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January 2012

## Secrecy and Self-Governance

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### Recommended Citation

Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. SCH. L. REV. 82 (2011-2012).

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GEOFFREY R. STONE

## Secrecy and Self-Governance

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## SECRECY AND SELF-GOVERNANCE

War inevitably intensifies the tension between individual liberty and national security. But there are wise and unwise ways to strike the appropriate balance. In the years after 9/11, the Bush administration embraced a series of policies—including torture, surveillance of private communications, clandestine detention of American citizens, secret prisons in Eastern Europe, closed deportation proceedings, and restrictions on the writ of habeas corpus—that undermined the fundamental American values of individual dignity, personal privacy, and due process of law.

In my view, however, the most dangerous policy of the Bush administration was its attempt to hide its decisions from the American public. In an effort to evade the constraints of separation of powers, judicial review, checks and balances, and democratic accountability, the Bush administration systematically promulgated its policies in secret, denied information to Congress, abused the classification process, narrowly interpreted the Freedom of Information Act, redacted vast quantities of information from government websites, punished government whistleblowers, jailed journalists for refusing to disclose their confidential sources, threatened to prosecute the press for revealing the administration's secret programs, and broadly invoked executive immunity and the state secrets doctrine to prevent both Congress and the courts from evaluating the lawfulness of its programs.

By shielding its decisions from legal, congressional, and public scrutiny, the Bush administration undermined the single most central premise of a self-governing society: it is the *citizens* who must evaluate the judgments, policies, and programs of their representatives. As James Madison observed, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”<sup>1</sup>

### I. INTRODUCTION: FREE SPEECH AND NATIONAL SECURITY

Throughout American history, wartime administrations have limited public discourse in the name of national security. In 1798, for example, on the eve of a threatened conflict with France, Congress enacted the Sedition Act of 1798, which effectively made it a crime for any person to criticize the President, the Congress, or the government.<sup>2</sup> Although the Republicans, led by Thomas Jefferson and James Madison, opposed the Act as a violation of the First Amendment, the Federalists, led by John Adams and Alexander Hamilton, defended it as a wartime necessity.<sup>3</sup>

Similarly, during the Civil War, the Lincoln administration invoked martial law, suspended the writ of habeas corpus, shut down “disloyal” newspapers, and imprisoned critics of the President's policies.<sup>4</sup> And during World War I, the Wilson administration advocated the enactment of the Espionage Act of 1917 and the Sedition Act of 1918, which made it unlawful for any person to criticize the war, the

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1. 9 JAMES MADISON, *THE WRITINGS OF JAMES MADISON* 103 (Gaillard Hunt ed., G.P. Putnam's Sons 1910).
  2. Sedition Act of 1798, ch. 74, 1 Stat. 596, 596–97 (expired 1801).
  3. See GEOFFREY R. STONE, *WAR AND LIBERTY: AN AMERICAN DILEMMA* 1–21 (2007).
  4. See *id.* at 22–40.

draft, the government, the President, the flag, the military, or the cause of the United States. The government prosecuted some two thousand individuals under these statutes, with the consequence that free and open debate was stifled almost completely.<sup>5</sup>

Measured by these standards, the efforts of the Bush administration to directly suppress public debate after 9/11 were relatively modest. This was so, in part, because of a fundamental shift in American law and culture. By the 1960s, a consensus had emerged in the United States—both in the public understanding and in the courts—that these past episodes had been grievous errors in which the nation had allowed fear and partisan exploitation to override its commitment to individual liberty and democratic self-governance. By the time of the Vietnam War, it had become clear that the government could not constitutionally punish its critics, even in wartime, merely because they questioned the wisdom, morality, or efficacy of government policy.<sup>6</sup> That consensus, which reflected a profound shift in American values and law, has held to the present, with the result that the Bush administration—unlike the Adams, Lincoln, and Wilson administrations—did not even attempt to prosecute critics of its policies. This is an important milestone in American history. We should not let it pass unnoticed or in any way take it for granted. Viewed historically, it is a significant triumph for the rule of law.<sup>7</sup>

But this shift no doubt frustrated the Bush administration. If the government cannot constitutionally control public discourse in time of war by simply silencing its critics, how can it assert sufficient control over public debate to protect the national security? The Bush administration settled on a new strategy: if it could not punish citizens for criticizing its policies, then it should prevent them from knowing what those policies are. After all, if citizens do not know what the government is doing, they are hardly in a position to question its judgments.

Here, then, is the dilemma: The government often has exclusive possession of information about its policies, programs, processes, and activities that would be of great value to informed public debate. But government officials often insist that such information must be kept secret, even from those to whom they are accountable—the American people. How should we resolve this dilemma? The issue is complex and has many dimensions.

The reasons why government officials want secrecy, for example, are many and varied. They range from the truly compelling to the patently illegitimate. Sometimes, government officials may want secrecy because they fear that the disclosure of certain information might seriously undermine the nation's security (for example, by revealing detailed battle plans on the eve of battle). Sometimes, they may want secrecy because they do not want to have to deal with public criticism of their decisions or because they do not want the public, the Congress, or the courts to override their decisions,

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5. *See id.* at 41–63.

6. *See id.* at 107–27.

7. *See* GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 550–51 (2004).

which they believe to be wise. Sometimes, they may want secrecy because disclosure will expose their own incompetence or wrongdoing. Some of these reasons for secrecy are obviously more worthy of deference than others.

Adding to the complexity, the contribution of the disclosure to informed public discourse may vary widely depending upon the nature of the information. The disclosure of some confidential information may be extremely valuable to public debate (for example, the revelation of unwise or even unlawful government programs, such as the Bush administration's torture memos or its authorization of expanded electronic surveillance). The disclosure of other confidential information, however, may be of little or no legitimate value to public debate (for example, the publication of the identities of covert American agents in Iran).

The most vexing problem arises when the public disclosure of secret information is both harmful to national security *and* valuable to self-governance. Suppose, for example, the government undertakes a study of the effectiveness of security measures at the nation's nuclear power plants. The study concludes that several nuclear power plants are especially vulnerable to terrorist attack. Should this study be kept secret, or should it be disclosed to the public? On the one hand, publishing the report would reveal our vulnerabilities to terrorists. On the other hand, publishing the report would alert the public to the situation, enable citizens to press government officials to remedy the problems, and empower the public to hold accountable those public officials who failed to keep the nation safe. The public disclosure of such information could both cost and benefit the nation. Should the study be made public?

In theory, this question can be framed quite simply: Do the benefits of disclosure outweigh the costs of disclosure? That is, does the value of the disclosure to informed public deliberation outweigh the danger to the national security? As a practical matter, however, this simple framing of the issue is not terribly helpful. It is exceedingly difficult to measure in any objective, consistent, predictable, or coherent manner either the "value" of the disclosure to public discourse or the "danger" to national security. And it is even more difficult to balance such incommensurable values against one another.

Moreover, even if we were to agree that this is the right question, we would still have to determine who should decide whether the benefits outweigh the costs of disclosure. Should this be decided by public officials whose responsibility it is to protect the national security? By public officials who might have an incentive to cover up their own mistakes? By low-level public officials who believe their superiors are keeping information secret for inadequate or illegitimate reasons—that is, by "leakers"? By reporters, editors, and bloggers who have gained access to the information? By judges and jurors in the course of criminal prosecutions of leakers, journalists, and publishers?

In this essay, I will focus on three questions. First, in Part II, I will consider the circumstances in which the government can constitutionally punish a public employee for *disclosing* classified information relating to national security to a journalist for the purpose of publication. That is, in what circumstances may the government punish leakers? Second, in Part III, I will explore the circumstances in which the government

can constitutionally punish the press for *publishing* classified information. Should it matter whether the press obtained that information through illegal leaks? Third, in Part IV, I will examine the circumstances in which the government can constitutionally compel a journalist to reveal the identity of her confidential sources. That is, in what circumstances does the First Amendment grant the journalist a constitutional right to refuse to disclose to a court the identity of the public employee who unlawfully leaked classified information? As we shall see, these issues are as difficult as they are important, and the governing law is often unformed and surprisingly obscure. I shall try to bring some clarity to these questions.

## II. THE RIGHTS OF PUBLIC EMPLOYEES

The first question concerns the First Amendment rights of public employees. To understand those rights, we must establish a baseline. Let us begin, then, with the rights of individuals who are *not* government employees. That is, in what circumstances may ordinary people, who are *not* public employees, be held legally accountable for revealing information to a journalist for the purpose of publication? Answering this question will enable us to establish a baseline definition of First Amendment rights. We can then inquire whether the First Amendment rights of government employees are any different.

In general, an ordinary individual (that is, an individual who is not a government employee) has a broad First Amendment right to reveal information to journalists for the purpose of publication.<sup>8</sup> There are a few limitations, however.

First, the Supreme Court has long recognized that there are certain “limited classes of speech,” such as false statements of fact, obscenity, and threats, that “are no essential part of any exposition of ideas” and are therefore of only low First Amendment value.<sup>9</sup> Such speech may be restricted without satisfying the usual demands of the First Amendment. For example, if X makes a knowingly false and defamatory statement about Y to a journalist, with the understanding that the journalist will publish the information, X might be liable to Y for the tort of defamation.<sup>10</sup> Or, if X reveals to a reporter that Y was raped, with the expectation that the reporter will publish the information, X might be liable to Y for invasion of privacy. The public disclosure of Y’s identity, unlike the fact of the rape, might be thought of such slight value to public debate that it can be prohibited in order to protect Y’s privacy.<sup>11</sup>

Second, private individuals sometimes voluntarily contract with other private individuals to limit their speech. Violation of such a private agreement may be actionable as a breach of contract. For example, if X takes a job as a salesman and agrees as a condition of employment not to disclose his employer’s customer list to

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8. See Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 139–40 (2001).

9. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

10. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–48 (1974).

11. See Gewirtz, *supra* note 8, at 178–79.

competitors, he might be liable for breach of contract if he reveals the list to a reporter for a trade journal with the expectation that the journal will disseminate the list. In such circumstances, the individual has voluntarily agreed to limit what otherwise would be a First Amendment right. Such privately negotiated waivers of constitutional rights are generally enforceable.<sup>12</sup>

Third, there might be situations, however rare, in which an individual discloses previously non public information to a journalist in circumstances in which publication of the information would be so dangerous to society that the individual might be punished for disclosing it to the journalist. For example, suppose a scientist discovers how to produce the Ebola virus from ordinary household materials. The harm caused by the public dissemination of that information might be so likely, imminent, and grave that the scientist could be punished for facilitating its publication.<sup>13</sup>

These examples illustrate the few circumstances in which an individual might be held legally responsible for disclosing information to a journalist for the purpose of publication. However, as noted before, the First Amendment accords individuals *very* broad freedom to share information with reporters for the purpose of publication.

To what extent is a *government employee* in a similar position? When we ask about the First Amendment rights of public employees, we must focus on the *second* of the three situations examined above. It is the waiver of rights issue that poses the critical question. Although the first and third situations are relevant in the public employee context, it is the waiver issue that is at the very core of the matter.

At its most bold, the government's position is simple: just like a private individual, it should be able to enter into contracts with people in which they voluntarily agree to waive their constitutional rights, and as long as the waiver is voluntary, that should end the matter. This is not the law. The Supreme Court has long recognized that, unlike private entities, the government *cannot* constitutionally insist that individuals surrender their constitutional rights as a condition of public employment or receipt of other government benefits.<sup>14</sup> Surely, it would be unconstitutional, for example, for the government to require individuals to agree as a condition of employment that they will never criticize the President, never practice the Muslim faith, never have an abortion, or never assert their constitutional right to be free from unreasonable searches and seizures.

It would be no answer for the government to point out that the individuals had *voluntarily* agreed not to criticize the President, practice their faith, have an abortion, or assert their Fourth Amendment rights, for even if individuals consent to surrender their constitutional rights in order to obtain a government job, the government cannot constitutionally condition employment on the waiver of those rights. As the

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12. See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

13. See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

14. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[E]ven though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons . . . [It may not do so] on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”).

Supreme Court has long held, “unconstitutional conditions” on public employment violate the Constitution. The government cannot legitimately use its leverage over jobs, welfare benefits, driver’s licenses, tax deductions, zoning waivers, and the like to extract waivers of constitutional rights.<sup>15</sup>

This does not mean, however, that the government can *never* require individuals to waive their constitutional rights as a condition of public employment. There are at least two circumstances, relevant here, in which the government may restrict the First Amendment rights of its employees. First, as the Supreme Court noted in its 1968 decision in *Pickering v. Board of Education*, the government “has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case,” the Court said, “is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of [its activities].”<sup>16</sup> In other words, the government has a legitimate interest in running effectively, and some restrictions of employee speech are reasonably necessary and appropriate to achieve efficiency.

The Hatch Act, for instance, prohibits public employees from taking an active part in political campaigns.<sup>17</sup> The goal is to insulate public employees from undue political pressure and improper influence. To enable public employees to perform their jobs properly, the government may require them to waive what would otherwise be their First Amendment right to participate in partisan political activities.<sup>18</sup> Another illustration might involve a police officer who uses racist language in a street encounter. In such circumstances, the police department might reasonably conclude that the officer can no longer perform her job effectively in that neighborhood, or that her continued employment would seriously undermine the department’s credibility with the community.<sup>19</sup> As *Pickering* observed, it may be appropriate in such circumstances to “balance” the competing interests.<sup>20</sup> Similarly, a government employee’s disclosure of confidential information to a journalist for the purpose of publication might jeopardize the government’s ability to function effectively. For example, if an IRS employee gives a reporter X’s confidential tax

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15. See Cass R. Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 914–15 (1986).

16. 391 U.S. 563, 568 (1968). In *Pickering*, a high school teacher was dismissed for writing a letter to a local newspaper criticizing school policy. The Court held that the dismissal violated the First Amendment. *Id.* at 564, 574–75.

17. Hatch Political Activities Act, ch. 410, 53 Stat. 1147 (1939) (codified as amended in scattered sections of 5 U.S.C.).

18. See *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 556–57 (1973); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 94–96 (1947).

19. *Cf. City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (holding that a police officer’s distribution of sexually explicit video of himself on eBay was “detrimental to the mission and functions of the employer”).

20. *Pickering*, 391 U.S. at 568.

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records, this might seriously impair the public's confidence in the tax system and thus undermine the government's capacity to function efficiently.

A second reason why the government may sometimes restrict what otherwise would be the First Amendment rights of public employees is that the employee learns the information *only* by virtue of his government employment. Arguably, it is one thing for the government to prohibit its employees from speaking in ways other citizens can speak, but it is something else entirely for the government to prohibit them from speaking in ways other citizens *cannot* speak. If a public employee gains access to confidential information only *because* of his public employment, then prohibiting him from disclosing that information to anyone outside the government might be said not to restrict his First Amendment rights at all because he had no right to *know* the information in the first place.<sup>21</sup>

There is little clear law on this question. In its 1980 decision *Snepp v. United States*, however, the Supreme Court held that a former employee of the CIA could constitutionally be held to his agreement not to publish "any information or material relating to the [CIA]" without prior approval.<sup>22</sup> The Court did *not* suggest that *every* government employee can be required to abide by such a rule. Rather, it emphasized that a "former intelligence agent's publication of . . . material relating to intelligence activities can be detrimental to vital national interests."<sup>23</sup> In light of *Snepp* and *Pickering*, it seems reasonable to assume that a public employee who discloses *classified* information relating to *national security* to a journalist for the purpose of publication has violated his position of trust and ordinarily may be discharged and/or criminally punished without violating the First Amendment.

Now, it is important to note that this conclusion is specific to public employees. It does not govern those who are *not* public employees. Unlike public employees, who have agreed to abide by constitutionally permissible restrictions of their speech, journalists and publishers have *not* agreed to waive their rights. The analogy is to the private employee who agrees not to disclose his employer's customer lists. Although he might be liable for breach of contract, the journalist to whom he discloses the list and the trade journal that publishes it are not similarly answerable to the employer.

This distinction between public employees and other individuals is critical in the context of confidential information. Information the government wants to keep secret may be of great value to the public. The public disclosure of an individual's tax return may undermine the public's confidence in the tax system, but it may *also* reveal important information, for example, about a political candidate's finances.

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21. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) ("A litigant has no First Amendment right of access to information made available only for purposes of trying his suit."); see also Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 Sup. Ct. Rev. 169, 174–79 (further discussing the *Rhinehart* holding).

22. 444 U.S. 507, 508 (1980).

23. *Id.* at 511–12; see also *Haig v. Agee*, 453 U.S. 280, 284–85 (1981) (finding that the record showed defendant's actions in breaking his agreement and divulging classified information "prejudiced the ability of the United States to obtain intelligence, and [was] followed by episodes of violence against the persons and organizations identified").

The conclusion that the government has a legitimate reason to prohibit its employees from disclosing such information does *not* reflect a judgment that the government's interest in confidentiality necessarily *outweighs* the public's interest in disclosure. Indeed, information about a political candidate's finances might be of great significance to public debate, and it would plainly be unconstitutional for the government to prohibit the dissemination of such information if it did *not* come from the government's own files.

In theory, of course, it would be possible for courts to decide in each instance whether the First Amendment protects an unauthorized disclosure of confidential information by a public employee because the value of the information to the public outweighs the government's need for secrecy. But such an approach would put courts in an extremely awkward position and would in effect convert the First Amendment into a constitutional Freedom of Information Act.<sup>24</sup> The Supreme Court has eschewed that approach and granted the government considerable deference in deciding whether and when public employees may disclose confidential government information. This is not to say that such disclosures are *always* punishable. In applying *Pickering* and *Snepp*, courts do not give the government complete *carte blanche* to insist on secrecy. The government's restrictions must always be "reasonable."<sup>25</sup>

Returning to the problem of confidential information relating to the national security, the key issue involves *classified* information. The Bush administration authorized the classification of any information whose public disclosure "reasonably could be expected to result in damage to the national security."<sup>26</sup> The classification system is a notoriously imperfect guide to the real *need* for confidentiality. The concept "reasonably be expected to result in damage to the national security" is inherently vague and plastic. It is impossible to know from this standard how likely, imminent, or grave the potential harm must be. Moreover, the classification process is poorly designed and sloppily implemented. Predictably, government officials tend to *overclassify*. An official charged with the task of classifying information will invariably err on the side of over- rather than underclassification. It is "better to be safe than sorry," and no official wants to be responsible for *underclassification*. In addition, we know from experience that public officials have abused the classification system to hide from public scrutiny their own misjudgment, incompetence, and venality.<sup>27</sup>

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24. 5 U.S.C. § 522 (Supp. III 2009).

25. *Snepp*, 444 U.S. at 510; *Pickering*, 391 U.S. at 568.

26. See Exec. Order No. 13,292, 68 Fed. Reg. 15,315, 15,315 (Mar. 25, 2003), *available at* <http://www.fas.org/sgp/bush/coamend.html>, *amending* Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995).

27. See, e.g., *United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring) ("There exists the tendency, even in a constitutional democracy, for government to withhold reports of disquieting developments and to manage news in a fashion most favorable to itself."); *Halperin v. Kissinger*, 606 F.2d 1192, 1204 n.77 (D.C. Cir. 1979) (noting "the well-documented practice of classifying as confidential much relatively innocuous or noncritical information"); DANIEL PATRICK MOYNIHAN, *Foreword to COMM'N ON PROTECTING & REDUCING GOV'T SECRECY*, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at xxxix

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Despite these very real concerns, the courts have concluded that there are good reasons to have clear, simple, and easily administered rules to guide the conduct of public employees. As a result, the courts have held that a government employee *ordinarily* can be disciplined, discharged, or prosecuted for knowingly disclosing *classified* information to a journalist for the purpose of publication.<sup>28</sup> Are there *any* circumstances in which a public employee has a First Amendment right to disclose *classified* information to a journalist? Courts have generally held that, in order for the government to punish a public employee for the disclosure of classified information, the government must at the very least prove that the disclosure would be “potentially damaging to the United States.”<sup>29</sup> Although this judgment is implicit in the very fact of classification, the fact of classification is not deemed conclusive. Because the classification process is imperfect, independent proof of at least *potential* harm to the national security is required.

This is a far cry, however, from requiring the government to prove that the disclosure will create a clear and present danger of grave harm to the nation. The gap between these two standards represents the difference between the rights of public employees and the rights of other individuals. It is what the public employee surrenders as a condition of his employment, it is the effect of *Pickering* balancing, and it is a measure of the deference we grant the government in the management of its “internal” affairs.

There is, of course, a fundamental disadvantage in this approach. As we have seen, information may be *both* potentially dangerous to national security *and* valuable to public debate. Consider, for example, evaluations of new weapons systems, plans for shooting down hijacked airplanes, and government policies on the use of torture. One might reasonably conclude that some or all of this information should be available to the public to enable informed public deliberation. But the approach to public employee speech that I have described would ordinarily empower the government to forbid the disclosure of such information.

Let there be no doubt, granting such deference to the government to determine what information to withhold from the public inevitably *overprotects* government secrecy at the expense of informed public debate. We accept this approach largely for the sake of simplicity. But we should be under no illusions about its impact. This standard gives inordinate weight to secrecy at the expense of public accountability.

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(1997), <http://www.gpo.gov/congress/commissions/secrecy/pdf/04dpm.pdf> (indicating that by the mid-1990s, 1336 government employees were authorized to classify information “top secret,” and more than two million public employees and one million government contractors had “derivative classification” authority); Harold Edgar & Benno C. Schmidt, Jr., *Curtis-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 354 (1986) (“[T]he [e]xecutive is inherently self-interested in expanding the scope of matters deemed ‘secret’; the more that is secret, the more that falls under executive control.”).

28. See *Morison*, 844 F.2d at 1068; see also *United States v. Rosen*, 445 F. Supp. 2d 602, 618 (E.D. Va. 2006).

29. *Morison*, 844 F.2d at 1071.

There is at least one situation in which a government employee *must* have a First Amendment right to disclose classified information, even if the disclosure might harm the national security. This arises when the disclosure reveals *unlawful* government conduct. Applying the *Pickering* standard, the government has no legitimate interest in keeping secret its own illegality, and the public has a compelling interest in the disclosure of such information. Thus, even if the government ordinarily can punish a public employee for disclosing classified information, that presumption must disappear when the disclosure reveals the government's own wrongdoing. The government is, after all, accountable to the public. In a self-governing society, citizens need to know when their representatives violate the law.<sup>30</sup>

### III. THE RIGHTS OF THE PRESS TO PUBLISH

This, then, brings me to the second question: In what circumstances may the government constitutionally punish the press for *publishing* classified information? This issue arose most recently in late 2005, after the *New York Times* revealed the existence of the Bush administration's secret surveillance of electronic communications.<sup>31</sup> President Bush decried the publication of this information as "shameful,"<sup>32</sup> Republican congressmen labeled the publication "treason,"<sup>33</sup> and former attorney general Alberto Gonzales called for the *Times* to be criminally prosecuted.<sup>34</sup> Despite all the bluster, no criminal prosecution ensued.<sup>35</sup> Indeed, it is important to note that in the entire history of the United States the government has *never* prosecuted the press for publishing classified information relating to the national security.

Of course, this does not mean such a prosecution is impossible. It may be that the press has exercised great restraint and has never published confidential information in circumstances in which a prosecution would be constitutionally permissible. Or, it may be that the government has exercised great restraint and has never prosecuted the press even though such prosecutions would have been constitutionally permissible.

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30. Indeed, federal law forbids classification for the purpose of concealing "violations of law, inefficiency, or administrative error." Exec. Order No. 13,292, 68 Fed. Reg. at 15,318 (Mar. 28, 2003).

31. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, available at <http://www.nytimes.com/2005/12/16/politics/16program.html>.

32. David Stout, *Bush Says U.S. Spy Program Is Legal and Essential*, N.Y. TIMES (Dec. 19, 2005), <http://www.nytimes.com/2005/12/19/politics/19cnd-prexy.html>.

33. David Remnick, *Nattering Nabobs*, NEW YORKER, July 10, 2006, at 33–34, available at [http://www.newyorker.com/archive/2006/07/10/060710ta\\_talk\\_remnick](http://www.newyorker.com/archive/2006/07/10/060710ta_talk_remnick); see also Rick Klein, *House Votes to Condemn Media over Terror Story*, BOS. GLOBE, June 30, 2006, at A1.

34. Walter Pincus, *Prosecution of Journalists Is Possible in NSA Leaks*, WASH. POST, May 22, 2006, at A04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/21/AR2006052100348.html>.

35. See also Michael Barone, *Blowback on the Press*, U.S. NEWS & WORLD REP. (May 8, 2006), <http://www.usnews.com/usnews/news/articles/060508/8barone.htm>; Walter Pincus, *Senator May Seek Tougher Law on Leaks*, WASH. POST, Feb. 17, 2006, at A04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/16/AR2006021602186.html>.

We cannot know the answer until we define the circumstances in which such a prosecution would be consistent with the First Amendment.

Because there has never been such a prosecution, the Supreme Court has never had occasion to rule on such a case. The closest it has come to such a situation was *New York Times Co. v. United States*, also known as “the Pentagon Papers case,” in which the Court held unconstitutional the Nixon administration’s effort to enjoin the *New York Times* and the *Washington Post* from publishing a purloined copy of a top-secret Defense Department study of the Vietnam War.<sup>36</sup> Justice Stewart’s opinion best captures the view of the Court: “We are asked,” he wrote,

to prevent the publication . . . of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.<sup>37</sup>

Thus, in the Pentagon Papers case, the Court held that although elected officials have broad authority to keep classified information secret, once that information gets into the hands of the press the government has only very limited authority to prevent its further dissemination.

This may seem an awkward, even incoherent, state of affairs. If the government can constitutionally prohibit public employees from disclosing classified information to the press in the first place, then why can’t it enjoin the press from publishing that information if a government employee *unlawfully* leaks it? But one could just as easily flip the question. If the press has a First Amendment right to *publish* classified information unless publication will “surely result in direct, immediate, and irreparable damage to our Nation or its people,” then why should the government be allowed to prohibit its employees from revealing such information to the press merely because it poses a *potential* danger to the national security? If we view the issue from the perspective of *either* the public’s right to know *or* the government’s interest in secrecy, it would seem logical that the same rule should apply to both public employees and the press. The very different standards governing public employees on the one hand, and the press on the other, present a puzzle.

There are, however, plausible reasons for this seemingly peculiar state of affairs. As we have seen, the government has broad authority to prohibit public employees from disclosing classified information to the press. This rule is based *not* on a careful balancing of the government’s need for secrecy versus the public’s need for information, but rather on the need for a clear and easily administrable rule for public employees. For the sake of simplicity, the law governing public employees *overprotects* the government’s legitimate interest in secrecy. But the need for a simple rule for public employees has nothing to do with the rights of the press or the needs of the public, as such. And under ordinary First Amendment standards, the press has broad freedom to publish information of value to public debate unless, at the very least, the

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36. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

37. *Id.* at 730 (Stewart, J., concurring).

government can prove that the publication poses a clear and present danger of grave harm.<sup>38</sup> In this situation, the law *overprotects* the press' right to publish, relative to a case-by-case balancing of value against danger.

This is surely a “disorderly situation,” but it arguably works. If we grant the government too much power to punish the press, then we risk too great a sacrifice of public deliberation; if we grant the government too little power to control confidentiality “at the source,” then we risk too great a sacrifice of secrecy and government efficiency.<sup>39</sup> The solution has thus been to reconcile the irreconcilable values of secrecy and accountability by guaranteeing *both* a strong authority of the government to prohibit leaks *and* an expansive right of the press to publish them.<sup>40</sup>

Four questions remain: First, does the same constitutional standard govern criminal prosecutions and prior restraints? Second, what sorts of disclosures might satisfy the Pentagon Papers standard? Third, how should we deal with information that both satisfies the Pentagon Papers standard *and* contributes significantly to public debate? And fourth, does this peculiar doctrinal structure actually work?

In the Pentagon Papers case, the Court emphasized that it was dealing with an injunction against speech. An injunction is a prior restraint, a type of speech restriction that, in the Court's words, bears a particularly “heavy presumption against its constitutional validity.”<sup>41</sup> This raises the question of whether the test stated in the Pentagon Papers case should govern criminal prosecutions as well as prior restraints.

In dealing with expression at the very heart of the First Amendment—speech about the conduct of government itself—the distinction between prior restraint and criminal prosecution should not carry much weight. Thus, in my view, the standard used in the Pentagon Papers case is essentially the same test the Court would use in a criminal prosecution of the press for publishing information about the conduct of government. Indeed, it was partly for this reason that the Bush administration did not prosecute the *New York Times* for disclosing the existence of the secret National Security Agency (NSA) surveillance program—the government could not constitutionally have won such a prosecution.

Is there, then, *any* speech that could constitutionally be punished under this standard? The examples traditionally offered were “the sailing dates of transports” or the precise “number and location of troops” in wartime.<sup>42</sup> The publication of such information would instantly make American troops vulnerable to enemy attack and thwart battle plans already underway. Other examples might include publication of the identities of covert CIA operatives in Iran or public disclosure that the government has broken the enemy's secret code, thus alerting the enemy to change its cipher. In situations like these, the harm from publication might be sufficiently likely, imminent, and grave to warrant punishing the disclosure.

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38. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

39. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 78–80 (1975).

40. *See id.* at 86–88.

41. *See N.Y. Times Co.*, 403 U.S. at 714; *id.* at 723 (Douglas, J., concurring) (citation omitted).

42. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

An important feature of these illustrations often passes unnoticed. What makes these examples so compelling is not only the nature and magnitude of the harm, but also the implicit assumption that the information does not contribute to public debate. In most circumstances, there is no apparent value in having the public know the secret “sailing dates of transports” or the secret “location of American troops” on the eve of battle. It is not as if these matters will instantly be topics of political discussion. After the fact, of course, such information may be critical in evaluating the effectiveness of our military leaders, but at the very moment the ships are set to sail or the troops are set to attack, it is less clear what contribution that information would make to public debate. My point is not that these examples involve “low” value speech in the conventional sense of the term, but rather that they involve information that does not seem particularly “newsworthy” at the moment, and that this factor plays an implicit but central role in making these illustrations so persuasive.

The failure to notice this feature of these hypotheticals can lead to a critical failure of analysis. Interestingly, an analogous failure was implicit in the famous example Justice Holmes first used to elucidate the clear and present danger test—the false cry of fire in a crowded theatre.<sup>43</sup> Why can the false cry of fire be restricted? Because it creates a clear and present danger of a mad dash to the exits. Therefore, Holmes reasoned, the test for restricting speech must be whether it creates a clear and present danger of serious harm.<sup>44</sup>

But Holmes’ reasoning was spurious. Suppose the cry of fire is *true*? In that case, we would *not* punish the speech—even though it still causes a mad dash to the exits—because the value of the speech *outweighs* the harm it creates. Thus, at least two factors must be considered in analyzing this situation: the harm caused by the speech *and* the value of the speech. Suppose, for example, a newspaper accurately reports that American troops in Afghanistan recently murdered twenty members of the Taliban in cold blood. As a result of this publication, members of the Taliban could quite predictably kidnap and murder twenty American citizens. Can the newspaper constitutionally be punished for disclosing the initial massacre? I would argue no. Even if there was a clear and present danger that the retaliation would follow, and even if we agree that this is a grave harm, the information is simply too important to the American people to punish its disclosure.

What this suggests is that to justify the criminal punishment of the press for publishing classified information, the government must prove not only that the defendant published classified information, the publication of which would result in likely, imminent, and grave harm to the national security, but *also* that the publication would not significantly contribute to public debate.

Finally, there is the question of whether this “disorderly situation” ultimately serves the public interest. The theory is that, because it is impossible to balance in an ad hoc manner the government’s interest in keeping information confidential against the public’s interest in knowing the information, we instead adopt twin doctrines

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43. Schenck v. United States, 249 U.S. 47, 52 (1919).

44. *Id.*

that, on the one hand, overprotect the government's authority to keep information confidential and, on the other hand, overprotect the press' right to publish information that comes into its hands. In theory, it all balances out and the common good is served.

The problem with this theory is that government power to classify is so broad, and its power to punish leaders is so great, that the "balance" is tilted too heavily on the side of the government. Although it would, indeed, be impossible to balance the competing interests in an ad hoc manner with respect to all information in the government's possession, one way to redress the current imbalance would be to change the circumstances in which the government can classify information. That is, the Supreme Court should hold that, under the First Amendment, the government cannot constitutionally classify information merely because it "could reasonably be expected to cause damage to the national security."<sup>45</sup> Rather, to classify information and thus block its disclosure to the public, the government should have to demonstrate that unauthorized disclosure of the material would be likely to cause serious damage to the national security.<sup>46</sup> Of course, phrases like "likely" and "serious" can be manipulated, but they would at least emphasize the danger that overclassification poses to the very essence of effective self-governance.<sup>47</sup>

#### IV. THE JOURNALIST-SOURCE PRIVILEGE

This brings me to the third question: In what circumstances can the government constitutionally compel a journalist to reveal the identity of an individual who *unlawfully* leaked classified information to the journalist to enable her to publish it? Put differently, to what extent does the First Amendment recognize a journalist-source privilege? The goal of most legal privileges is to promote open communication in circumstances in which society wants to encourage communication. There are many such privileges, including the attorney-client privilege, the doctor-patient privilege, the psychotherapist-patient privilege, the privilege for confidential spousal communications, and the priest-penitent privilege. In each of these instances, three judgments support the existence of the privilege: First, the relationship is one in which open communication is important to society. Second, in the absence of a privilege, such communication will be inhibited. And third, the cost to the legal system of losing access to the privileged information is outweighed by the benefit to society of open communication in the protected relationship.

The logic of the journalist-source privilege is similar. Public policy certainly supports the idea that individuals who possess information of significant value to the public ordinarily should be encouraged to convey that information to the public. But

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45. See Exec. Order No. 13,292, 68 Fed. Reg. 15,315, 15,328–29 (Mar. 25, 2003), *available at* <http://www.fas.org/sgp/bush/eoamend.html> (amending Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995)).

46. For an excellent proposal along these lines, see Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 948–76 (2006).

47. See *id.* at 976.

some individuals who possess such information may be reluctant to have it known that they are the source. They may fear retaliation, gaining a reputation as a “snitch,” losing their privacy, getting sued or prosecuted, or simply getting “involved.”

A congressional staffer, for example, may have reason to believe that a senator has taken a bribe. She may want someone to investigate but may not want to get involved personally. Or, an employee of a corporation may know that his employer is manufacturing an unsafe product but may not want coworkers to know that he was the source of the leak. In such circumstances, individuals may be reluctant to disclose the information to the press unless they have some way to protect their confidentiality. Without a journalist-source privilege, these sources may decide that silence is the better part of wisdom. A journalist-source privilege thus makes sense for the same reason the attorney-client privilege, the doctor-patient privilege, and the psychotherapist-patient privilege make sense. It is in society’s interest to encourage the communication, and without a privilege the communication will often be chilled.

Does the First Amendment protect such a privilege? The Supreme Court addressed this question in its 1972 decision, *Branzburg v. Hayes*.<sup>48</sup> The four dissenting Justices concluded that “when a reporter is asked to appear before a grand jury and reveal confidences,” the government should be required to “demonstrate a compelling and overriding interest in the information.”<sup>49</sup> The majority, however, rejected this conclusion, holding that the First Amendment does not give a reporter a constitutional right to refuse to disclose relevant information to a grand jury.<sup>50</sup>

The Court reached this conclusion for two reasons. First, as a general matter of First Amendment interpretation, the Court is reluctant to invalidate a law merely because it has an *incidental* effect on First Amendment freedoms.<sup>51</sup> Laws that *directly* regulate expression (for example, “No one may criticize the government” or “No one may distribute leaflets on the Mall”) are the *central* concern of the First Amendment.<sup>52</sup> Laws that only incidentally affect free expression, however, are of only peripheral First Amendment concern. Examples of such laws would include a speed limit, as applied to someone who speeds in order to get to a political demonstration on time, and a law prohibiting public urination, as applied to someone who urinates on a government building in order to express his disdain for the government. The Court has held that such laws will almost never violate the First Amendment. Indeed, except in highly unusual circumstances in which the incidental effect of a law might inadvertently have a *severe* impact on First Amendment freedoms, the Court routinely rejects such First Amendment challenges.<sup>53</sup>

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48. 408 U.S. 665 (1972).

49. *Id.* at 743 (Stewart, J., dissenting).

50. *Id.* at 708–09 (majority opinion).

51. *Id.* at 682–83.

52. See Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 297–98 (2009).

53. *Id.*

The reason for this doctrine is not that such laws cannot dampen First Amendment rights, but that a rule that allowed *every* law to be challenged whenever it impinges even indirectly on someone's freedom of expression would be a judicial nightmare.<sup>54</sup> Does an individual have a First Amendment right not to pay taxes because taxes reduce the amount of money he has available to buy books or to support political causes? Does an individual have a First Amendment right to violate a law against public nudity because she wants to picket in the nude? Does a reporter have a First Amendment right to violate laws against burglary or wiretapping because burglary and wiretapping will enable him to get a story? To keep life simple, and to avoid such intractable and ad hoc line-drawing, the Court simply *presumes* that laws of general application are constitutional, even as applied to speakers and journalists, except in extraordinary circumstances.<sup>55</sup> Predictably, the Court invoked this principle in *Branzburg*.<sup>56</sup> The law requiring witnesses to testify is not directed against free speech and has only an incidental effect on journalists and their sources. It is therefore presumptively constitutional.

Second, recognition of a First Amendment-based journalist-source privilege would have required the Court to decide who, exactly, is a "journalist." For the Court to decide this question *as a matter of First Amendment interpretation* would have flown in the face of more than two hundred years of constitutional precedent. The idea of defining or "licensing" the press in this manner is anathema to our constitutional tradition. As the Court observed in *Branzburg*, if it had recognized a First Amendment journalist-source privilege, "it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as [it is] of the large metropolitan publisher."<sup>57</sup>

## V. CONCLUSION

As I have tried to show, it is not easy to reconcile the interest in protecting the national security with the often competing interests in preserving a free and responsible press and an informed electorate. When all is said and done, the First Amendment does not and cannot solve all of our problems. The Constitution serves as an important, but only *limited*, safeguard against undue government secrecy. As construed by the Supreme Court, the First Amendment gives strong protection to the press when it publishes even classified information relating to the national security, even when it was leaked unlawfully, but it gives the press and the public essentially no constitutional right to *demand* such information from the government—and it gives public employees only a very limited right to disclose such information to the press.

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54. *See id.* at 298.

55. *See id.* at 297.

56. *Branzburg*, 408 U.S. at 682.

57. *Id.* at 704.

What is needed, then, to rein in the sorts of abuses we saw under the Bush administration is not so much a change in constitutional law but a change in public policy, either in the form of executive action or congressional legislation. With the election of Barack Obama in 2008, there was every reason to expect a greater commitment to a more open approach to executive transparency and accountability. To what extent has the Obama administration achieved this goal?

By the end of the Bush administration, there were at least four obvious changes in government policy that could significantly have improved the situation. First, either by executive order or congressional amendment of the Freedom of Information Act,<sup>58</sup> the government should no longer classify information merely because its disclosure might have the *potential* to harm the national security. This standard, which dates back to an October 2001 directive from then attorney general John Ashcroft, does not adequately protect the compelling national interest in preserving an open and responsible government.<sup>59</sup>

Indeed, prior administrations had employed a more restrained approach. The Clinton administration, for example, denied classification whenever there was a “significant doubt” about the need to classify.<sup>60</sup> The Reagan and Bush I administrations required administrative review within thirty days whenever there was “reasonable doubt” about the necessity for classification.<sup>61</sup> The Carter administration denied classification to any document for which there was “reasonable doubt” about the propriety of classification.<sup>62</sup> And the Ford and Nixon administrations allowed classification only upon a finding that “unauthorized disclosure could reasonably be expected to cause damage to the national security.”<sup>63</sup> After taking office, President Obama repealed the Ashcroft standard and reinstated the “significant doubt” test that had prevailed in the Clinton administration.<sup>64</sup> Whether this is ultimately the “right” standard for classification, Obama’s action was certainly a significant step in the right direction.

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58. 5 U.S.C. § 552 (Supp. III 2009).

59. Memorandum from Att’y Gen. John Ashcroft on the Freedom of Information Act to Heads of All Fed. Dep’ts & Agencies (Oct. 12, 2001), *available at* <http://www.justice.gov/archive/oip/011012.htm> (establishing “sound legal basis” standard for DOJ defense of FOIA non-disclosure decisions, replacing the stricter “foreseeable harm” standard).

60. *See* Exec. Order No. 12,958, 60 Fed. Reg. 19,825, 19,826 (Apr. 17, 1995), *available at* <http://www.fas.org/sgp/clinton/eo12958.html>.

61. *See* Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (Apr. 2, 1982), *available at* <http://www.fas.org/irp/offdocs/eo12356.htm>.

62. *See* Exec. Order No. 12,065, 43 Fed. Reg. 28,949 (June 28, 1978), *available at* <http://www.fas.org/irp/offdocs/eo/eo-12065.htm>.

63. *See* Exec. Order No. 11,652, 37 Fed. Reg. 5209, 5210 (Mar. 8, 1972), *available at* <http://www.fas.org/irp/offdocs/eo/eo-11652.htm>.

64. *See* Exec. Order No. 13,526, 75 Fed. Reg. 707, 708 (Dec. 29, 2009), *available at* <http://www.fas.org/irp/offdocs/eo/eo-13526.htm>.

Second, after the experiences of the Bush II administration, it seemed clear that Congress needed to enact legislation that would afford greater protection to national security whistleblowers. Perhaps most importantly, it is essential to protect those public employees who disclose unconstitutional or otherwise unlawful government actions. With the dawn of the Obama administration, members of Congress enthusiastically introduced the Whistleblower Protection Enhancement Act of 2009, which offered substantial protection to government whistleblowers.<sup>65</sup> Only three months after his inauguration, a bipartisan group from the House sent a letter to the President urging him to support the bill and to issue an executive order affording federal whistleblowers greater protection.<sup>66</sup> Although candidate Obama had expressed support for a law protecting federal whistleblowers during the 2008 presidential campaign,<sup>67</sup> his administration has not taken any significant steps toward strengthening whistleblower protections. Moreover, the President took no action in response to the letter, and news accounts have described his administration as “proving more aggressive than the Bush administration in seeking to punish unauthorized leaks.”<sup>68</sup> The whistleblower protection bill still languishes in committee.

Third, the state secrets privilege is a common-law doctrine designed to enable the government to protect sensitive national security information from disclosure in litigation. The Bush administration repeatedly invoked the privilege in an unprecedented manner in order to block judicial review of a broad range of questionable constitutional practices, including the secret NSA surveillance program, the secret rendition of alleged terrorists, and challenges to the legality of the dismissal of government whistleblowers.<sup>69</sup> The beginning of the Obama administration brought hope that Congress would enact the proposed State Secrets Protection Act of 2009, which was intended both to clarify and to limit the permissible scope of the doctrine.<sup>70</sup> After President Obama took office, Attorney General Eric Holder issued a memorandum limiting the scope of the doctrine, requiring the approval of the attorney general’s office for its use, and authorizing its invocation “only when genuine and significant harm to national defense or foreign relations is at stake and only to

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65. See S. 372, 111th Cong. (2010), [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:s372eah.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s372eah.txt.pdf); H.R. 1507, 111th Cong. (2009), [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h1507ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1507ih.txt.pdf).

66. See Letter from Seven Members of Cong. to President Barack Obama (Apr. 30, 2009), <http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/whistleblowerletterfinal.pdf>.

67. See Nat’l Whistleblower Ctr. Survey of the Candidates for President—2008 (May 8, 2007), <http://www.whistleblowers.org/storage/whistleblowers/documents/obama.survey.scanned.pdf>.

68. Scott Shane, *Obama Takes a Hard Line Against Leaks to Press*, N.Y. TIMES, June 11, 2010, at A1, available at <http://www.nytimes.com/2010/06/12/us/politics/12leak.html?ref=whistleblowers>.

69. See *ACLU v. NSA*, 467 F.3d 590 (6th Cir. 2006) (surveillance program); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), cert. denied, 552 U.S. 947 (2007) (rendition); *Edmonds v. Dep’t of Justice*, 323 F. Supp. 65 (D.D.C. 2004), *aff’d*, 161 F. App’x 6 (D.C. Cir. 2005) (whistleblower).

70. S. 417, 111th Cong. (2009), [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:s417is.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s417is.txt.pdf); H.R. 984, 111th Cong. (2009), [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h984ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h984ih.txt.pdf).

the extent necessary to safeguard those interests.”<sup>71</sup> Since then, however, the Obama administration has continued to aggressively assert the privilege in litigation involving such issues as the CIA’s use of extraordinary rendition and the NSA’s practice of wiretapping American citizens, and it has taken no significant steps to support the legislation.<sup>72</sup>

Fourth, the events during the Bush administration made clear that it was long past time for Congress to create a statutory journalist-source privilege. Although the Supreme Court rejected a First Amendment privilege in *Branzburg*, forty-nine states and the District of Columbia have recognized such a privilege either by statute or common law.<sup>73</sup> Congress should rectify the federal omission by enacting the Free Flow of Information Act, which would recognize a qualified journalist-source privilege as a matter of federal law.<sup>74</sup> This statute would enable journalists to protect the confidentiality of their sources unless the government could prove disclosure of the protected information is necessary to prevent significant harm to the national security that “outweigh[s] the public interest in gathering or disseminating news or information.”<sup>75</sup> In what seems to be a recurring theme, then senator Obama supported the Free Flow of Information Act but later shifted gears when he assumed the presidency. In 2007, he was one of the cosponsors of the original Senate bill.<sup>76</sup> But in 2009, he objected to the scope of the privilege envisioned by the bill and requested the Senate to require judges to defer to executive branch judgments on matters of national security, rather than to make their own independent judgments on such issues.<sup>77</sup> Former senator Arlen Specter (D-PA), another of the bill’s cosponsors,

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71. Memorandum from Att’y Gen. Eric Holder to Heads of Exec. Dep’ts and Agencies (Sept. 23, 2009), <http://www.justice.gov/opa/documents/state-secret-privileges.pdf>; see Charlie Savage, *Justice Dept. Planning to Limit Government’s Use of State Secrets Privilege*, N.Y. TIMES, Sept. 23, 2009, at A16, available at <http://www.nytimes.com/2009/09/23/us/politics/23secrets.html>.
72. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1076 (9th Cir. 2010) (en banc) (“extraordinary rendition”); *In re NSA Telecomm. Records Litig.*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010); *Jewel v. NSA*, No. 08-CV-4373, 2010 U.S. Dist. LEXIS 5110, at \*2 (N.D. Cal. Jan. 21, 2010) (wiretapping); *Jewel v. NSA*, 2010 U.S. Dist. LEXIS 5110, at \*2 (N.D. Cal. Jan. 21, 2010) (wiretapping); see also Charlie Savage, *Secrets Cited in White House Effort to Block Suit*, N.Y. TIMES, Sept. 25, 2010, at A7, available at <http://www.nytimes.com/2010/09/25/world/25awlaki.html>.
73. See GEOFFREY R. STONE, *TOP SECRET: WHEN OUR GOVERNMENT KEEPS US IN THE DARK* 60 n.10 (2007).
74. See H.R. 985, 111th Cong. (2009), <http://www.gpo.gov/fdsys/pkg/BILLS-111hr985ih/pdf/BILLS-111hr985ih.pdf>; S. 448, 111th Cong. (2009), <http://www.gpo.gov/fdsys/pkg/BILLS-111s448is/pdf/BILLS-111s448is.pdf>.
75. Free Flow of Information Act of 2009, H.R. 985, 111th Cong. § 2(a)(4), <http://www.gpo.gov/fdsys/pkg/BILLS-111hr985ih/pdf/BILLS-111hr985ih.pdf>.
76. See Free Flow of Information Act, S. 2035, 110th Cong. (2007), <http://www.gpo.gov/fdsys/pkg/BILLS-110s2035is/pdf/BILLS-110s2035is.pdf>.
77. See Charlie Savage, *White House Proposes Changes in Bill Protecting Reporters’ Confidentiality*, N.Y. TIMES, Oct. 1, 2009, at A17, available at <http://www.nytimes.com/2009/10/01/us/01shield.html>.

rightly called the President's changes "totally unacceptable."<sup>78</sup> Although the bill passed in the House, it is still pending before the Senate Judiciary Committee.<sup>79</sup>

The performance of the Obama administration on these four issues—especially the latter three—has surely disappointed expectations. This is a lesson in "trust us." Those in power are always certain that they themselves will act reasonably. They therefore resist limitations on their own discretion. The problem is that "trust us" is no way to run a self-governing society.

Some measure of secrecy is, of course, essential to the effective functioning of government, especially in wartime. But the Bush administration's obsessive secrecy intentionally and dangerously constrained meaningful oversight by Congress, the press, and the public, directly undermining the vitality of democratic governance. Looking back over those past eight years, one cannot escape the inference that the cloak of secrecy imposed by the Bush administration had less to do with the war on terrorism than with its desire to insulate executive action from public scrutiny. Such an approach to self-governance weakens our democratic institutions and renders our nation less secure in the long run. Alas, the Obama administration has done too little to redress the situation, and it therefore remains true that a serious reconsideration of our laws is necessary if we are to preserve the most fundamental elements of our liberty.

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78. *Id.*

79. H.R. 985 passed in the House on March 31, 2009; no action has been taken since it was referred to the Senate Committee on the Judiciary on April 1, 2009. S. 448 was referred to the Committee on December 11, 2009, but has advanced no further.