

Statement of
Gabriel Schoenfeld
Senior Editor, Commentary
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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 not the Washington Times.) 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 subway 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.