers a shield allowing journalists to step outside the law.

The courts that sent Judith Miller to prison for refusing to reveal her sources explicitly cited the holding in *Branzburg* v. *Hayes* (1972), a critical case in the realm of press freedom. In *Branzburg*, which involved not government secrets but narcotics, the Supreme Court ruled that "it would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on . . . the reporter to violate valid criminal laws," and that "neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."

The Plame affair extends the logic of *Branzburg*, showing that a journalist can be held in contempt of court when the unauthorized disclosure of intelligence-related information is at stake.10 Making this episode even more relevant is the fact that the classified information at issue—about which Judith Miller gathered notes but never published a single word, hence doing no damage herself to the public interest—is of trivial significance in comparison with disclosure of the NSA surveillance program, which tracks the surreptitious activities of al-Qaeda operatives in the U.S. and hence involves the security of the nation and the lives of its citizens. If journalists lack immunity in a matter as narrow as Plame, they also presumably lack it for their role in perpetrating a much broader and deadlier breach of law.

"Unauthorized disclosures can be extraordinarily harmful to the United States national-security interests and . . . far too many such disclosures occur," said President Clinton on one occasion, adding that they "damage our intelligence relationships abroad, compromise intelligence gathering, jeopardize lives, and increase the threat of terrorism." To be sure, even as he uttered these words, Clinton was in the process of vetoing a bill that tightened laws against leaking secrets. But, his habitual triangulating aside, he was right and remains right. In recent years a string of such devastating leaks has occurred, of which the NSA disclosure is at the top of the list.

By means of that disclosure, the *New York Times* has tipped off al Qaeda, our declared mortal enemy, that we have been listening to every one of its communications that we have been able to locate, and have succeeded in doing so even as its operatives switch from line to line or location to location. Of course, the *Times* disputes that its publication has caused any damage to national security. In a statement on the paper's website, Bill Keller asserts complacently that "we satisfied ourselves that we could write about this program . . . in a way that would not expose any intelligence-gathering methods or capabilities that are not already on the public record." In his book, James Risen goes even further, ridiculing the notion that the NSA wiretapping "is critical to the global war on terrorism."

Government officials, he writes, "have not explained why any terrorist would be so naïve as to assume that his electronic communication was impossible to intercept."

But there are numerous examples of terrorists assuming precisely that. Prior to September 11, Osama bin Laden regularly communicated with top aides using satellite telephones whose signals were being soaked up by NSA collection systems. After a critical leak in 1998, these conversations immediately ceased, closing a crucial window into the activities of al Qaeda in the period running up to September 11.

Even after September 11, according to Risen and Eric Lichtblau in their December story, terrorists continued to blab on open lines. Thus, they wrote, NSA eavesdropping helped uncover a 2003 plot by Iyman Faris, a terrorist operative, who was apprehended and sentenced to 20 years in prison for providing material support and resources to al Qaeda and conspiring to supply it with information about possible U.S. targets. Another plot to blow up British pubs and subways stations using fertilizer bombs was also exposed in 2004, "in part through the [NSA] program." This is the same James Risen who blithely assures us that terrorists are too smart to talk on the telephone.

For its part, the *New York Times* editorial page remains serenely confident that the problem is not our national security but the overreaching of our own government. Condescending to notice that the "nation's safety is obviously a most serious issue," the paper wants us to focus instead on how "that very fact has caused this administration and many others to use it as a catch-all for any matter it wants to keep secret." If these are not the precise words used by Colonel McCormick's *Tribune* as it gave away secrets that could have cost untold numbers of American lives, the self-justifying spirit is exactly the same.

We do not know, in our battle with al Qaeda, whether we have reached a turning point like the battle of Midway (whose significance was also not fully evident at the time). Ongoing al-Qaeda strikes in the Middle East, Asia, and Europe suggest that the organization, though wounded, is still a coordinated and potent force. On January 19, after having disappeared from view for more than a year, Osama bin Laden surfaced to deliver one of his periodic threats to the American people, assuring us in an audio recording that further attacks on our homeland are "only a matter of time. They [operations] are in the planning stages, and you will see them in the heart of your land as soon as the planning is complete." Bin Laden may be bluffing; but woe betide the government that proceeds on any such assumption.

The 9/11 Commission, in seeking to explain how we fell victim to a surprise assault, pointed to the gap between our foreign and domestic intelligence-collection systems, a gap that over time had grown into a critical vulnerability. Closing that gap, in the wake of September 11, meant intercepting al-Qaeda

communications all over the globe. This was the purpose of the NSA program—a program "essential to U.S. national security," in the words of Jane Harman, the ranking Democratic member of the House Intelligence Committee—the disclosure of which has now "damaged critical intelligence capabilities."

One might go further. What the *New York Times* has done is nothing less than to compromise the centerpiece of our defensive efforts in the war on terrorism. If information about the NSA program had been quietly conveyed to an al-Qaeda operative on a microdot, or on paper with invisible ink, there can be no doubt that the episode would have been treated by the government as a cut-and-dried case of espionage. Publishing it for the world to read, the *Times* has accomplished the same end while at the same time congratulating itself for bravely defending the First Amendment and thereby protecting us—from, presumably, ourselves. The fact that it chose to drop this revelation into print on the very day that renewal of the Patriot Act was being debated in the Senate—the bill's reauthorization beyond a few weeks is still not assured—speaks for itself.

The Justice Department has already initiated a criminal investigation into the leak of the NSA program, focusing on which government employees may have broken the law. But the government is contending with hundreds of national-security leaks, and progress is uncertain at best. The real question that an intrepid prosecutor in the Justice Department should be asking is whether, in the aftermath of September 11, we as a nation can afford to permit the reporters and editors of a great newspaper to become the unelected authority that determines for all of us what is a legitimate secret and what is not. Like the Constitution itself, the First Amendment's protections of freedom of the press are not a suicide pact. The laws governing what the *Times* has done are perfectly clear; will they be enforced?

1 *State of War: The Secret History of the CIA and the Bush Administration*. Free Press, 240 pp., $26.00.

2 The non-partisan status of the Congressional Research Service has been called into question in this instance by the fact that the study's author, Alfred Cumming, donated $1,250 to John Kerry's presidential campaign, as was reported by the *Washington Times*.

3 What the U.S. government was doing, furthermore, differed little if at all from what it had done in the past in similar emergencies. "For as long as electronic communications have existed," as Attorney General Alberto Gonzalez has pointed out, "the United States has conducted surveillance of [enemy] communications during wartime—all without judicial warrant."

4 David Kahn concludes in *The Codebreakers* (1967) that in part, "the Japanese trusted too much to the reconditeness of their language for

communications security, clinging to the myth that no foreigner could ever learn its multiple meanings well enough to understand it properly. In part they could not envision the possibility that their codes might be read."

5 In January 2001, a decade-and-a-half after his release, and following a campaign on his behalf by Senator Daniel Patrick Moynihan, Morison was granted a full pardon by President Bill Clinton on his final day in office.

6 If Franklin continues to cooperate with the authorities, his sentence will be reviewed and probably reduced after the trial of Rosen and Weissman.

7 According to Jon Friedman's online Media Web, the *Times*'s publisher, Arthur Sulzberger, Jr., also met with President Bush before the NSA story was published.

8 "The Espionage Statutes and Publication of Defense Information," *Columbia Law Review*, Vol. 73., No. 5., May 1973.

9 If the Japanese were not paying close attention to American newspapers, the Germans were. Within days of Pearl Harbor, Hitler declared war on the United States, indirectly citing as a *casus belli* the American war plans revealed in the *Tribune*.

10 Whether Plame was in fact a secret agent—according to *USA Today*, she has worked at CIA headquarters in Langley, Virginia since 1997—remains an issue that is likely to be explored fully if the Libby case proceeds to trial.

COMMENTARY
June 2006

Controversy

The Espionage Act and the "New York Times"

Gabriel Schoenfeld & Critics

TO THE EDITOR:
Gabriel Schoenfeld illuminates one horn of the dilemma posed by unauthorized

disclosures of classified information ["Has the *New York Times* Violated the Espionage Act?," March]. Certainly the government has the authority and the duty to protect the nation against disclosures that could genuinely threaten national security. But there are reasons why prosecutors have never yet chosen to adopt Mr. Schoenfeld's single-minded view of what the law requires.

When the *New York Times* disclosed the President's warrantless surveillance program last December 16, it was not the first time in recent years that the strictures of Section 798 of Title 18 of the United States Code had arguably been violated. It was not even the hundredth time.

Newspapers and books have routinely purveyed stories involving classified communications intelligence for decades, and in several cases their authors have been rewarded not with prison but with prizes and celebrity status (think Bob Woodward, Seymour Hersh).

Nor are the offending publications all purportedly "liberal" in orientation. Almost certainly the most prolific conduit for publication of classified information, including communications-intelligence information, has been Bill Gertz of the *Washington Times*, who throughout most of the Clinton administration reported directly from classified sources just about every few days, and still does from time to time.

Yet these celebrated reporters still walk freely among us despite the fact that, if intelligence officials are to be believed, their stories have degraded intelligence methods and cost taxpayers many millions of dollars.

The point is that, while government agencies pursue leakers of classified information with whatever tools they can muster, it has long been accepted government practice to keep hands off the press that publishes the information. Have prosecutors somehow remained ignorant of the statutes that Mr. Schoenfeld so acutely analyzes? Probably not.

Rather, it appears there are competing societal interests at stake that until now have induced government to adopt a kind of constructive ambiguity on the matter and, in practice, to renounce the power to penalize press outlets.

What are those competing societal interests? One is the important role played by the press in the process of policy development. Without romanticizing the press or ignoring its evident defects, it seems objectively true that news coverage plays an integral role in the daily operation of government. Both for good and for ill, the news media help to set the public-policy agenda and to drive the congressional-oversight process. Efforts to impose new legal barriers on press coverage could have unpredictable adverse consequences.

Another societal interest is the ability of the press to compensate for unwarranted official secrecy by publishing information that should not or need not be classified. While it is true that the nation's most sensitive secrets are classified, not everything that is classified is sensitive. In fact, the classification system has become a bizarre confection of genuine national-security secrets, bureaucratic fetishes, self-serving political manipulations, and inconsistencies. One example: the 1997 intelligence budget total was declassified in October 1997, but the 1957 and the 1967 budget totals remain classified. Why? Because the CIA says so! There is no other discernible reason.

I recently acquired a historical document that indicates that the 1972 budget appropriation for the National Security Agency was $65.2 million. This information remains classified, and is not acknowledged even today by the NSA. Furthermore, since it pertains specifically to communications-intelligence activities of the United States, albeit historical ones, my knowing and willful disclosure of it could conceivably be in violation of the same Section 798 that Mr. Schoenfeld suspects has been traduced by the *New York Times*. Should I therefore be prosecuted? Should COMMENTARY be penalized for publishing the information in this letter? That would be absurd.

There seems to be, however, an unstated bargain with government that the press will not abuse this freedom beyond a certain point. The most influential purveyors of classified leaks also tend to be the most responsible in their editorial processes, consulting government officials prior to publication and offering them opportunities to argue against disclosure. As is well known, the *New York Times* held back its story on warrantless surveillance for a year.

Of course, not all classified secrets that might come into possession of the press are trivial and inconsequential. One can imagine circumstances in which a news organization commits such an outrageous breach of faith by publishing sensitive secrets as to invite public opprobrium and nullify the government's tacit acceptance of the freedom to publish classified information.

Has the *New York Times* committed such a breach with its warrantless-surveillance story? I doubt it.

STEVEN AFTERGOOD
Federation of American Scientists
Washington, D.C.

TO THE EDITOR:
The title of Gabriel Schoenfeld's article is misleading. If the *Times* broke the law (and Mr. Schoenfeld is correct, in my view, that it did), it was not the Espionage Act but rather a separate and very specific statute that makes it a crime to publish

communications intelligence. Be that as it may, however, the important question is not whether there was a technical violation of the statute but rather why the information was given to the *Times* and whether the paper should have published it.

The Foreign Intelligence Surveillance Act of 1978 (FISA) was passed after a series of leaks to the press revealed that Presidents had improperly used their power to conduct warrantless surveillance to spy on their political opponents while also gathering legitimate foreign intelligence. Congress wanted to make clear—to intelligence officers, Presidents, and private citizens alike—the circumstances under which it was appropriate to conduct electronic surveillance; it also wanted to have judges supervise the process. FISA was successful beyond anyone's expectations. It permitted far more surveillance for legitimate purposes than had ever been done, and it prevented abuses. There were also no leaks about its workings.

When President Bush made the momentous and, in my view, clearly illegal decision to authorize warrantless surveillance, he broke this bargain. The result was that many officials were concerned about what the government was doing, and one or more of them went to the press as others had done prior to FISA's enactment.

The administration has said that it did not go to Congress to seek an amendment to FISA after the attacks of September 11 because it did not believe that it could get the law changed without information leaking out that would jeopardize the new program. It has never elaborated on that implausible explanation—implausible because Congress's record in enacting and amending FISA showed that it could be done without leaks, and because ordering this warrantless program was itself almost guaranteed to produce leaks.

What should the *Times* have done when it received the information? Exactly what it did do. Not rush to print but rather seek to verify the story and give the government ample opportunity to persuade the paper that the story should not run or that some details should be withheld. The *Times* has never explained why it held the story for a year or why it then decided to print it; nor do we know what specific facts it withheld.

Mr. Schoenfeld argues that the paper committed not only a shameful act but a crime. My view is that it may have violated a criminal statute but that its conduct was far from shameful. There is no evidence to back up the claim that the *Times* published the story as a reflection of the views presented on its editorial page about the government's conduct of the war on terror. The separation of those two functions at the *Times* is well known, and the delay in publishing the story reflects far greater deference to the government's views than is evident in its editorials.

The key question is whether the story published in the *Times* was likely to cause harm to national security. The *Times* concluded that it would not and that the public was entitled to know about a program that many consider to be illegal. Mr. Schoenfeld argues that the leak must have caused harm. He suggests that al Qaeda learned from the *Times* article that the NSA had "succeeded" in listening to all of its conversations. But the December 16 story said no such thing, only that the government was trying to intercept some conversations without a warrant. It is true that al Qaeda may be sloppy from time to time in how it communicates, but surely not because it did not believe, long before the *Times* published its story, that the NSA was trying to listen to its conversations. All the story revealed was that the NSA was listening to some calls without a warrant—not how successful it was or even under what circumstances it was trying to listen in.

The way to move forward to protect national security is not to indict the *Times* but to have the government explain what new authority it needs and then to have the Congress consider further amendments to FISA.

MORTON HALPERIN
Open Society Institute
Washington, D.C.

TO THE EDITOR:
Gabriel Schoenfeld raises a legitimate if somewhat provocative question in "Has the *New York Times* Violated the Espionage Act?" The case he presents is compelling, but in the end his assertions about the reach and intent of the 1917 Espionage Act are highly troubling.

During the 90 years of the law's existence, no one in government has attempted to push it in the direction Mr. Schoenfeld advocates, because to do so would have been constitutionally questionable and politically incendiary. It would also have stunted vital governmental processes and subverted political discourse.

Contemporary political conditions are even more inhospitable to such adventurism. The nation's capital has become an information-detention center. Thousands of federal employees are generating secrets at a breathtaking pace, even reclassifying material that has been in the public domain for decades. Congressional oversight has been tepid. Courts have been deferential. In these circumstances, the press remains one of the most important guarantors of effective political inquiry and discourse.

The federal prosecutors who chose to go after two recipients of leaked secrets in the AIPAC case dramatically broadened the scope of the Espionage Act. Prosecuting the *New York Times* or other members of the press for a practice that has proved repeatedly to be in the public interest would go even farther. Even the

government prosecutors in the AIPAC case concede that applying the Espionage Act to the press "would raise legitimate and serious issues and would not be undertaken lightly."

Their caution is well founded. To put in the hands of government officials unprecedented power to punish the press for publishing truthful information of real public concern is a frontal assault on the First Amendment. It assumes an infallibility on the part of political leaders that is not warranted given the reality of governmental abuse, mistakes, and miscalculations.

To interpret the Espionage Act in a way that equates journalists engaged in democratic discourse with spies engaged in perfidy would make the nation less secure as well as less free. Meaningful discourse about things that matter would be reduced to only those facts that are officially sanctioned, a prospect chilling enough even if all secrets were responsibly made and truly essential to national—as opposed to political—security.

PAUL MCMASTERS
First Amendment Center
Arlington, Virginia

TO THE EDITOR:
I completely agree with Gabriel Schoenfeld's analysis that the *New York Times* should be prosecuted for violating the Espionage Act of 1917—right after George Bush is impeached for violating the Fourth Amendment of the U.S. Constitution. You do not have to be a constitutional lawyer to realize that

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

prohibits the NSA wire-tapping operation. But we would, of course, not know about that operation without the "treasonous" action of the *New York Times*.

MARK KUPERBERG
Swarthmore College
Swarthmore, Pennsylvania

TO THE EDITOR:
I am sure that Gabriel Schoenfeld's call for prosecuting the *New York Times* has

no political motivation whatsoever and could be sustained without the absurd proposition that al Qaeda never suspected its communications might be under surveillance. I am equally sure that Mr. Schoenfeld's interest in investigating the *Times* for (possibly) breaking the law and his total lack of interest in investigating the administration for (almost certainly) breaking the law can be explained somehow (good luck!). What remains uncertain is who, exactly, benefits from this concern for state secrets and complete disregard for both the Bill of Rights and the checks and balances of our Constitution. What does seem clear is that positions like his, heartily supported by the most secretive White House in history, are making a mockery of democracy in this country.

JON SHERMAN
Chicago, Illinois

TO THE EDITOR:
If letting the public know that we have a law-violating President who needs to be impeached violates the law, I only hope the *New York Times* continues to violate the laws of tyrants.

JOE BERNT
E.W. Scripps School of Journalism, Ohio University
Athens, Ohio

GABRIEL SCHOENFELD writes:
In the brief interval since my article appeared, the issue of government secrets has gone from hot to scorching.

First, the Justice Department's criminal investigation into the NSA leak is proceeding apace. A parallel investigation is under way into a story by Dana Priest that appeared in the *Washington Post* last November, reporting that the CIA had established clandestine prisons for al-Qaeda suspects somewhere in Eastern Europe. Already one high-ranking CIA officer, Mary O. McCarthy, has been dismissed by the agency for allegedly playing some role in the unauthorized disclosure.

Second, two other proceedings involving government secrets, the I. Lewis "Scooter" Libby case and the AIPAC case, continue to generate new and controversial revelations as they head toward trial. Opening a new front in the leak wars, the FBI has been attempting to retrieve classified documents, apparently connected to the AIPAC case in some way, from the estate of the late investigative journalist, Jack Anderson.

Third, the broader journalistic fraternity has circled the wagons around the journalists and media outlets that published the leaks. In March, James Risen and Eric Lichtblau, the two *Times* reporters who broke the NSA story, were awarded a Goldsmith prize by Harvard's Joan Shorenstein Center on the Press, Politics & Public Policy. In April, the two won a Pulitzer prize, as did the *Post*'s Dana Priest.

In its news pages, the *Times* has twice taken brief note of my article and the controversy surrounding the paper's actions. In a story appearing in early February, Bill Keller, the *Times*'s top editor, defended these actions on the grounds that the NSA story had "prompted an important national discussion of the balance between security and liberty." In subsequent weeks, and particularly after the Goldsmith and Pulitzer prizes were awarded, he expanded and amplified his remarks, praising his paper and its reporters for making known a "highly secret program" in the face of vigorous official objections:

It's rare that the government makes a concerted, top-level appeal to hold a story (I can think of only four or five instances in my nineteen years as an editor), and it's even more rare that we agree. But we take such appeals seriously. We gave senior officials an opportunity to make their case. They laid out a detailed argument that publishing what we then knew would compromise ongoing anti-terror operations.

After the Pulitzer was announced, the *Times*, in a full-page advertisement congratulating Lichtblau and Risen, observed that the NSA story "was extraordinarily difficult to report," especially because the two reporters "had to win the trust of those in the government who [knew] about the program," and that the "peril [was] so great for public officials who talked about it." It then concluded by suggesting that the story had caused little or no damage to national security; after all, the NSA program itself had "uncovered no active al Qaeda plots and [had] led investigators to only a few potential terrorists in the country whom they did not know about from other sources."

These developments and statements are useful to bear in mind as I respond to my critics. Let me begin with Mark Kuperberg, whose main point is that George Bush should be impeached for initiating the NSA program. Waxing sarcastic, he expresses gratitude to the *Times* for its "'treasonous'" conduct in bringing Bush's actions to light.

But, of course, not every violation of the Espionage Act constitutes treason. The statute encompasses a number of lesser offenses, and those are what I was discussing in my article. I never accused the *Times* of treason or even mentioned the word. Seeing Professor Kuperberg attribute it to me in quotation marks is another reminder, if one were needed, of how political discussion is routinely conducted in the academy these days.

Nor did my article concern itself with the question of whether Bush committed an impeachable offense in connection with the NSA surveillance of terrorists—as Joe Bernt, another professor, assumes in his declamatory missive. Even if it could be conclusively shown that President Bush had somehow violated the law—and, *pace* Morton Halperin, that proposition remains debatable—it would still leave unresolved the issues surrounding the actions of the *New York Times* in disclosing highly classified government secrets.

As I noted in my article, the secret NSA program revealed by the *Times* was not a case, like Watergate, of the executive branch of government running amok and trampling on civil liberties for personal or political gain or other nefarious purposes. Justice Department lawyers had reviewed the program at length, and leading members of both parties in both chambers of Congress were briefed about it on numerous occasions. If any of those members of Congress had objections to what the NSA was doing, they had a variety of proper means by which to register their dissenting views, and even to seek legal redress, without turning to the press.

Government officials in the executive branch likewise had other avenues. As I pointed out in my article, intelligence officers who uncover illegal conduct have, under the Intelligence Community Whistleblowers Act of 1998, a set of procedures that allow them to report misdeeds through classified channels and that ensure their complaints will be duly and properly considered. These procedures emphatically do not encompass blowing vital secrets by disclosing them to al-Qaeda via the *New York Times*.

In this connection, it is worth reflecting on Bill Keller's comment about the great "peril" to which public officials exposed themselves for revealing government secrets to the *Times*. Are these "whistleblowers" heroes, as the *Times* and other newspapers like to portray them, or something else entirely?

One way to answer this is to consider the oath that government employees must swear before being granted access to official secrets. The oath is contained in a standard document entitled "Classified Information Nondisclosure Agreement," which includes the following words:

I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause damage or irreparable injury to the United States or could be used to advantage by a foreign nation.

I hereby agree that I will never divulge classified information to anyone unless: (a) I have officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) responsible for the classification of the

information or last granting me a security clearance that such disclosure is permitted. . . .

I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information. . . .

I have been advised that any unauthorized disclosure of classified information by me may constitute a violation, or violations, of United States criminal laws. . . .

I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information, and at all times thereafter. . . .

I reaffirm that the provisions of the *espionage laws* [emphasis added], other federal criminal laws and executive orders applicable to the safeguarding of classified information have been made available to me; that I have returned all classified information in my custody; that I will not communicate or transmit classified information to any unauthorized person or organization; that I will promptly report to the Federal Bureau of Investigation any attempt by an unauthorized person to solicit classified information.

No one who appends his name to this non-disclosure agreement is compelled to do so; government officials sign it of their own free will. Is there anything about it that is in any way unclear? The U.S. government rightly does not think so. For passing relatively innocuous secrets (innocuous, that is, compared to what was contained in the *New York Times* article of December 16) to two officials of AIPAC, Lawrence Franklin, a Defense Department official, was recently sentenced to twelve years in prison.

The leakers of classified government documents are not heroes. Often acting from partisan motives or for personal gain, and almost always under the cover of anonymity, they are law-breakers willing to imperil the nation but not their careers. Journalists who publish sensitive intelligence secrets for the entire world to read, sometimes also from partisan motives (see James Risen's Bush-bashing book, *State of War*) or for personal gain and sometimes out of a conviction, now widespread in their profession, that they are journalists first and citizens subject to U.S. law second (see all the various statements of Bill Keller), fall into the same suspect class.

Although portions of the Espionage Act are riddled with ambiguous language, the provisions governing unauthorized *publication* of classified communications intelligence are perfectly clear, and the *Times*'s actions unequivocally violated them. I find it striking that not one of my correspondents challenges this; Morton Halperin explicitly affirms it. Instead, my interlocutors offer reasons why the law has not been enforced in the past and should not be enforced in this instance.

Steven Aftergood, whose reasoned and well-informed letter stands in welcome contrast to those from the sloganeering professors, makes this case most cogently. Let me attempt to answer his various points.

To begin with, I would not quarrel with Mr. Aftergood's claim that the government has a tendency to classify far too much information, and sometimes does so for reasons having little to do with national security, resulting in the "bizarre confection" to which he refers. But the answer is hardly for the press to appoint itself as arbiter of what is legitimately secret and what is not.

We live in a democracy in which Congress sets the laws and oversees the way they are carried out. If Congress, representing the American people, comes to believe that the executive branch is creating too many secrets, it has ample power to set things right, by funding faster and better declassification and/ or by changing the declassification rules. If, by contrast, a newspaper like the *New York Times* believes it has an obligation to publish a government secret, it should be prepared to accept the consequences as they have been set in law by the American people and its elected officials.

One of my correspondents, Jon Sherman, calls this idea a "mockery of democracy" and another, Joe Bernt, calls it "the law of tyrants." In fact, maintaining national-security secrets in an orderly way is integral to the workings of democracy, essential to its protection, fundamental to the rule of law, and—despite what a raft of civil libertarians and journalists is now saying—entirely consistent with what our Founding Fathers had in mind. Indeed, as Joseph Story's classic commentary on the Constitution make clear, the idea that the First Amendment "was intended to secure every citizen an absolute right to . . . print whatever he might please, without any responsibility, public or private . . . is a supposition too wild to be indulged by any rational man."

Mr. Aftergood's contention—citing the reporting of Bob Woodward, Seymour Hersh, and Bill Gertz—that Section 798 of the Espionage Act has been broken repeatedly in recent decades without eliciting prosecution is, alas, indisputable. Without doubt, he is also correct that there is a great reluctance within the Justice Department to pursue cases against the media. In a statement filed in the AIPAC case, the department (as Paul McMasters observes in his letter) acknowledged this explicitly, noting that "the fact that there has never been such a prosecution speaks for itself."

But one of my purposes in writing my article was to challenge this stance. Our attitudes and practices regarding government secrecy urgently need to adapt to the new world that was created on September 11. The good news is that government policy toward secrets *has* been changing. The bad new is that it *has* been changing in only the most haphazard and ill-thought-out ways.

A case in point is the decision to bring charges against the two AIPAC officials, itself an unprecedented application of the Espionage Act. Even if we were to assume, for the sake of argument, that the two lobbyists are guilty as charged, the classified information they are alleged to have improperly obtained and transmitted pales, as I have already noted, in comparison with the closely-guarded secrets that were conveyed to al Qaeda via the pages of the *New York Times*.

At the same time, the provision of the Espionage Act (Section 793) that the AIPAC men are charged with violating is notoriously vague and—when applied to non-governmental persons, as in this instance—subject to legitimate challenge on constitutional grounds. By contrast, the provision of the law (Section 798) bearing on the *Times*'s behavior is a model of clarity, and stands constitutionally unchallenged and unchallengeable. In 1950, when it was enacted as an amendment to the Espionage Act, Section 798 was endorsed by the American Society of Newspapers Editors (of which ranking *Times* editors were active members). As the investigation of the NSA leak continues, my hope is that the glaring discrepancy between the handling of these two cases will be brought to light.

Along with a number of other correspondents, Mr. Aftergood suggests that only minimal damage was done by disclosure of the NSA program. Even before the *Times* story appeared, so the argument goes, al-Qaeda operatives had cause to believe that their telephone and email messages were not secure, and they refrained from communicating through such channels. All the *New York Times* did, therefore, was to confirm a fact already widely known, without interfering with actual counterterrorism operations.

There is a certain surface plausibility to this contention. Beneath the surface, however, it ignores both logic and basic facts. Of course, my critics are no more privy than I am to the actual workings of the NSA program, and so we cannot confidently judge the actual costs of the *New York Times*'s disclosure. But the public statements of those who *are* privy to such knowledge are not reassuring. Jane Harman, the ranking *Democratic* member of the House Intelligence Committee, has said that the leak "damaged critical intelligence capabilities." None of my correspondents offers the slightest reason to doubt her words.

As the recent Madrid and London subway bombings make plain, to finance, plan, and carry out even a relatively modest terrorist operation requires an extensive exchange of information. And a moment's thought makes clear that there are not many available channels in which such an exchange can occur. Smoke signals from mountaintop to cave might suffice in a place like Afghanistan, but they would hardly work well in planning an operation to hit New York City out of Waziristan.

Couriers present a different set of problems; they are typically much too slow and run great risks when crossing international borders. The global postal system is

also slow, unreliable, and vulnerable to interception. In terms of speed, clarity, reliability, and security, telephone and email simply cannot be surpassed. This explains why, even after September 11, al-Qaeda operatives are known to have continued talking on open lines. Determined to mount further coordinated actions, they have had little choice.

The *New York Times*, in stating that the NSA program "led investigators to only a *few potential terrorists in the country* whom they did not know about from other sources" (emphasis added), has unwittingly made a devastating admission about the harm it may have inflicted on our country's security. Three of the four planes hijacked on September 11 were commandeered by only five men; one was commandeered by four. Together, these "few" terrorists caused massive destruction and took some 3,000 lives. If, in the post-September 11 era, the NSA surveillance program enabled our government to uncover even a "few" potential terrorists in the U.S., it was doing its job, doing it well, and, depending on who exactly these few potential terrorists were, doing it perhaps spectacularly well.

If, moreover, the *New York Times* story of December 16, 2005 did not completely compromise the NSA program, the details that the paper subsequently published, the even fuller elaboration in James Risen's book, and the attendant hailstorm of publicity effectively finished the job. Al-Qaeda operatives were put on notice not merely that they risked having their international communications intercepted but that interception was a near certainty. Not long after that revelation, in all likelihood, such communications ceased. Just as the disclosures undoubtedly threw a wrench into the work of terrorist planners, they threw an even larger wrench into our efforts to uncover their plots.

Compounding this damage is harm of a more general sort. In waging the war on terrorism, the U.S. depends heavily on cooperation with the intelligence agencies of allied countries. When our own intelligence services, including the NSA, the most secretive branch of all, demonstrate that that they are unable to keep shared information under wraps, international cooperation dries up. According to Porter Goss, director of the CIA in this period, "Too many of my counterparts from other countries have told me, 'You Americans can't keep a secret'. . . and some of these critical partners have even informed the CIA that they are reconsidering their participation in some of our most important antiterrorism ventures."

If counterterrorism were a parlor game—and that is how, in their recent cavalier treatment of sensitive intelligence secrets, the *Washington Post* and the *New York Times* seem to regard it—Goss's fretting could be easily dismissed. But every American was made aware on September 11 of the price of an intelligence shortfall. This is no game, but a matter of life and death.

Commentary

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June 7, 2006

The Honorable Arlen Specter
Chairman
United States Senate Committee
on the Judiciary
224 Dirksen Senate Office Building
Washington DC 20510

Dear Senator Specter:

It was a great privilege to testify before your committee yesterday on the subject of leaks of classified information. Please accept my gratitude for the invitation.

Please also allow me to clarify the record concerning one matter. In the course of our exchange, you inquired about Congress's understanding when it enacted Section 798 of Title 18. I had referred to the Chicago Tribune leak of 1942 regarding Japanese codes and suggested, relying on memory, that that episode was under discussion during the Congressional action leading to the passage of this law.

Following the hearing, I went to the Library of Congress to check my recollection. The facts are slightly at variance with what I said. The Chicago Tribune case may have been fresh in legislators' minds, but a previous and even more damaging leak involving Japanese codes was at the forefront of discussion. Indeed, the success of the Japanese surprise attack on Pearl Harbor can be attributed to this earlier leak.

The facts of the matter are set out in the Senate Report (No. 111, 81st Congress, 1st Session, March 11, 1949) which accompanied the Senate passage of Section 798. The relevant (and extremely interesting) part of the report states:

> The bill, while carefully avoiding the infringement of civil liberties, extends the protected field covered by the extremely narrow act of June 19, 1933 (48 Stat. 122), the latter being of far too limited application to afford to certain highly secret Government activities the protection which they need. The need for protection of this sort is best illustrated by an account of the very circumstances which surrounded the enactment of the act of June 10, 1933. In 1931 there had been published in the United States a book which gave a detailed account of United States successes in breaking Japanese diplomatic codes during the decade prior to publication. In 1933 it was learned that the same author had already placed in the hands of his publisher the manuscript of another book which made further detailed revelations of United States success in the breaking of foreign diplomatic codes. Immediate action secured the passage by the Congress of the measure of June 10, which effectively stopped publication of the second book. Unfortunately, the first book had done, and continued to do, irreparable harm. It had caused a furor in Japanese Government circles, and Japanese diplomatic codes had been changed shortly after its appearance. The new codes were more complex and difficult to solve than the old ones, and throughout the years from then until World War II not only the Japanese diplomatic cryptographers but the military and naval cryptographers as well were obviously devoting more study to cryptography than they ever had done before. In 1934 they introduced their first diplomatic machine cipher. Year by year, their codes and ciphers improved progressively by radical steps, and United States cryptanalysts had more and more difficulty and required more and more time to break them. It can be said that United States inability to decode the important Japanese military communications in the days immediately leading up to Pearl Harbor

> was directly ascribable to the state of code-security consciousness which the revelations of a decade earlier had forced on Japanese officialdom.

Reading this highly germane passage, I do not think there can be any doubt about what Congress intended, and why it intended it, when it passed Section 798 and specifically enjoined publication of classified information concerning communications intelligence.

I hope that this letter can be added to the hearing record so that this matter will be clearly understood.

Sincerely,

Gabriel Schoenfeld
Senior Editor

SEATTLE POST-INTELLIGENCER
http://seattlepi.nwsource.com/opinion/267295_andersoned.asp

First Amendment: Intent to chill

Thursday, April 20, 2006

SEATTLE POST-INTELLIGENCER EDITORIAL BOARD

Good for the family of Jack Anderson for standing up to FBI demands that agents sift through the late newspaper columnist's papers in a fishing expedition for classified documents.

Members of Congress, journalists, historians and the courts should join the fight.

"It's been determined," says an FBI spokesman, "that among the papers there are a number of classified U.S. government documents."

Determined by whom, through what process, under what authority and whose authority?

The FBI might have gotten away with that sort of bullying back in the days when J. Edgar Hoover ran the joint. And now it seems that the Bush administration is eager to turn back the clock on government secrecy. Recently, government agents were caught rifling the National Archives in search of declassified documents to reclassify.

Anderson's papers have been stored at Brigham Young University for years, yet the FBI waited until after his death last December to demand to go through them.

Is it payback time for those who helped Anderson expose FBI and CIA misdeeds over the years?

Anderson's son, Kevin, said, "My father's view was that the public is the employer of these government employees and has the right to know what they're up to."

Government employees are wrong to chill the media's pursuit of that right.

Testimony of Dean Rodney A. Smolla
United States Senate
Committee on the Judiciary

First Amendment and Public Policy Issues Regarding Reporter's Privilege And Criminal Liability for Knowing Possession of Illegally Leaked Classified National Security Information.

I am pleased to have the opportunity to present this testimony to the committee. Rather than burden the Committee with a long prepared statement, my opening remarks will be brief and succinct. I will welcome questions from the Members of the Committee and the opportunity to expand on these points as you deem appropriate. I have five points to make:

(1) There is disagreement among lower federal courts over the meaning of *Branzburg v. Hayes* and over the fundamental question of whether a First Amendment "Reporter's Privilege" exists at all. There is, however, substantial reason to doubt that current First Amendment Doctrine does include a Reporter's Privilege.

(2) There is no clarity in current constitutional doctrine over whether the First Amendment permits the criminal prosecution of reporters for the mere possession or subsequent publication of classified material that the reporter knows to have been leaked illegally. There is, however, substantial reason to doubt that current First Amendment doctrine does bar the making of such mere possession or subsequent publication of classified material criminal.

(3) Sound public policy rationales support the enactment by Congress of a federal shield law that would create a qualified Reporter's Privilege in federal courts. Sound policy rationales support recognition of the survival of this privilege after the death of the reporter.

(4) While the language of current federal espionage laws might plausibly be read to make knowing possession or subsequent publication of illegally leaked classified material criminal, there is substantial reason to doubt that Congress intended current statutory provisions to apply to journalists. Given the ambiguity surrounding congressional intent, and given the constitutional doctrine that cautions courts to construe statutes in a manner that avoids tension with First Amendment principles when possible, courts could appropriately hold that current laws are not intended to apply to journalists, instead inviting Congress to clarify its intent through new legislation that clearly does nor does not make knowing possession or subsequent publication of illegally leaked classified material by journalists criminal.

(5) Sound public policy rationales support the view that it would be unwise to make mere possession or subsequent publication of illegally leaked classified material by journalists criminal, even if the First Amendment is understood as permitting such an enactment.

I will be pleased to expand on any of these points during the question period. My principal value as a resource to the Committee is my expertise on the First Amendment issues implicated by points (1) and (2) above, and so I have appended to this summary of my testimony a brief Memorandum of Law summarizing the basis for my analysis on those two constitutional issues.

Appendix to Testimony of Rodney A. Smolla
Memorandum of Law

First Amendment Issues Regarding Reporter's Privilege
And Criminal Liability for Knowing Possession of Illegally Leaked Classified National Security Information.

I. There is Disagreement Among Lower Federal Courts Over the Meaning of *Branzburg v. Hayes* and over the Fundamental Question of Whether a First Amendment Reporter's Privilege Exists at All. There is, However, Substantial Reason to Doubt that Current First Amendment Doctrine Does Include a Reporter's Privilege

A. Courts Are Divided Over the Meaning of *Branzburg*

Courts are divided over whether current constitutional doctrine does or does not recognize a reporters privilege grounded in the First Amendment or federal common law. This disagreement among the lower courts stems from disagreement over how to interpret the Supreme Court's decision *Branzburg v. Hayes*.[1] In *Branzburg* the Supreme Court appeared to reject, by a five-to-four vote, the notion that there was any "reporter's privilege" emanating from the First Amendment protecting journalists from disclosure of confidential sources. The opinion of the Court, written by Chief Justice Burger for what appeared to be five Justices, was brusque and unequivocal, squarely repudiating the recognition of any such privilege.[2] In a short three-paragraph concurring opinion, however, Justice Powell wrote separately, in his words, to "add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding."[3] He then went on to suggest that it may be appropriate to balance the competing interests at stake on a case-by-case basis.[4]

Notwithstanding the apparently resounding defeat in *Branzburg* for the press, many lower courts, relying on Justice Powell's cryptic concurring opinion, held that the First Amendment did provide a conditional reporter's privilege of some kind.[5] Not all lower courts have been persuaded by this movement, and the question of whether the First Amendment does or does not provide a "reporter's privilege" of some kind remains a matter of debate,[6] fueled in part by ambivalent signals from the Supreme Court itself.[7]

B. Recent Decisions Cast Gathering Doubt Over the Existence of the Privilege

Several recent decisions,[8] including the highly visible decision by the United States Court of Appeals for the District of Columbia in the Judith Miller litigation, have cast serious doubt on the existence of a First Amendment privilege. Until the United States Supreme Court squarely addresses the issue and revisits *Branzburg*, First Amendment law will continue to be plagued by uncertainty.

In *In re Grand Jury Subpoena, Judith Miller,*[9] the United States Court of Appeals for the

District of Columbia Circuit in 2005 held that pursuant to the Supreme Court's decision in *Branzburg* no First Amendment reporter's privilege existed, period. When the United States Supreme Court refused to accept review, despite the urging of many amici and the able representation of prominent constitutional litigators, the significance of the Court of Appeals' ruling was further magnified. That the Supreme Court would let rest a decision of the District of Columbia Court of Appeals rejecting the privilege in a case of such prominence and visibility seemed to send a signal of agreement with the Judith Miller ruling, and the possible demise the long run of lower court precedent that had endorsed the existence of a qualified reporter's privilege grounded in the First Amendment. In the aftermath of *Branzburg*, journalists who continued to successfully assert the existence of a First Amendment reporter's privilege may have been living on borrowed time. That time may now have run out.

II. There is no Clarity in Current Constitutional Doctrine Over Whether The First Amendment Permits the Criminal Prosecution of Reporters for the Mere Possession or Subsequent Publication of Classified Material. There is, however, Substantial Reason to Doubt that Current First Amendment Doctrine Does Bar the Making of Mere Possession or Subsequent Publication of Classified Material Criminal.

A. The "*Daily Mail*" Line of Cases Protecting Publication of Truthful Information Lawfully Obtained

In a line of First Amendment cases nearly three decades old the Supreme Court has repeatedly stated that the First Amendment provides a high degree of protection for the publication of truthful information,[10] often emphasizing the link of such speech to the democratic process.[11] This line of precedent is sometimes referred to in shorthand as the "*Daily Mail*" line of cases.[12] These cases have never recognized an *absolute* First Amendment bar against the government prohibiting the publication of truthful information "lawfully obtained," however. Instead, they have applied a "heightened scrutiny" or "strict scrutiny" standard to such laws, requiring that they be justified by governmental interests of the "highest order" and that they be "narrowly tailored" to effectuate those interests."[13]

B. The Ambiguity of Meaning of the Phrase "Lawfully Obtained"

The Supreme Court has generally trimmed its holdings protecting the dissemination of truthful information with the caveat that such information be "lawfully obtained."[14] What the cases do not fully explain is what is meant by "lawfully obtained."[15]

Two plausible and very different meanings present themselves. At minimum, of course, the phrase as invoked by the Court was clearly intended to mean that the media itself had not engaged in any affirmative lawbreaking--that it had not hacked into the computer or broken into the file cabinet. In *Branzburg v. Hayes*,[16] the Supreme Court sternly admonished that it "would be frivolous to assert" that "the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws."[17] Newsworthy information might often be generated through criminal misconduct, and

newsworthiness alone cannot confer immunity, for "[a]lthough stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."[18]

If the minimum meaning of "lawfully obtained" is obvious, however, the outer limits not. The phrase could mean more. At least when the government has passed specific legislation making downstream disclosure of the information also criminal, it would not stretch ordinary understandings of language to treat such information as *not* being "lawfully obtained," in exactly the same way that we do not treat the knowing receipt of stolen goods as "lawfully obtained." The Court in *Florida Star v. B.J.F.*,[19] in striking down a judgment against the media for publishing the name of a rape victim inadvertently disclosed by the police themselves, explicitly reserved judgment on the trafficking problem, noting that the "*Daily Mail* principle does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper *or by a source*, government may ever punish not only the unlawful acquisition, but the ensuing publication as well."[20]

C. The Mixed Message of the Court's Ruling in *Bartnicki v. Vopper*

In *Bartnicki v. Vopper*,[21] the Supreme Court held that federal and state statutes prohibiting the disclosure of information obtained through illegal interception of cellular phone messages was unconstitutional as applied to certain media and non-media defendants who received and disclosed to others tape recordings of the intercepted messages from anonymous sources.[22] The Court in *Bartnicki* made it abundantly clear that it was not answering the ultimate question of whether the media may ever be held liable for publishing truthful information lawfully obtained, but was rather addressing what it described as "a narrower version of that still-open question,"[23] which it put as: "'Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?'"[24]

Justice Stevens wrote the opinion of the Court in *Bartnicki*, in an opinion nominally joined by Justices Kennedy, Souter, Ginsberg, Breyer, and O'Connor. But these appearances are deceiving. Although decided by a six-to-three majority, two of the Justices in the majority, Justices Breyer and O'Connor, concurred in an opinion (written by Justice Breyer) that appeared to dramatically trim the reach and rationale of the majority opinion. The holding in *Bartnicki* thus was narrowed in two ways: first, by the numerous explicit limitations placed on the reach of the decision in Justice Stevens' opinion for the Court, and second, by the substantial and important additional limitations articulated in Justice Breyer's concurring opinion. Indeed, *Bartnicki* is a case in which the nominal "opinion of the Court" may well not be that at all. Justice Stevens' opinion is more aptly described as a four-Justice plurality decision, a decision that was quite sharply and dramatically constrained by the limiting language in the Breyer and O'Connor concurrence.

Whereas the opinion for the Court by Justice Stevens emphasized the *Daily Mail* line of

cases and the presumptive unconstitutionality of laws that burden trafficking in truthful information, Justice Breyer's opinion adopted exactly the opposite baseline. Laws protecting private electronic conversations, like "laws that would award damages caused through publication of information obtained by theft from a private bedroom," must as "a general matter" be tolerated by the First Amendment, he argued, because of the importance of privacy, including its role in fostering private speech.[25] In Justice Breyer's view, the question was merely one of balance and tailoring; the Constitution does not broadly forbid legislation against trafficking in privacy contraband, it merely "demands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with personal, speech-related privacy."[26]

As Justice Breyer saw the matter, the case posed a true constitutional conflict, involving competing constitutional values--indeed, competing *First Amendment* values, the right of the media to publish information on the one hand, and the "right to be let alone," which in turn served the First Amendment interest in fostering private speech.[27] The strict scrutiny standard was out of place in such situations, Justice Breyer reasoned. Rather, with interests of constitutional dimension on both sides of the equation, a balancing methodology that gave meaningful weight to both of those dimensions was called for. Using a First Amendment cost-benefit analysis, Justice Breyer stated that he "would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?"[28]

The majority's holding, Justice Breyer insisted, was limited to the "special circumstances" the case presented, in which "the radio broadcasters acted lawfully (up to the time of final public disclosure)"[29] and the information broadcasted "involved a matter of *unusual* public concern, namely *a threat of potential physical harm to others*."[30] Note the emphasis added in the just-quoted caveat, in which Justice Breyer spoke of the case as involving a matter of "unusual" public concern, and then identified what was so unusual about it--a *threat* of *potential physical harm to others.*

And therein was the crux of the concurring views of Justices Breyer and O'Connor. Their quarrel was not with the general principle of banning the disclosure of illegally intercepted communication, but with the specific balance struck by the statutes being reviewed, *as applied* to the specific factual circumstances in *Bartnicki*, circumstances the two concurring Justices viewed through a prism of factual assumptions that cast them in their most sinister possible light. The statutes, *as applied*, failed to "reasonably reconcile" the competing interests, interfering "disproportionately" with "media freedom."[31]

The broadcasters, Justice Breyer noted, did not "encourage" or participate "directly or indirectly" in the interception.[32] "No one claims that they ordered, counseled, encouraged, or otherwise aided or abetted the interception, the later delivery of the tape by the interceptor to an intermediary, or the tape's still later delivery by the intermediary to the media."[33] This

observation suggested that in Justice Breyer's view, any such involvement by the media would have disqualified it from the protection the Court granted in *Bartnicki*, and rendered the media answerable under the statutes.

In a particularly intriguing discussion, Justice Breyer also emphasized that the laws at issue did not forbid the receipt of the tape itself.[34] Justice Breyer seemed to be signaling that *if* the law made it illegal to *receive* the actual tape recording, to obtain it (at least with knowledge that it contained illegally purloined conversations) would *itself* be unlawful conduct. In such a case, Justice Breyer appeared to be arguing, the media could no longer claim the safety-base of having acquired the information "lawfully," and would now be outside the ambit of the *Bartnicki* protection.[35] If this is what Justice Breyer in fact meant, he had identified a sizable constitutional loophole, and all but invited legislatures to amend their statutes and drive through.

D. The Pentagon Papers Case Reinforces the Prior Restraint Doctrine, But Does not Fully Solve the Possession or Subsequent Publication Questions

The "Pentagon Papers" case, *New York Times Co. v. United States,*[36] is famous for its holding that the First Amendment's heavy presumption against prior restraints barred the issuance of injunctions against *The New York Times* and *The Washington Post* forbidding them from publishing excerpts from the "Pentagon Papers," classified government documents recounting the history of the Vietnam War. But the "Pentagon Papers" case left many decisions unanswered. There were many opinions issued by individual Justices ranging widely over numerous constitutional and statutory questions. The very short *per curiam* decision that actually constituted the formal ruling of the Court said very little beyond recitation of the heavy presumption against prior restraints, and the conclusion that the government had failed to meet its burden of overcoming that presumption.

The Pentagon papers case did not overturn the traditional First Amendment principle, since reaffirmed by the Court,[37] that the presumption against prior restraints is not absolute. Most pointedly, in specific context of national security, the Court stated in dicta in Near v. Minnesota,[38] that "protection even as to previous restraint is not absolutely unlimited," and that "no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." The material that had been leaked in the Pentagon Papers was primarily historical, and there was no strong showing by the government that its release would endanger American lives or jeopardize in some palpable sense any ongoing American military or intelligence operations. The ruling in the Pentagon Papers case would thus not foreclose a prior restraint to prevent dissemination of leaked material in situations in which the government met the burden of demonstrating that dissemination was likely to endanger American lives or compromise an ongoing or planned military or espionage operation.

Wholly aside from the prior restraint issue, the Pentagon Papers case did not purport to rule upon or resolve the question of whether the First Amendment permitted prosecution for the knowing possession of illegally leaked classified material, or whether subsequent publication of such material could be made criminal, or whether existing federal statutes did or did not permit

such prosecutions.[39]

E. The Principle that The First Amendment Does Not Shield Journalists from Criminal or Civil Laws of General Applicability

If Congress were to clearly make the knowing possession or subsequent publication of illegally leaked classified material by any person (including journalists), the law would gain constitutional support from the principle that the First Amendment normally does not shield journalists from criminal or civil laws of general applicability.

The Supreme Court's decision in *Cohen v. Cowles Media Company*,[40] for example, held that the First Amendment did not prevent Minnesota from using its law of contracts and promissory estoppel in a suit brought by a source for breach of a promise of confidentiality made to the source by a journalist. In *Cohen,* there were numerous intersections with expressive activity. The promise made by the journalist to Dan Cohen to keep his identity secret involved the use of language. The breach of that promise by the journalist and the newspaper was effectuated entirely through expressive activity--publication of Cohen's name in the newspaper. The newspaper printed the truth, Cohen's identity, and his identity was entirely newsworthy. The newspaper printed Cohen's name because in the exercise of its editorial judgment it determined that Cohen, a political operative, had tried to smear an opponent. Yet despite all of this, the Court refused to apply any heightened First Amendment standard to Cohen's promissory estoppel claim, stating that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[41]

F. The Media May Normally Not be Singled Out for Especially Unfavorable Treatment

The "general applicability" rule cuts in two directions. While the *Cohen* ruling is an example of the doctrine that journalists are generally not exempted from ordinary rules of civil and criminal law, it is also when the government acts to attempt to criminalize publication of truthful information, government may not single out the press for especially unfavorable treatment.[42] This was an important element in the Supreme Court's ruling in *The Florida Star v. B.J.F.*,[43] in which the Court refused to permit liability against a newspaper that had revealed the name of an alleged rape victim. One of the constitutional infirmities emphasized by the Court was the Florida law's exclusive focus on media dissemination.

G. The First Amendment Does not Absolutely Forbid Criminalizing Possession of Material to "Dry Up the Market" for Trafficking in Such Material–the Child Pornography Example

Outside the realm of communication, legislatures routinely make the judgment that is as important to dry up the market for contraband as it is to attack its initial creation.[44] At times, most notably when approving laws attacking pornography, the Supreme Court has accepted the

"dry up the market" rationale even when dealing with speech. In *Osborne v. Ohio*,[45] the Supreme Court held that the rule of *Stanley v. Georgia*,[46] protecting "home possession" of obscene material, did apply to possession of child pornography.[47] Whereas in *Stanley* the State of Georgia primarily sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers, in regulating possession of child pornography, the government was able to rely on more than a mere paternalistic interest in regulating possessor's mind, but could rather defend its law in the hope "to destroy a market for the exploitative use of children."[48]

H. Suggested Elements of a Law that Could Satisfy Constitutional Requirements

The protection of national security secrets would presumably qualify as an interest of the "highest order." A well-crafted law that made the knowing possession or subsequent publication of illegally leaked classified material a criminal act, and that met the standard of "narrow tailoring," could thus presumably satisfy First Amendment requirements. The "narrow tailoring" of the law could well be critical to its constitutionality. Some of the attributes of a narrowly tailored law, for example, would be:

(1) Clarity in its intention to make possession illegal for all citizens (including but not limited to journalists) whether or not the situation involves classic espionage activity.

(2) A knowledge or scienter that required that the citizen-possessor or publisher knew that the material was classified and was illegally released.

(3) A knowledge or scienter requirement that the citizen-possessor or publisher knew or should have known that disclosure of the material could pose concrete injury to the national security of the United States, such as by placing in danger the lives of American military or intelligence personnel, or compromising an ongoing or planned military or intelligence operation.

(5) The existence of a "whistleblower" or "safe harbor" defense that would exempt the citizen-possessor from liability when the material leaked exposes criminal wrongdoing or unconstitutional behavior by the government or government officials (tracking the rationale of Justice Breyer in *Bartnicki*).

I. A Cautionary Conclusion: Constitutional Power Does Not Equate with Sound Policy

In this Memorandum I have attempted to state objectively the currently understood constitutional principles that would be implicated by legislation rendering criminal the mere possession of illegally leaked classified national security material. That Congress may the constitutional power to pass such legislation, however, does not mean that it should.

It is beyond the scope of this Memorandum of Law, which seeks to provide objective guidance, to delve deeply into the public policy questions that would be posed by such

legislation. It is worth noting, however, that we have for many years lived in a society in which we have not prosecuted journalists merely for possessing classified material, even though it they journalist knew the material had been illegally leaked. We have instead chosen to investigate and in appropriate cases prosecute the government employees who broke the law most directly by leaking the material in the first instances. New legislation that would upset this carefully honed balance between the government and the vital and important independence of the press in a free society ought not be entertained or enacted without a strong showing that it is necessary to protect national security. It is important to way in the balance the social good that is often produced by the freedom of a vigorous press to receive and publish material exposing arguably criminal, unethical, or unconstitutional actions by the government.

I believe that our society would not be well-served by new legislation that would clarify existing law to render mere possession or subsequent publication of illegally leaked classified national security material illegal.

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[1]408 U.S. 665 (1972).

[2]The opinion of the Court in *Branzburg* is literally permeated with rejection of the privilege, with scores of sentences expressing, in different ways, the Court's unwillingness to read such a privilege into the First Amendment. *See, e.g., id.* at 697 (" Of course, the press has the right to abide by its agreement not to publish all the information it has, but the right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function."); *id.* at 698 ("We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press."); *id.* at 699 ("It is said that currently press subpoenas have multiplied, that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials. These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere.").

[3]*Id.* at 709 (Powell, J., concurring).

[4]*Id.* at 709-10 (Powell, J., concurring) ("The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in Mr. Justice Stewart's dissenting opinion, that state and federal authorities are free to 'annex' the news media as 'an investigative arm of government.' ... If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.").

[5]*See, e.g.,* Zerilli v. Smith, 656 F.2d 705 (D.C.Cir.1981) (qualified privilege available under some circumstances in civil litigation, since *Branzburg* does not control in civil cases); United States v. Burke, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983) (reporters qualified privilege in criminal, as well as civil cases, conditioned upon "clear and specific showing" that the information sought [1] is highly material and relevant, [2] is necessary or critical to the claim, and [3] is not obtainable from other available sources); United States v. Cuthbertson, 630 F.2d 139 (3d Cir.1980), *cert. denied*, 454 U.S. 1056 (1981) (journalists have a federal common law qualified privilege, in both civil and criminal cases, to refuse to divulge their sources); LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986) (whether journalist's privilege will protect source depends upon whether the information sought is relevant, can be obtained by alternate means, and is the subject of a compelling interest); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir.1980), *cert. denied*, 450 U.S. 1041 (1981) (reporter has first amendment privilege which protects refusal to disclose identity of confidential informants, although privilege is not absolute).

[6]*See* In re Grand Jury Proceedings, Storer Communications, Inc. v. Giovan, 810 F.2d 580, 585 (6th Cir. 1987) ("Accordingly, we decline to join some other circuit courts, to the extent that they have stated their contrary belief that those predicates do exist, and have thereupon adopted the qualified privilege balancing process urged by the three *Branzburg* dissenters and rejected by the majority... That portion of Justice Powell's opinion certainly does not warrant the rewriting of the majority opinion to grant a first amendment testimonial privilege to news reporters, especially when the quoted language is considered in the context of that language which precedes it."). Among courts that do recognize a reporter's privilege, there is a debate over whether it applies only to "confidential" material gathered by journalists, or to "non-confidential" material as well, such as videotape "outtakes" from television interviews. Several circuits have extended the privilege to non-confidential work product, either in civil or criminal cases. *See* Shoen v. Shoen, 5 F.3d 1289, 1294-95 (9th Cir.1993). Other courts, however, have refused to extend the privilege to non-confidential material. *See* Gonzalez v. National Broadcasting

Company, 155 F.3d 618 (2d Cir. 1998) (rejecting privilege as to non-confidential material); United States v. Smith, 135 F.3d 963 (5th Cir.1998) (refusing to apply privilege to nonconfidential videotape outtakes sought in a criminal proceeding); In re Shain, 978 F.2d 850, 853 (4th Cir.1992) (tacitly rejecting the privilege in a criminal case where the information sought was non-confidential).

[7]Subsequent statements by the Supreme Court and individual Justices have advanced the ambiguity. In *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201(1990), for example, the Supreme Court stated: "In *Branzburg*, the Court rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary." And in *New York Times, Co. v. Jascalevich*, 439 U.S. 1301, 1302 (1978), Justice White writing an in-chambers single-Justice opinion denying a stay, stated: "There is no present authority in this Court that a newsman need not produce documents material to the prosecution or defense of a criminal case, or that the obligation to obey an otherwise valid subpoena served on a newsman is conditioned upon the showing of special circumstances."

[8]See McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003) (Posner, J.) ("The defendants claim that the tapes in question are protected from compelled disclosure by a federal common law reporter's privilege rooted in the First Amendment. See Fed. R. 501. Although the Supreme Court in Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), declined to recognize such a privilege, Justice Powell, whose vote was essential to the 5-4 decision rejecting the claim of privilege, stated in a concurring opinion that such a claim should be decided on a case-by-case basis by balancing the freedom of the press against the obligation to assist in criminal proceedings. at 709-10, 92 S.Ct. 2646. Since the dissenting Justices would have gone further than Justice Powell in recognition of the reporter's privilege, and preferred his position to that of the majority opinion (for they said that his "enigmatic concurring opinion gives some hope of a more flexible view in the future, id. at 725, 92 S.Ct. 2646), maybe his opinion should be taken to state the view of the majority of the Justices-though this is uncertain, because Justice Powell purported to join Justice White's "majority" opinion. A large number of cases conclude, rather surprisingly in light of Branzburg, that there is a reporter's privilege, though they do not agree on its scope. See, e.g., In re Madden, 151 F.3d 125, 128-29 (3d Cir.1998); United States v. Smith, 135 F.3d 963, 971 (5th Cir.1998) Shoen v. Shoen, 5 F.3d 1289, 1292-93 (9th Cir.1993); In re Shain, 978 F.2d 850, 852 (4th Cir.1992); United States v. LaRouche Campaign, 841 F.2d 1176, 1181-82 (1st Cir.1988); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir.1986). A few cases refuse to recognize the privilege, at least in cases, which Branzburg was but this case is not, that involve grand jury inquiries. In re Grand Jury Proceedings, 5 F.3d 397, 402-03 (9th Cir.1993); In re Grand Jury Proceedings, 810 F.2d 580, 584-86 (6th Cir.1987). Our court has not taken sides. Some of the cases that recognize the privilege, such as Madden, essentially ignore *Branzburg*, see 151 F.3d at 128; some treat the "majority" opinion in Branzburg as actually just a plurality opinion, such as Smith, see 135 F.3d at 968-69; some audaciously declare that Branzburg actually created a reporter's privilege, such as Shoen, 5 F.3d at 1292, and von Bulow v. von Bulow, supra, 811 F.2d at 142; see also cases cited in Schoen at 1292 n. 5, and Farr v. Pitchess, 522 F.2d 464, 467-68 (9th Cir.1975). The approaches that these decisions take to the

issue of privilege can certainly be questioned. See In re Grand Jury Proceedings, supra, 810 F.2d at 584-86. A more important point, however, is that the Constitution is not the only source of evidentiary privileges, as the Supreme Court noted in Branzburg with reference to the reporter's privilege itself. 408 U.S. at 689, 706, 92 S.Ct. 2646. And while the cases we have cited do not cite other possible sources of the privilege besides the First Amendment and one of them, LaRouche, actually denies, though without explaining why, that there might be a federal common law privilege for journalists that was not based on the First Amendment, see 841 F.2d at 1178 n. 4; see also In re Grand Jury Proceedings, supra, 5 F.3d at 402-03, other cases do cut the reporter's privilege free from the First Amendment. See United States v. Cuthbertson, 630 F.2d 139, 146 n. 1 (3rd Cir.1980); In re Grand Jury Proceedings, supra, 810 F.2d at 586-88; cf. Gonzales v. National Broadcasting Co., 194 F.3d 29, 36 n. 2 (2d Cir.1999).").

[9]397 F.3d 964, 33 Media L. Rep. (BNA) 1673 (D.C. Cir. 2005), cert. denied, 125 S. Ct. 2977 (2005).

[10]See, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (holding unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim obtained from courthouse records); The Florida Star v. B.J.F., 491 U.S. 524 (1989) (holding unconstitutional the imposition of liability against a newspaper for publishing the name of a rape victim in contravention of a Florida statute prohibiting such publication in circumstances in which a police department inadvertently released the victim's name); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104 (1979) (finding unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender, where the newspapers obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor, stating that the "magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty"); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (overturning criminal sanctions against newspaper for publishing information from confidential judicial disciplinary proceedings leaked to the paper); Butterworth v. Smith, 494 U.S. 624 (1990) (refusing to enforce the traditional veil of secrecy surrounding grand jury proceedings against a reporter who wished to disclose the substance of his own testimony after the grand jury had terminated, holding the restriction inconsistent with the First Amendment principle protecting disclosure of truthful information).

[11]*See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986) ("speech of public concern is at the core of the First Amendment's protections"); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (When the law regulates discussion on "public affairs" truthful speech "may not be the subject of either civil or criminal sanctions," because such speech "is more than self-expression; it is the essence of self-government.").

[12]The *Daily Mail* case, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) has come to be seen as the case encapsulating the principle most succinctly. *See id.* at 103 ("if a newspaper *lawfully obtains* truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state

interest of the highest order.")

[13]The Florida Star v. B.J.F., 491 U.S. 524 (1989).

[14]*See, e.g.,* The Florida Star v. B.J.F., 491 U.S. 524, 534 (1989) ("First, because the *Daily Mail* formulation only protects the publication of information which a newspaper has 'lawfully obtain[ed],'. . . the government retains ample means of safeguarding significant interests upon which publication may impinge, including protecting a rape victim's anonymity. To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the Daily Mail principle the publication of any information so acquired."); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979) ("None of these opinions directly controls this case; however, all suggest strongly that if a newspaper *lawfully obtains* truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978) (in the course of protecting a newspaper's First Amendment right to print confidential material from proceedings before Virginia's Judicial Inquiry and Review Commission the Court noted that its holding was not "concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it.").

[15]The Florida Star v. B.J.F., 491 U.S. 524, 535 n. 8 (1989) ("The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. This issue was raised but not definitively resolved in *New York Times Co. v. United States* . . . and reserved in *Landmark Communications*. . . We have no occasion to address it here.") (emphasis in original) (citing New York Times Co. v. United States 403 U.S. 713 (1971); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978).

[16]408 U.S. 665 (1972).

[17]*Id.* at 691.

[18]*Id.*

[19]491 U.S. 524 (1989).

[20]*Florida Star*, 491 U.S. at 535 n.8 (emphasis added).

[21]121 S.Ct. 1753 (2001).

[22]Gloria Bartnicki was a principal labor negotiator for a teachers' union in Pennsylvania, the Pennsylvania State Education Association. Anthony Kane, a high school teacher at Wyoming Valley West High School, was president of the union. In May of 1993, Bartnicki and Kane had a telephone conversation concerning the ongoing labor negotiations with a local school board. Kane was speaking from a land phone at his house. Bartnicki was talking from her car, using her

cellular phone. Strategies and tactics were discussed, including the possibility of a teacher strike. The talk was candid, and included some blunt down-and-dirty characterizations of their opponents in the labor controversy, at times getting personal. One of the school district's representatives was described as "too nice," another as a "nitwit," and still others as "rabble rousers." Among the opposition tactics that raised the ire of Bartnicki and Kane was the proclivity, in their view, of the school district to negotiate through the newspaper, attempting to pressure the teachers' union by leaks to the press. The papers had reported that the school district was not going to agree to anything more than a pay raise of three percent. As they discussed this position, Kane stated: "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . [t]o blow off their front porches, we'll have to do some work on some of those guys." An unknown person intercepted the conversation, presumably using a scanner that picked up the cell phone transmissions, recording it on a cassette tape. An unknown person proceeded to place the tape in the mail box of the president of a local taxpayer's group that was opposed to the teachers' union and its bargaining positions, a man named Jack Yocum. Yocum listened to the tape, recognized the voices of Bartnicki and Kane, and took the tape to a local radio station talk show host, Frederick Vopper. Vopper received the tape in the Spring of 1993, but waited until late September 30 to broadcast it, which he did a number of times. At first Vopper broadcast a part of the tape that revealed Bartnicki's phone numbers. She began to receive menacing calls, and was forced to changed her numbers. The tape later was warped so that the numbers would be indistinguishable when it was played on the air. Yocum, who first received the tape, and Vopper, who played it on the radio, both realized that it had been intercepted from a cell phone, and that a scanner had probably been used to make the intercept. Other media outlets also received copies of the tape, including a newspaper in Wilkes-Barre, but no other broadcaster or publisher played the tape or disclosed its contents until the material on the tape was initially broadcast by Vopper. Once Vopper broke the story, however, secondary coverage of the events, including the contents of the tape, appeared in other media outlets. Invoking a federal statute and a very similar Pennsylvania law, Bartnicki and Kane sued Yocum, Vopper, and the radio stations that carried Vopper's show, for having used and disclosed the tape of their intercepted telephone conversation.

[23]*Id.* at 1762.

[24]*Id.* at 1762 (*quoting Boehner*, 191 F.3d. at 484-485) (Sentelle, J., dissenting). The Court observed that it's unwillingness to construe the question before it any more broadly was consistent with the "Court's repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment." *Bartnicki*, 121 S.Ct. at 1762.

[25]*Id.* (*citing* Warren & Brandeis, *The Right to Privacy*, 4 Harv. L.Rev. 193 (1890); Restatement (Second) of Torts § 652D (1977); Katz v. United States, 389 U.S. 347, 350-351 (1967) ("[T]he protection of a person's general right to privacy--his right to be let alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual States").

[26]*Bartnicki*, 121 S.Ct. at 1767 (Breyer, J., concurring).

[27]*Id.* 1766 (*quoting* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[28] *Bartnicki*, 121 S.Ct. at 1766 (Breyer, J., concurring).

[29]*Bartnicki*, 121 S.Ct. at 1766 (Breyer, J., concurring).

[30]*Id.* 1766 (Emphasis added).

[31]*Id.* at 1767.

[32]*Id.*

[33]*Id.* (*Citing* 18 U.S.C. § 2 (criminalizing aiding and abetting any federal offense); 2 W. LaFave & A. Scott, Substantive Criminal Law §§ 6.6(b)-©, pp. 128-129 (1986) (describing criminal liability for aiding and abetting).

[34]*Bartnicki*, 121 S.Ct. at 1767 *Id.* (Breyer, J., concurring).

[35]*Id.*, 1767 ("The Court adds that its holding 'does not apply to punishing parties for obtaining the relevant information unlawfully.'").

[36]403 U.S. 713 (1971).

[37]See Nebraska Press Association v. Stuart, 427 U.S. 539, 570 (1976).

[38]383 U.S. 697 (1931).

[39]The question of whether current federal espionage laws were intended by Congress to reach journalists who knowingly receive illegally leaked classified material is not addressed in this Memorandum of Law. As the conflicting opinions of those Justices in the "Pentagon Papers" who addressed this issue attest, however, the intent and meaning of existing laws are a best unclear, and for that reason alone the laws ought not be invoked against journalists unless and until Congress acts affirmatively to clarify their meaning.

[40]501 U.S. 663 (1991).

[41]*Id.* at 669. *See also* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990) (sustaining generally applicable tax laws as applied to religious institution); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (sustaining application of antitrust laws to the press); Associated Press v. United States, 326 U.S. 1 (1945) (same); Associated Press v. NLRB, 301 U.S. 103 (1937) (sustaining application of National Labor Relations Act to the press); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (sustaining application of Fair Labor Standards Act to the press).

[42]See, e.g., Florida Star, Inc. v. B.J.F., 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989);

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974); Grosjean v. American Press Co., 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660, 1 Media L. Rep. (BNA) 2685 (1936). See also Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989) (striking down exemption from state sales and use tax of religious periodicals under Establishment Clause, but not reaching Press Clause issues).

[43] 491 U.S. 524 (1989).

[44]*See* Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 93, at 692 (1972) (explaining that social policy rationale for making it a crime to receive stolen property is to remove the incentive to steal by drying up the market for stolen goods).

[45]495 U.S. 103 (1990).

[46]394 U.S. 557 (1969).

[47]*Osborne* involved an Ohio statute which, on its face, purported to prohibit the possession of "nude" photographs of minors. The Supreme Court recognized that depictions of nudity, without more, constitute protected expression. But as construed by the Ohio Supreme Court, the statute prohibited only "the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.". By limiting the statute's operation in this manner, the Supreme Court held, "the Ohio Supreme Court avoided penalizing persons for viewing or possessing innocuous photographs of naked children." *Id.* The Supreme Court also found it significant that the Ohio Supreme Court concluded that the State must establish scienter in order to prove a violation of the law. .

[48]*See also* New York v. Ferber, 458 U.S. 747, 760 (1982). ("[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market.").

Everything Jersey

The Star-Ledger

Standing up to secrecy

Saturday, April 22, 2006

Not content with stamping any memos it can "top secret" and reclassifying already-public documents in the National Archives, federal agents now have a new target: the papers of the late investigative columnist Jack Anderson.

FBI agents have been calling Anderson's widow, questioning a George Washington University professor, asking for the names of anyone who has looked through Anderson's files. The Pulitzer Prize-winning muckraker donated his papers to the university, but his family hasn't transferred them yet.

The government's prime target is information that might help prosecutors in a case against two former lobbyists charged with disclosing classified materials. But the G-men also made it clear they would confiscate anything else they came across that could be considered secret or confidential, no matter how old or innocuous.

Fortunately, Anderson's relatives see this for the arrogant power play that it is. They are saying no. Just to be safe, they should keep the papers until it is clear the FBI or other agencies won't be able to use the university to find a way to satisfy the government's confiscatory urges.

Anderson spent a career outing government secrets, not ones that threatened America's security but plenty that showed Congress, the White House and other federal players at their most venal. Over the decades, he caused many vexatious moments for those who wanted to keep citizens in the dark about how their government really operated, and the nation was far the better for it. Anderson would be pleased to know his legacy is still carrying out that mission.

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Trying To Get Muckraker's Papers, Did FBI Trick Widow?

By Justin Rood - April 19, 2006, 11:59 AM

This morning's newspapers are **ablaze** with the outrageous **news** that the FBI was trying to get its hands on over 200 boxes of files once belonging to legendary investigative journalist Jack Anderson.

What the papers didn't report was the truly ugly extent to which the bureau has gone to achieve their goal -- such as manipulating Anderson's elderly widow to sign a document she apparently didn't understand.

I spoke with Jack Anderson's son Kevin yesterday. He's an attorney, and acts as the family's representative with the FBI. He told me that the lead agent in this case, Leslie Martell, went behind his and his siblings' backs to get his elderly mother, Olivia, to sign a form that would allow FBI agents to review and remove documents from her husband's files.

Agent Martell and her partner came twice to meet with Olivia Anderson; on both occasions, Olivia's daughter was present, although she was in and out of the meeting, caring for her children.

Through Kevin, his sister says that at no time was she present when any consent form was discussed or signed, which leads the family to conclude the agents waited until they were alone with Olivia before presenting the document.

Soon after, Martell went to Mark Feldstein, a journalism professor at GWU who has been reviewing Anderson's files, and told him of the signed consent form.

I called Feldstein, who told me about his exchange with the FBI agent. "She said, 'Mrs. Anderson signed a consent form'" to allow the FBI to review the documents and take what they wanted, Feldstein said. Alarmed, he called the family to ask if this was the case. They were shocked, he said.

When Kevin told his mother the document would allow government agents to review and remove her deceased husband's documents, she was furious, Kevin told me. "She was more outraged than any of us," Kevin said. "She's volunteered to go to jail on this one. She feels pretty strongly about this." Olivia, who was raised among the West Virginia coal fields, turned 79 in February.

The FBI was never a fan of Anderson's. The longtime *Washington Post* scribe frequently exposed hypocrisies and corruption hiding behind government classification. Former FBI chief J. Edgar Hoover once called Jack "lower than the regurgitated filth of vultures."

Calls to the FBI about the consent form were not immediately returned.

(*ed. note: new information was added to this post at 12:56 PM.*)

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The Times-Tribune

04/20/2006

FBI should state interest in papers

Soon after the funeral of columnist Jack Anderson last December, the FBI informed his widow that it wanted access to his papers. Agents said they planned to sift through the documents and to remove anything they deemed to be a risk to national security.

The premise for the proposed search is an ongoing five-year investigation of two lobbyists for an American pro-Israel organization who are suspected of leaking classified government documents.

Mr. Anderson, who died at 83, had been in poor health for most of the five years for which the investigation has been active, and had not written columns on the matter.

Throughout his career, Mr. Anderson wrote many columns based on information he had received from sources within the government.

That does not mean that the FBI has carte blanche to rifle through his papers, however. If it has information that the papers contain useful information relative to a crime or crimes, it should obtain warrants specifically detailing the data in question.

Doing so would require it to provide the court with some probable cause for a search, and preclude the agency from conducting a fishing expedition for information that it might find merely embarrassing, rather than threatening to national security.

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Court Cases Raise New Issues About Shielding News Sources

POLITICS & ECONOMICS

WEDNESDAY, APRIL 19, 2006 A8

Media Firms File to Quash Subpoenas in Libby Matter; Columnist's Kin Resist FBI

By Anne Marie Squeo
And Sarah Ellison

Two high-profile court cases in Washington are raising new questions about reporters' protections of their sources and notes, including after death, and could set the stage for further legal battles.

Yesterday, media companies asked a federal judge to quash subpoenas issued by lawyers representing I. Lewis Libby, a former top White House official, arguing they are overly broad, relate to confidential sources and are largely irrelevant to the case. Reporters have figured in the criminal case against Mr. Libby, who was indicted on charges of lying during a criminal investigation into the leaking of a Central Intelligence Agency agent's identity.

Death in December

At the same time, the family of the late Jack Anderson, the columnist known for exposing government corruption and scandals, went public with a dispute over the Federal Bureau of Investigation's efforts to obtain access to his notes and papers and remove those they deem classified before the documents become available to the public at George Washington University. The university, in Washington, D.C., is in the process of acquiring about 200 boxes belonging to Mr. Anderson, who died in December at the age of 83.

The FBI has said that among other things it is looking for information that may be tied to the coming trial of two former lobbyists for the American Israel Public Affairs Committee, who are accused of leaking classified information to journalists and others.

Free-speech advocates say the cases represent an assault on reporters' unpublished work -- notes, drafts of stories, telephone conversations and emails -- that may or may not have been used in a story. Efforts to pass a federal shield law protecting journalists have stalled, and the Bush administration has stepped up efforts to crack down on leaks.

The Justice Department is investigating leaks of information to journalists who reported on the National Security Agency's warrantless surveillance program as well as the government's use of overseas secret prisons to interrogate terrorist suspects. Monday, articles on both subjects were awarded Pulitzer Prizes, newspaper journalism's highest honor.

In the Anderson case, FBI agents sought access to the documents from family members, the university and others who have seen them. While agents have said their interest in Mr. Anderson's documents relates to a continuing investigation involving the pro-Israel lobby group known as AIPAC, the FBI said yesterday its interest is focused on removing classified documents that might be in the boxes.

'Reasonable Concern'

News of the FBI's requests was reported earlier by the Chronicle of Higher Education. In a statement, the FBI said it has determined that the late journalist's papers include a number of documents containing classified information that belong to the government. "Under the law, no private person may possess classified documents that were illegally provided to them," the statement said. "The U.S. government has reasonable concern over the prospect that these classified documents will be made available to the public at the risk of national security and in violation of the law." The two-paragraph statement didn't mention the AIPAC investigation.

The FBI is seeking to review Mr. Anderson's documents from 1980 to the present, and Kevin Anderson, the journalist's son, says the government has declined repeated attempts to limit the inquiry to just documents related to AIPAC. The columnist's family has notified the FBI that they won't provide access to the records, leaving the government little choice but to issue a subpoena or its equivalent to get to them.

Meanwhile, the case against Mr. Libby will partly hinge on the testimony of former New York Times reporter Judith Miller, Time magazine reporter Matthew Cooper and NBC News Washington bureau chief Tim Russert. All three media organizations filed motions with the court seeking to quash trial subpoenas issued by the defense team, as did Ms. Miller.

The indictment against Mr. Libby alleges he lied about his conversations with these journalists. But his defense team contends any discrepancies between his testimony and that of the reporters were innocent mistakes, not intentional misrepresentations. To that end, they are seeking documents, emails, and notes from reporters and their news organizations that go well beyond what were provided to the special prosecutor investing the potentially illegal leaking of a CIA agent's identity.

From the New York Times, Mr. Libby's defense team is seeking documents provided not just to Ms. Miller but also to Nicholas Kristof, a Times columnist who wrote about a fact-finding mission to Niger by former U.S. ambassador Joseph Wilson, the husband of Valerie Plame, the CIA agent whose identity was disclosed. The defense is also seeking communications between any New York Times employee or agent and eight government officials that relate to Mr. Wilson.

Door Was Opened

Special Prosecutor Patrick Fitzgerald opened the door for such requests when he forced reporters to testify in the CIA-leak investigation, and went so far as to send Ms. Miller to prison for 85 days to compel her testimony. While media lawyers and free-speech advocates say Mr. Fitzgerald's probe weakened journalistic protections and set a dangerous precedent for other prosecutors, reporters and news organizations were allowed to tailor the information provided, something Mr. Libby's defense team doesn't appear inclined to do.

NBC News, a subsidiary of General Electric Co., also is fighting a request for documents and information related to both Mr. Russert and fellow newscaster Andrea Mitchell.

From Time magazine, for instance, Mr. Libby's defense team is seeking not just information from Mr. Cooper, but also documents reflecting conversations between employees of Time Inc. about Ms. Plame and her husband, as well as discussions between employees and their sources. They are also seeking draft copies of stories.

"Although Mr. Libby has claimed a right to know what information the press corps in general possessed concerning Mrs. Wilson's affiliation with the CIA, under that theory he would be entitled to subpoena all reporters in Washington to learn what they knew, and when they knew it," the filing by Time, a unit of Time Warner Inc., said yesterday. "There is no stopping point to this approach."

A6 WEDNESDAY, APRIL 19, 2006 THE WASHINGTON POST

FBI Rebuffed on Reporter's Files

Agents Seek Data on AIPAC Case and Classified Papers

By SPENCER S. HSU
Washington Post Staff Writer

The family of the late newspaper columnist Jack Anderson yesterday rejected a request by the FBI to turn over 50 years of files to agents who want to look for evidence in the prosecution of two pro-Israel lobbyists, as well as any classified documents Anderson had collected.

Kevin P. Anderson, son of the storied Washington-based writer, said the family is outraged at what it calls government overreaching and "a dangerous departure" from First Amendment press protections, a stance joined by academic and legal experts.

"After much discussion and due deliberation, the family has concluded that were Mr. Anderson alive today, he would not cooperate with the government on this matter," the family wrote in a letter sent by Washington lawyer Michael D. Sullivan to the FBI. "Instead, he would resist the government's efforts with all the energy he could muster."

Jack Anderson, who reported for and wrote the "Washington Merry-Go-Round" column for more than half a century, died in December at 83.

In targeting the journalist's files after his death, the government is widening its crackdown on leaks of sensitive information. That campaign already includes several FBI inquiries, a polygraph investigation inside the CIA and a Justice Department warning that it may seek to criminalize conversations about classified subjects by nongovernment officials such as journalists, researchers and think-tank analysts.

Kevin Anderson said FBI agents contacted the columnist's 78-year-old widow about a month after his death seeking access to his reporting materials. Agents subsequently contacted Mark Feldstein, an Anderson biographer who once worked for him and is now a George Washington University professor. Feldstein is helping to arrange the transfer of 188 cartons of material owned by the family from Brigham Young University to GWU.

Kevin Anderson, Sullivan and Feldstein said FBI agents assured them that they sought information related to the American Israel Public Affairs Committee case, adding only incidentally that if they came across classified materials they would have to seize them. But Anderson said the government agents would not specify what they were looking for, nor agree to allow anyone without a security clearance to review the files for them.

Investigative columnist Jack Anderson died in December.

Kevin Anderson said agents were "duplicitous" about their "true objective . . . to whitewash Jack Anderson's papers and attempt to remove from history embarrassing documents."

The clash — reported by the Chronicle of Higher Education yesterday — escalates the controversy over the Justice Department prosecution of Steven J. Rosen and Keith Weissman. The two former lobbyists for AIPAC were indicted in August for receiving classified information in conversations with U.S. government officials and passing it on to journalists and Israeli Embassy officials.

Kevin Anderson said the time period U.S. prosecutors are examining came after his father was battling Parkinson's disease and was no longer reporting for the column.

FBI spokesman Bill Carter declined to comment on the AIPAC case, but said the bureau is seeking to remove all classified materials before Anderson's papers are opened to the public through a bequest to the GWU library.

"It has been determined that, among the papers, there are a number of U.S. government documents containing classified information," Carter said, such as information about sources and methods used to gather intelligence. "Under the law, no private person may possess classified documents that were illegally provided to them. There is no legal basis under which a third party could retain them as part of an estate. The documents remain the property of the U.S. government."

Experts said the case illustrates encroachment on press freedoms triggered by the AIPAC case. Defense lawyers say the indictment brought under the 1917 Espionage Act is unconstitutionally vague when applied to the oral receipt and transmission of national defense information by nongovernment civilians.

First Amendment lawyer Floyd Abrams noted "a disturbing logic" to government efforts first to target the receipt of information that journalists have historically discussed without any threat of sanction, and then to track down documents "which even the FBI under J. Edgar Hoover would not have taken steps to obtain from Anderson."

Steven Aftergood, director of the Federation of American Scientists' Project on Government Secrecy, said the executive branch's increasingly aggressive effort to control publication even after documents have been disclosed "is a profoundly dangerous step."

"It is both ironic and somehow fitting that Jack Anderson should again be at the center of a controversy like this," Aftergood added. "What the FBI couldn't do during his lifetime, they're now seeking to do after his death, and I think many Americans will find that offensive."

The episode adds an unexpected epilogue to the career of Anderson, one of the nation's most widely published investigative columnists.

In 54 years at the column, Anderson broke stories about the Keating Five congressional ethics scandal; the Iran-contra scandal; the CIA-Mafia plot to kill Fidel Castro; allegations about a possible Bulgarian connection to the shooting of Pope John Paul II; and an Iranian link to the bombing of the U.S. Embassy in Beirut.

Anderson made President Richard M. Nixon's "enemies list," and Nixon tried to smear him as a homosexual. The CIA was ordered to spy on him, and according to the Watergate tapes a Nixon aide ordered two associates to try to poison him. Anderson won the Pulitzer Prize in 1972 for reporting the U.S. government's shift away from India toward Pakistan.

A24 THURSDAY, APRIL 20, 2006 R

The Washington Post

AN INDEPENDENT NEWSPAPER

Dangerous Prosecution

The Bush administration wants to criminalize Washington's daily trade in secret information.

WHILE NO ONE is paying much attention, the Bush administration is promoting a reading of an old and largely moribund law that could radically diminish the openness of U.S. government while criminalizing huge swaths of academic debate and journalism. No one has announced it in so many words, but if the government succeeds, for the first time non-officials — activists, congressional staffers, journalists — would be deemed criminal for transmitting secret information or even for just receiving it.

You can see this effort in the government's prosecution of two former officials of the American Israel Public Affairs Committee and again this week in the FBI's attempt to seize control of the papers of the late columnist Jack Anderson. Steven J. Rosen and Keith Weissman, the former AIPAC officials, are charged with conspiring to disclose national defense information to people not authorized to receive it — including their AIPAC colleagues, officials of the Israeli government and a reporter for The Post. The government did not charge them under a normal spying law. Instead, it invoked a World War I-era statute that prohibits people who receive secret information from disclosing it further.

If that sounds scary, the government arguments in its favor are even scarier. For one thing, prosecutors assert in a recent brief that "there is simply no First Amendment right to disclose national defense information." Does this mean academics have no right to debate the legality of the wiretapping program of the National Security Agency, the facts of which have mostly been revealed in leaks? Does it mean that an activist who gets information from a whistle-blower has no right to disclose it to a member of Congress? According to the government, it does.

The government claims that the statute is limited enough not to be worrying, because it requires, among other things, that a person must believe that the information could be used to help a foreign country or hurt the United States. But most sensitive information can be used to help a foreign nation — even if it can also be used to inform the American people.

Prosecutors also would make it a crime for private citizens to *receive* improper leaks — though their brief denies it. In one count, the government charges the AIPAC officials with conspiring with their source, former Pentagon official Lawrence A. Franklin, to have him disclose information to them — and then to disclose it further. In a separate count, Mr. Rosen is charged with aiding and abetting Mr. Franklin's leak to him by providing a fax number to which to send the material. If this is a crime, then journalists and congressional staffers could be as vulnerable as people who wrongly provide information to a foreign power.

The late Mr. Anderson's case makes clear that this problem is not merely theoretical but real and immediate. The FBI recently sought to go through his papers and take back those it deemed classified. It's the same legal theory at work, as the bureau's spokesman, Bill Carter, explained: "Under the law, no private person may possess classified documents that were illegally provided to them."

Until now, two things have prevented this law from morphing into an American version of Britain's Official Secrets Act: discretion on the part of prosecutors and the belief that the courts would not tolerate a reading of it that ran smack into the First Amendment. Prosecutors have thrown discretion to the wind; now it's up to the courts.

The Washington Post

FBI's Israel Interests in Columnist's Files Detailed

Professor Says Agents Sought Names of Reporters for Anderson Who Were Close to Nation or AIPAC

By WALTER PINCUS
Washington Post Staff Writer

FBI agents last month sought the identities of pro-Israel reporters who had worked for columnist Jack Anderson or were close to the American Israel Public Affairs Committee (AIPAC) when they asked to look through the late journalist's files, according to Mark Feldstein, director of the journalism program at George Washington University.

The agents asked Feldstein, a former journalist who is writing a book about Anderson, for the material as part of the criminal prosecution of Steven J. Rosen and Keith Weissman, two former AIPAC lobbyists who were indicted last August on charges of violating the 1917 Espionage Act by receiving and transmitting national defense information.

Feldstein said he was called on March 2 by an FBI agent who asked for a meeting to talk about something "too sensitive" to discuss on an open telephone line. Feldstein already knew that the FBI had been unsuccessful in getting access to Anderson's files from the Anderson family after the columnist's death in December.

Feldstein, a former intern of Anderson's who is writing about the columnist's major exposés during the Nixon years, has had access to the roughly 200 boxes of material since they were delivered to the university by the Anderson family.

When the FBI interview took place at his home on March 3, Feldstein said, he was surprised that the agents mentioned that they were looking into the Rosen-Weissman case and possible espionage "going back to the early 1980s." They wanted to know whether "we had seen classified documents" in the Anderson files, particularly about Israel and Iran — areas of leaked information in the lobbyists' case.

At some point during the questioning, Feldstein said, one of the agents, Leslie Martell, "began asking questions about pro-Israel reporters who had worked for Anderson" or "had ties to AIPAC." He said she "ran names by me," saying that "I only had to give them an initial." He said he "tried to wave them off," referring to several former Anderson reporters whom they named.

Asked last week about Martell's questioning, FBI spokesman Michael P. Kortan said that "the bureau would decline to comment on the event."

A senior FBI agent, who spoke about colleagues on the condition of anonymity, said yesterday that it would not be unusual to try to narrow down the field of potential sources by using this approach. "It might have been a way to get to an area of interest," the agent said, "or it may have been a way of testing information they had gotten in the past or were getting from this source."

An FBI spokesman, William Carter, said yesterday that the bureau will continue to try to gain access to Anderson's files before they are made public because it is concerned about classified documents that could hurt U.S. interests. Carter said "an informant had told us he had seen classified U.S. government documents among Anderson's papers." The bureau wants to review them "to make sure they are not still detrimental to U.S. interests before foreign agents see them," he added.

Feldstein said he told the FBI agents that Anderson had not been actively writing his columns since 1986, when he was struck with both Parkinson's disease and cancer. After that time, he depended upon associates to write the columns and a revolving corps of reporters and interns to help gather information. Feldstein also said that no classified documents had turned up in his review of Anderson's Nixon-era files nor in a preliminary search by his graduate students of subsequent years through 2004.

About a week later, the FBI told Anderson's son, Kevin, a lawyer in Utah, that a bureau informant had said that the columnist or his reporters had met with one of the AIPAC lobbyists and that there had been an exchange of classified documents. According to the FBI, the informant had also told the bureau that Anderson or his reporters had met with an agent of a foreign power and had discussed classified U.S. information, Kevin Anderson said in a telephone interview.

In a court filing last week, attorneys for Rosen and Weissman described these and several FBI's actions as "outrageous government conduct." They contended that agents used a subterfuge to get Anderson's widow to sign a paper consenting to a bureau review of the files.

U.S. District Judge T.S. Ellis III denied on Friday a motion to dismiss the AIPAC case based on the alleged outrageous conduct, saying only that the FBI actions with regard to Anderson have little to do with the case.

One of the names Martell mentioned, according to Feldstein, was that of Dale Van Atta, a former Anderson associate who helped write the column in the late 1980s and early 1990s. Van Atta, who has left the New York Times to help write a book about Sen. Hillary Rodham Clinton (D-N.Y.), said yesterday that he had not been contacted by the FBI. Van Atta has, however, kept in contact with the Anderson family and is puzzled by the attempts to search the columnist's files for material that could help in the Rosen-Weissman case.

As for the FBI seeking to review classified documents in the files, Van Atta said Anderson "really didn't deal with classified documents. He had a great memory and hardly took any notes." Van Atta said he had looked through many of the files when they were stored at Brigham Young University in Utah, and he noted that "there really was not that much there."

A16 SATURDAY, APRIL 29, 2006 R

The Washington Post

Mark Feldstein

A Chilling FBI Fishing Expedition

In an earlier life I spent 20 years as an investigative reporter, getting subpoenaed and sued in the United States, and censored and physically harassed in other parts of the globe. But when I switched careers to academia, I thought such scrapes would come to an end. I was wrong.

On March 3 two FBI agents showed up at my home, flashing their badges and demanding to see 25-year-old documents that I have been reading as part of my research for a book I'm writing about Jack Anderson, the crusading investigative columnist who died in December.

I was surprised, to put it mildly, by the FBI's sudden interest in journalism history. I asked what crimes the agents were investigating.

"Violations of the Espionage Act," was the response. The Espionage Act dates to 1917 and was used to imprison dissidents who opposed World War I.

Evidently the Justice Department has decided that it wants to prosecute people who whispered national security secrets decades ago to a reporter now dead. The FBI agents asked me if I had seen any classified government documents in the nearly 200 boxes of materials the Anderson family has donated to my university. I replied that I had seen some government documents — reports, audits, memos — but didn't know what their classification status was.

"Just because the documents aren't marked 'classified' doesn't mean they're not," Agent Leslie Martell suggested helpfully. But I was unable to give her the answer that she wanted: that our collection housed classified records.

Later, after I thought about it, I could recall seeing only one set of papers that might once have been classified: the FBI's own documents on Jack Anderson. But our version of those papers was heavily censored, unlike the original FBI file already in their own office.

Ironically, for the past five years the FBI and other federal agencies have refused to turn over such documents to me under the Freedom of Information Act, even though almost all the people named in them are now dead. The government claims it would violate their privacy, jeopardize national security or — in the most absurd argument of all — compromise "ongoing law enforcement investigations."

I told the FBI that the Anderson papers in our collection were "ancient history," literally covered in dust. That didn't matter, the agents replied. They were looking for documents going back to the early 1980s. The agents admitted that the statute of limitations had expired on any possible crimes committed that long ago, but they still wanted to root through our archives because even such old documents might demonstrate a "pattern and practice" of leaking.

The agents also wanted the names of graduate students who had worked with me on my book to see if any had seen classified government documents. They hadn't, but the FBI agents didn't seem to believe our denials and wanted to know where the Anderson archives are housed and who controlled custody of the papers.

The agents said they are investigating espionage involving two indicted lobbyists for the pro-Israel lobbying group AIPAC, the American Israel Public Affairs Committee, and they wanted me to tell them the names of former Jack Anderson reporters who were pro-Israel in their views or who had pro-Israeli sources. I told them I felt uncomfortable passing on what would be second-hand rumors.

If I didn't want to name names, the agents said, they could mention initials and I could nod yes or no. That was a trick Robert Redford and Dustin Hoffman used in "All the President's Men." I didn't name any initials, either.

I tried to explain to the agents why it was extremely unlikely there could be anything in our files relevant to their criminal case: Jack Anderson had been sick with Parkinson's disease since 1986 and had done very little original investigative reporting after that.

If the agents had done even rudimentary research, they would have known that. The fact that they didn't was disturbing, because it suggested that the bureau viewed reporters' notes as the first stop in a criminal investigation rather than as a last step reluctantly taken only after all other avenues have failed. That's the standard the FBI is supposed to use under Justice Department guidelines designed to protect media freedom.

I decided there were good reasons not to help the FBI:

Whistle-blowing sources would be scared off from confiding in reporters about abuses of power if they had reason to fear that the government would find out about it by rifling through journalistic files even past the grave. And the public justifiably won't trust the press if it's turned into an arm of law enforcement.

I told the FBI that although I was no longer an investigative reporter, my sympathies still remained with my fellow journalists. "We're not after the reporters," Agent Martell replied. "Just their sources."

I didn't find that a comforting response.

Ultimately the courts may have to decide whether we make the Anderson papers available to the federal government. But I am proud that my university and the Anderson family are resisting the FBI's fishing expedition into these files.

The writer, director of the journalism program at George Washington University, was an investigative correspondent for CNN in Washington. His book "Poisoning the Press: Richard Nixon, Jack Anderson and the Rise of Washington's Scandal Culture" will be published next year.