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# The Media and National Security

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# THE MEDIA AND NATIONAL SECURITY

ROBERT A. SEDLER<sup>†</sup>

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## I. INTRODUCTION

In our discussion of the media and national security,<sup>1</sup> we begin with the First Amendment, not only with its legal doctrines and principles, but also with the values of the First Amendment and its function in a free and democratic society. We will first discuss how the First Amendment protects the media with respect to its disclosure of information purportedly affecting national security. We will then discuss the process by which the media voluntarily refuses to publish information on the ground that the disclosure of the information will seriously harm the national security. We will finally discuss the relationship between the government and the media with respect to obtaining information that may affect the national security.

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1. The title of this Article is taken from the title of the panel, "The Media and National Security," which was a part of the Symposium, "Issues in the War on Terror: Investigations, the Media and Article III Courts," sponsored by the *Wayne Law Review* on November 16, 2006. I moderated the panel. The participants were William Harlow, the former Chief Spokesman for the Central Intelligence Agency, Dana Priest, a Pulitzer Prize winner and *Washington Post Reporter*, covering the intelligence community and national security issues, and Adam Liptak, the National Legal Correspondent for the *New York Times*. Much of the material in this article is based on the research that I did in connection with presiding over this panel. In the course of the article I will refer to certain points that were made during the panel discussion, but I have made no attempt to obtain statements or specific information from the participants on the panel.

## II. HOW THE FIRST AMENDMENT PROTECTS THE MEDIA

The media is in the business of expression,<sup>2</sup> and when the government tries to regulate or sanction expression - in the name of national security or otherwise - the First Amendment stands as a substantial obstacle to its doing so. The government cannot avoid the constraints of the First Amendment by the talismanic invocation of "national security," for there is no "national security" or "state secrets" exception to the requirements of the First Amendment. This proposition follows from the Supreme Court's landmark 1971 decision, *New York Times Co. v. United States (The Pentagon Papers Case)*,<sup>3</sup> where the Supreme Court applied the prior restraint doctrine to hold that a court could not issue an injunction against the publication of the Pentagon Papers, a classified study detailing the American government's decision-making process in Vietnam.<sup>4</sup> The government argued that the publication of this document - highlighting many mistakes in that process - would seriously impair the ability of the United States to negotiate a peace settlement with the North Vietnamese government.<sup>5</sup> This argument was insufficient to justify a prior restraint, since, as Justice Brennan pointed out, "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."<sup>6</sup> According to Justice Stewart, the only circumstances in which a prior restraint could be justified would be where Congress has acted specifically to prevent the disclosure of the

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2. However, the fact that the media is in the business of expression does not give it any First Amendment rights beyond those enjoyed by the public at large. When reporters assert a right to attend public trials, for example, they are asserting the same right as is held by the public at large. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980) ("[A] trial courtroom also is a public place where the people generally - and representatives of the media - have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.").

3. 403 U.S. 713, 717 (1971) ("The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of the government and inform the people.").

4. *Id.* at 714.

5. *Id.* at 718.

6. *Id.* at 725-26. *Cf. Haig v. Agee*, 453 U.S. 280 (1981) (upholding the revocation of a passport of a former C.I.A. agent who wrote a book in which he disclosed secret intelligence operations and the names of C.I.A. agents for the purpose of obstructing intelligence operations and the recruiting of intelligence personnel). In *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), a lower court issued an injunction against the publication of a magazine article dealing with the development and production of thermonuclear weapons on the ground that publication of the article would contribute to nuclear proliferation and that would "adversely affect the national security of the United States." *Id.* at 995. The government abandoned its case against the magazine after it was discovered that information similar to that the government sought to enjoin was available in a government library elsewhere. *United States v. Progressive, Inc.*, 610 F.2d 819 (7th Cir. 1979).

information, and where disclosure of the information “will surely result in direct, immediate, and irreparable damage to our Nation or its people.”<sup>7</sup> The test of “direct, immediate, and irreparable damage to our Nation or its people” represents the test to determine when it is constitutionally permissible for a court to issue an injunction against the publication of information allegedly harmful to “national security.”<sup>8</sup>

An example of a permissible prior restraint under this highly exacting standard, analogous to the disclosure of troop movements discussed by Justice Brennan in *The Pentagon Papers Case*,<sup>9</sup> would be the publication of the names of CIA agents working undercover in foreign countries, since the disclosure would create a specific threat of harm to the agents themselves and to the intelligence gathering activities of the agents by “blowing their cover.”<sup>10</sup> But absent the disclosure of information having this kind of extremely harmful effect, the First Amendment precludes the issue of an injunction against the publication of information on purported “national security” grounds.

I would also submit that the First Amendment would not tolerate post-publication sanctions against the media based on surmise or

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7. *New York Times Co.*, 403 U.S. at 730 (Stewart, J. concurring). The holding of the Supreme Court in *The Pentagon Papers Case* is based on the opinion of Justice Stewart, joined in by Justice White, since their position represents the narrowest ground of agreement among the Justices who concurred in the judgment. *See Marks v. United States*, 430 U.S. 188, 193 (1977). The court issued a *per curiam* opinion to the effect that the government had not met the heavy burden of showing justification for the imposition of a prior restraint. *New York Times Co.*, 403 U.S. at 714. Justices Black, Douglas, Brennan, Stewart, White and Marshall concurred in the *per curiam* opinion, with five Justices writing concurring opinions. Justices Black and Douglas emphasized that the First Amendment made no exception for national security, and indicated that a prior restraint would never be justified on national security grounds. *Id.* at 714-720 (Black, J., concurring). Justice Brennan agreed with Justices Black and Douglas that no prior restraint was permissible, except possibly in time of war with respect to the disclosure of troop movements or the like. *Id.* at 724-28 (Brennan, J., concurring). Justices Stewart and White concurred on narrower grounds, stating that a prior restraint was not permissible in this case, because Congress had not acted specifically to prevent the disclosure of this information and because it could not be said that the disclosure of this information “will surely result in direct, immediate, and irreparable damage to our Nation or its people.” *Id.* at 730 (Stewart, J., concurring).

8. *New York Times Co.*, 403 U.S. at 730 (Stewart, J., concurring).

9. *See id.* at 726-27 (Brennan, J., concurring).

10. *See Haig*, 453 U.S. at 281 (upholding the revocation of a passport of a former C.I.A. agent who wrote a book in which he disclosed secret intelligence operations and the names of C.I.A. agents for the purpose of obstructing intelligence operations and the recruiting of intelligence personnel); *see also Progressive, Inc.*, 467 F. Supp. 990. A lower court issued an injunction against the publication of a magazine article dealing with the development and production of thermonuclear weapons on the ground that publication of the article would contribute to nuclear proliferation and that would “adversely affect the national security of the United States.” *Id.* at 995. The government abandoned its case against the magazine after it was discovered that information similar to that the government sought to enjoin was available in a government library in New Mexico. *United States v. Progressive, Inc.* 486 F. Supp. 5, 7 (W.D. Wis. 1979).

conjecture that disclosure of the particular information would be harmful to “national security.” In my opinion, the government could not constitutionally impose post-publication sanctions on the disclosure of information allegedly harmful to “national security” unless it could make a strong showing that the information was of such a nature that its disclosure caused “direct, immediate, and irreparable damage” to a particular national security interest. What I am saying here is that the constitutional permissibility of post-publication sanctions against the disclosure of information by the media would be subject to the clear and present danger doctrine, and that in this context, what constitutes a clear and present danger to national security would be defined by the “direct, immediate and irreparable damage” standard formulated by Justice Stewart in *The Pentagon Papers Case*.<sup>11</sup> Again, an example of a publication creating such a danger would be the publication of the names of CIA agents working undercover in foreign countries, since it would create a specific threat of harm to the agents themselves and to the intelligence gathering activities of the agents by “blowing their cover.”<sup>12</sup> Two other examples may be found in the federal law prohibiting the disclosure of classified information, specifically the prohibition against the disclosure of “the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government,” and the prohibition against the disclosure of “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.”<sup>13</sup> These are very narrow prohibitions, and the disclosure of this kind of information could cause very serious harm to intelligence gathering activities.<sup>14</sup>

However, there is no “state secrets” exception to the requirements of the First Amendment. That is, the fact that particular information has been classified as “secret” by the government does not mean that

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11. The clear and present danger doctrine has developed primarily in the context of determining when the government can constitutionally prohibit the advocacy of unlawful action, such as the violent overthrow of the government. Under the clear and present danger test, advocacy of unlawful action is constitutionally protected “except where the advocacy is directed toward inciting imminent lawless action and is likely to incite or produce such action.” *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969). *See also Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (holding that threats of violence made by university students during an anti-war demonstration did not reach the point of “likely to incite or produce [imminent lawless] action”). *See generally* Robert A. Sedler, *The First Amendment in Litigation: The “Law of the First Amendment”*, 48 WASH. & LEE L. REV. 457 (1991) (discussing the clear and present danger doctrine).

12. *See Haig*, 453 U.S. at 280.

13. 18 U.S.C. §§ 798(a)(1)-(2) (2006).

14. It is difficult to see any responsible reporter seeking to obtain or report information about governmental codes or cryptographic systems. It would also seem that there is very little public interest in knowing about this kind of information.

Congress can prohibit the disclosure of that information. Rather, the disclosure of classified information can be prohibited only when the government can make a showing that the disclosure of the particular classified information would cause “direct, immediate and irreparable damage” to an identifiable national security interest.<sup>15</sup> Two of the provisions of the federal law prohibiting the disclosure of classified information are overly broad. These provisions prohibit:

[Any publication] 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 . . . concerning the communication intelligence activities of the United States or any foreign government; or obtained by the processes of communication intelligence from the communications of any foreign government.<sup>16</sup>

The reason that these provisions could not be invoked against the dissemination of classified information by the media, such as the *New York Times*' disclosure of the NSA surveillance program, is that (1) because these provisions are overly broad, if they were not interpreted as embodying the clear and present danger test, they would be void on their face for over-breadth,<sup>17</sup> and (2) if they were interpreted as embodying that exacting test, it is very unlikely that any particular publication would fall within the prohibition. Since two provisions of the law are very narrow and only prohibit the disclosure of information that no responsible journalist would want to disclose, and since two others are overly broad and could not constitutionally be invoked against the kinds of information that the media in fact would publish, it is not surprising that we have not seen any prosecutions against the media for a violation of this law.

The point to be emphasized then is that there is no national security or state secrets exception to the requirements of the First Amendment and that, with very limited exceptions, the government cannot prevent or sanction the disclosure of information by the media on the ground that the disclosure is harmful to national security.

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15. See *New York Times Co.*, 403 U.S. at 730 (Stewart, J., concurring).

16. 18 U.S.C. §§ 798(a)(3)-(4) (2006).

17. See, e.g., *Brandenburg*, 395 U.S. at 447-48.

### III. THE VOLUNTARY REFUSAL OF THE MEDIA TO PUBLISH INFORMATION HARMFUL TO NATIONAL SECURITY

While the First Amendment strongly protects the right of the media to publish information against the wishes of the government, the First Amendment also strongly embodies the principle of editorial discretion and the right of the media to decide what they will and will not publish.<sup>18</sup> Reporters and editors are acting in the best traditions of the First Amendment and in accordance with their role in advancing the function of freedom of expression in a democratic and open society if they decide that particular information should not be published because the disclosure of that information would seriously harm the public interest in national security.

“The Media and National Security” Symposium panel discussed extensively the matter of the media’s deciding that particular information should not be published because the disclosure of that information would seriously harm the public interest in national security. In this connection, the panel explored questions such as: How do government officials go about suggesting to reporters or editors that they not disclose information on grounds that the disclosure will harm national security? How do reporters and editors deal with requests to not disclose? And finally, how do they decide independently that certain information should not be published for reasons of national security?

Although the panelists presented different perspectives, they agreed that it was rare for the government to try to persuade the media to refuse to publish an entire story. Rather, the government’s concern was to prevent the publication of particular information contained in a story. A typical situation was the government saying to a reporter, “We have a real problem with this story. Can you take some facts out of the story?” Facts that the government typically wants to remove from stories are those relating to location or assistance from foreign governments that those governments would prefer to keep secret. From the standpoint of the government official making the request, it is “Trust me on this one.” From the standpoint of the editor (the request not to disclose always goes to a top editor) it is a matter of trying to accommodate the request by winnowing down the story to “what is really important.”

In an op-ed in the *New York Times* a few months before the Symposium, Dean Baquet, editor of *The Los Angeles Times*, and Bill Keller, executive editor of *The New York Times*, set forth an editorial

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18. See *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 117-121 (1973) (discussing the right of editorial discretion); see also *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998) (recognizing the right of editorial discretion); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (also recognizing the right of editorial discretion).

view on how the press balances national security with its mission to report the news.<sup>19</sup> The authors point out that

In recent years our papers have brought you a great deal of information the White House never intended for you to know - classified secrets about the questionable intelligence that led the country to war in Iraq, about the abuse of prisoners in Iraq and Afghanistan, about the transfer of suspects to countries that are not squeamish about using torture, about eavesdropping without warrants.<sup>20</sup>

The authors then ask, “[h]ow do we, as editors, reconcile the obligation to inform with the instinct to protect?”<sup>21</sup> They answer that “sometimes the judgments are easy,” such as their reporters in Iraq and Afghanistan who take great care to conceal operational intelligence in reports, knowing the possibility that the information could be seen and used by the enemy.<sup>22</sup> However the authors admit that “[o]ften the judgments are painfully hard.” The process, they say, begins with reporting.<sup>23</sup> The reporters work “with sources who may be scared, who may know only part of the story, who may have their own agendas that need to be discovered and taken into account.” “We double check and triple check. We seek out sources with different points of view. We challenge our sources when contradictory information emerges.”<sup>24</sup>

The next step is hearing the government’s case. Baquet and Keller say that “no article on a classified program gets published until the responsible officials have been given a fair opportunity to comment.”<sup>25</sup> More significantly, they point out that if “the [responsible officials] want to argue that publication represents a danger to national security, we put things on hold and give them a respectful hearing.”<sup>26</sup> Often the reporters agree to participate in off-the-record conversations with officials, so that they can make their case without fear of spilling more secrets onto our front pages.<sup>27</sup>

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19. Dean Baquet & Bill Keller, *When Do We Publish a Secret?*, N.Y. TIMES, July 1, 2006, at A15.

20. *Id.*

21. *Id.*

22. *See id.*

23. *Id.*

24. *Id.*

25. Baquet & Keller, *supra* note 19.

26. *Id.*

27. Baquet and Keller say that in the last few years each of them has had the experience of withholding or delaying an article when the administration convinced them that the risk of publication outweighed the benefits. The *New York Times* withheld the article “on telephone eavesdropping for more than a year, until editors felt that further reporting had whittled away the administration’s case for secrecy.” *Id.* The *New York Times* says that it did not publish articles that “might have jeopardized efforts to protect

But in the final analysis, the reporters make the decisions:

We understand that honorable people may disagree with any of these choices - to publish or not to publish. But making those decisions is the responsibility that falls to editors, a corollary to the great gift of our independence. It is not a responsibility we take lightly. And it is not one that we can surrender to the government.<sup>28</sup>

There is a different view about the responsibility of the media with respect to government secrets in what a proponent of that view, Gabriel Schoenfeld, the senior editor of *Commentary*, has called “the life-and-death area of national security.”<sup>29</sup> Mr. Schoenfeld takes as his starting point the *New York Times*’ disclosure of the National Security Agency’s domestic surveillance program, and maintains that “there is a well-founded principle that newspapers do not carry a shield that automatically allows them to publish whatever they wish.”<sup>30</sup> He further contends that, “the press can and should be held to account for publishing military secrets in wartime.”<sup>31</sup> However, as Mr. Schoenfeld notes, “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 become abundant.”<sup>32</sup> But, legality aside, Mr. Schoenfeld raises the question of “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 us all what is a legitimate secret and what is not.”<sup>33</sup> Carried to its logical conclusion, Mr. Schoenfeld’s

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vulnerable stockpiles of nuclear material, and articles about highly sensitive counterterrorism initiatives that are still in operation.” *Id.* The *Los Angeles Times* said that it “withheld information about American espionage and surveillance activities in Afghanistan discovered on computer drives purchased by reporters in an Afghan bazaar.” *Id.* They said that sometimes they dealt “with the security concerns by editing out gratuitous detail that lends little to public understanding but might be useful to the targets of surveillance.” *Id.* An example of this situation was the *Washington Post*’s agreeing, at the administration’s request, not to name the specific countries that had secret Central Intelligence Agency prisons. Baquet & Keller, *supra* note 19.

28. *Id.*

29. Gabriel Schoenfeld, *Has the “New York Times” Violated the Espionage Act?*, COMMENT. MAG., Mar. 2006, at 23.

30. *Id.* at 26.

31. *Id.*

32. *Id.* at 24. As we have discussed previously, the disclosure of information that the government wishes to keep secret on “national security” grounds can only be prohibited where the government makes a strong showing that the disclosure of the information would cause “direct, immediate and irreparable damage” to a particular national security interest. The disclosure of the National Security Agency’s domestic surveillance program could hardly meet this very exacting test and so is constitutionally protected.

33. *Id.* at 31.

position is that, again apart from the legalities, and apart from the matter of defining what is a “military secret,” the media should not be publishing military secrets in wartime.

Obviously, the media disagrees with that position, and as we have seen, they frequently publish what Mr. Schoenfeld calls “government secrets in wartime.”<sup>34</sup> For better or worse, this is how it works in the American constitutional system. Regardless of the outcome, because of the strength of the First Amendment in the American constitutional system,<sup>35</sup> only the media can decide whether to publish “government secrets in wartime.” If the media’s publication of “government secrets in wartime” somehow impedes the government in its “war on terrorism,” this is the price that we have chosen to pay for living under a constitutional system in which the value of freedom of expression takes precedence over other values, including the value of national security. The positive side of the equation is that the government cannot operate in secret, that its actions are subject to public scrutiny and criticism, and that the pressure of public opinion, sometimes manifested in Congressional action, may force a change in government policy. For example, in the wake of public criticism following the media disclosure of the National Security Agency’s domestic surveillance program, the Bush Administration announced that in the future, it would seek warrants for such surveillance from the Foreign Intelligence Surveillance Court.<sup>36</sup> In addition, Congress made legislative changes that actually expanded the authority of the government to seek warrants for such surveillance.<sup>37</sup> The public debate over surveillance of communications directed toward American citizens - and indeed the public debate over all governmental activities in the “war on terrorism” - is the result of the media’s relentless disclosure of those activities and is in the best traditions of the First Amendment.

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34. *Id.* at 24.

35. As to the strength of the First Amendment in the American Constitutional System, see Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377 (2006).

36. Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1.

37. The law embodying these changes, however, was only effective for six months. See Scott Shane, *Senate Panel to See Papers on Agency’s Eavesdropping*, N.Y. TIMES, Oct. 26, 2007, at A18. Congress is now considering reauthorizing the law, and in connection with the debate over reauthorization, the White House has agreed to share secret document of the National Security Agency’s domestic surveillance program with the Senate Judiciary Committee. *Id.*

#### IV. THE RELATIONSHIP BETWEEN THE GOVERNMENT AND THE MEDIA WITH RESPECT TO OBTAINING INFORMATION THAT MAY AFFECT NATIONAL SECURITY

We now turn to the matter of the media seeking to obtain information from the government and conversely of the government seeking to obtain information from the media. In this regard, one of the points made during the panel discussion was that the media and the government are not always engaged in an adversary relationship, with the media wanting to publish information and the government wanting to keep the information secret.<sup>38</sup> Sometimes government officials, in order to advance the government's purpose, voluntarily disclose information to the media, so that the media will assist them in conveying the government's message to the public.<sup>39</sup> Often the information is disclosed surreptitiously, without identifying the governmental source, so that it is best described as an "authorized leak."<sup>40</sup> At these times, the government-media relationship can become very symbiotic, and the media's publication of the information that the government wants to convey to the public clearly serves the public information function of the First Amendment.

The government-media relationship becomes adversarial when the media obtains "unauthorized disclosures leaks" from officials inside the government. Officials inside the government are sworn to secrecy, and they cannot successfully assert a First Amendment right to violate their oath of secrecy.<sup>41</sup> Still, prosecutions against government officials for unauthorized disclosures of information are fairly rare, usually because it is not possible to identify the source of the "leak."<sup>42</sup> In any event, the fact that the media obtained the information through an unauthorized "leak" from a government official, as in *The Pentagon Papers* case, has no effect whatsoever on the media's First Amendment right to publish the

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38. Robert A. Sedler, *The Media and National Security Panel at the Wayne Law Review Symposium: Issues in the War on Terror: Investigations, the Media, and Article III Courts* (Nov. 16, 2006).

39. *Id.*

40. *Id.*

41. *See United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

42. *Id. Morison* is an example of a successful prosecution against a government employee for unauthorized disclosure of classified information. *Id. Morison* was employed at the Naval Intelligence Support Center and had a Top Secret Security clearance. *Id.* at 1060. In connection with his security clearance, he had signed a non-disclosure agreement. *Id.* He had also been doing off-duty work for *Jane's Fighting Ships*, an English publication that provided current information on naval operations internationally. *See id.* He took certain satellite secured photographs of a Soviet aircraft carrier under construction in a Black Sea naval shipyard and sent them to *Jane's*. *Morison*, 844 F.2d at 1061. He was convicted for a violation of the Espionage Act, 18 U.S.C. §§ 641, 793(d), (e), for transmitting the secret documents to "one not entitled to receive them." *Morison*, 844 F.2d at 1060. The court summarily rejected his claim that the First Amendment protected the transmittal. *Id.* at 1068.

information.<sup>43</sup> The panel discussed the matter of unauthorized “leaks” and the reasons why a government official would “leak” information to the media. These reasons were sometimes personal.<sup>44</sup> For example, the government official felt important because he or she was approached for information by the media or the official had a good working relationship with the reporter and wished to help the reporter with a story.<sup>45</sup> Sometimes the reasons were in the broad sense political, such as that there had been bureaucratic infighting, and the official disclosed the information in order to advance that official’s position, or that the official believed that the government was doing something very wrong, and wanted to disclose the information in order to advance what the official believed was the “public interest.”<sup>46</sup>

Apart from unauthorized “leaks” by disaffected government officials, the media has no way of obtaining information from the government that the government does not wish to disclose.<sup>47</sup> Courts have long established that there is no First Amendment right of access to information possessed by the government or sources of information within the government’s control.<sup>48</sup> This means that as a constitutional matter, the government may refuse to release information within its control and may deny access to governmental facilities in which governmental functions and operations are taking place.<sup>49</sup> While Congress has enacted the Freedom of Information Act,<sup>50</sup> in order to provide broad public access to information within the control of the executive branch, the Act specifically exempts from disclosure national defense or foreign policy information properly classified pursuant to an executive order issued by or under the authority of the President.<sup>51</sup> The current executive order exempts information pertaining to military plans, weapons or operations, information pertaining to the vulnerabilities of

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43. *See also* *Bartnicki v. Vopper*, 532 U.S. 514, 516 (2001) (holding that the federal wiretap law, prohibiting the illegal interception of telephone communications, could not constitutionally be applied to impose liability against a newspaper for broadcasting an illegally intercepted communication concerning a matter of public interest, notwithstanding that the newspaper had reason to know that the communication had been illegally intercepted).

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See* *Houchins v. KQED, Inc.*, 438 U.S. 1, 9-12 (1978) (noting that since the media has no greater First Amendment rights than are enjoyed by the public at large, the media likewise cannot claim a constitutional right of access to government-controlled information).

49. It is for this reason that the government may restrict media access to military operations, such as those taking place in Iraq, and may limit access to media persons “embedded” with military units or otherwise receiving military approval for their reporting activities.

50. 5 U.S.C. § 552 (2006).

51. 5 U.S.C. § 552(b)(1) (2006).

national security systems, installations, plans or projects, information pertaining to foreign governments and foreign relations, information about scientific, technological or economic matters that relate to national security, information pertaining to programs for safeguarding nuclear materials or facilities, cryptology information, confidential source information, and other categories of national security information ordered classified by the President.<sup>52</sup> With so much governmental information foreclosed to the media, it is easy to understand why the media may try to obtain information from unauthorized "leaks" by government officials.

On the other hand, the First Amendment does not preclude the government from obtaining information from members of the media if the government is entitled to obtain the same kind of information from the public at large. Again, it must be emphasized that the media have no First Amendment rights beyond those enjoyed by the public at large.

Thus, a reporter may constitutionally be compelled to testify before a grand jury and to reveal information obtained from confidential sources in the process.<sup>53</sup> Similarly, the government may search newspaper offices with a properly obtained search warrant and is not required to proceed by way of subpoena.<sup>54</sup>

The matter of the media and national security in relation to the government's power to obtain information from members of the media recently surfaced in the case of New York Times investigative reporter Judith Miller. The facts of this case are as follows.<sup>55</sup> In President Bush's State of the Union Address on January 28, 2003, the President stated that: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." There was an ensuing public controversy over the accuracy of the proposition that Saddam Hussein had sought uranium, a key ingredient in the development of nuclear weaponry, from Africa.<sup>56</sup> On July 6, 2003, the New York Times printed an op-ed article written by former Ambassador Joseph Wilson.<sup>57</sup> In the article, Wilson claimed that the Central Intelligence Agency sent him to Niger in 2002 in response to inquiries from Vice President Cheney to investigate whether Iraq had been seeking to purchase uranium from Niger.<sup>58</sup> Wilson further claimed that he had

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52. Exec. Order No. 12,065, 43 Fed. Reg. 28,949 (July 3, 1978).

53. *Branzburg v. Hayes*, 408 U.S. 665, 685-86 (1972).

54. *Zurcher v. Stanford Daily*, 436 U.S. 547, 558-60 (1978).

55. The facts are taken from the opinion of the United States Court of Appeals for the District of Columbia in *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005).

56. *Id.* at 965-66.

57. *Id.* at 966.

58. *Id.*

conducted the requested investigation and reported that there was no credible evidence that any such effort had been made.<sup>59</sup>

On July 14, 2003, columnist Robert Novak wrote an article that appeared in the Chicago Sun-Times.<sup>60</sup> In his column, he asserted that the decision to send Wilson to Niger had been made “routinely without Director George Tenet’s knowledge,” and that “two senior administration officials” told him that Wilson’s selection was at the suggestion of Wilson’s wife, Valerie Plame, whom Novak described as a CIA “operative on weapons of mass destruction.”<sup>61</sup> After the Chicago Sun-Times published Novak’s column, various media accounts reported government officials had told other reporters that Wilson’s wife worked at the CIA monitoring weapons of mass destruction, and that she was involved in her husband’s selection for the mission to Niger.<sup>62</sup>

For government officials to tell the media that Valerie Plame worked for the CIA could be a violation of a federal law prohibiting the unauthorized disclosure of the identity of a federal agent.<sup>63</sup> A special prosecutor was appointed to conduct an investigation into whether government employees had violated this law.<sup>64</sup> The special prosecutor convened a grand jury to investigate the matter, and the grand jury issued subpoenas to Judith Miller, seeking documents and testimony relating to conversations between her and a specified government official on certain dates concerning Valerie Plame or concerning Iraqi efforts to obtain the uranium.<sup>65</sup> Miller refused to comply with the subpoena and the court held her in contempt.<sup>66</sup> The court rejected her claim of First Amendment privilege, in accordance with applicable Supreme Court precedent.<sup>67</sup> She was also confined, until claiming that she had been released from secrecy

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59. *Id.*

60. *Id.* at 966.

61. *Miller*, 397 F.3d at 966 (citing Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31).

62. *Id.* One such reporter was Matthew Cooper, whose article on this matter appeared in *Time* magazine. *Id.* An August 2, 2004 subpoena to Time requested “all notes, tape recordings, e-mails, or other documents of Matthew Cooper relating to the July 17, 2003 Time.com article entitled ‘A War on Wilson?’ and the July 21, 2003 Time Magazine article entitled, ‘A Question of Trust.’” *Id.* Cooper and Time moved to quash the subpoenas. *Id.* at 967. However, on October 7, 2004, the District Court denied the motion. *Id.* They also refused to comply with the subpoenas. *Miller*, 397 F.3d at 967. Accordingly, on October 13, 2004, the District Court held that their refusal was without just cause and held both in contempt. Cooper and Time subsequently complied with the subpoena. *Id.*

63. 50 U.S.C. § 421 (2006).

64. *Miller*, 397 F.3d at 966.

65. *Id.* at 967.

66. *Id.*

67. *Id.* at 968-72.

by the source of her information, she agreed to comply with the subpoena.<sup>68</sup>

The Judith Miller case brought attention to the fact that there is no federal reporters' shield law, enabling journalists to refuse to reveal confidential sources. Some 33 states and the District of Columbia have such laws, and a bill to establish a federal shield law is now pending in Congress.<sup>69</sup> But in the absence of such a law, the federal government and federal prosecutors can require reporters to disclose information obtained from confidential sources.<sup>70</sup> To this extent, the government has a weapon against the media that the media does not have against the government.

### V. CONCLUSION

In this article, we have discussed the media and national security from the perspective of the First Amendment, not only with its legal doctrines and principles, but also with the values of the First Amendment and its function in a free and democratic society. We have first discussed how the First Amendment protects the media with respect to its disclosure of information purportedly affecting national security. We have emphasized that there is no national security or state secrets exception to the requirements of the First Amendment, and have concluded that with very limited exceptions, the government cannot prevent or sanction the disclosure of information by the media on the ground that the disclosure is harmful to national security.

We have then discussed the process by which the media voluntarily refuses to publish information on the ground that the disclosure of the information will seriously harm the national security. The discussion points out that the media takes very seriously governmental requests that it avoid disclosing particular information that the government wants to

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68. David Johnston & Douglas Jehl, *Times Reporter Free From Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1.

69. See Kathy Kiely, *Measure to Shield Reporters' Secret Sources Likely to Pass*, USA TODAY, Oct. 15, 2007, at 5A.

70. See *Miller*, 397 F.3d at 975. The Justice Department has promulgated guidelines for the issuance of subpoenas for testimony by the news media. *Id.* These guidelines require that Attorney General must approve the subpoena. *Id.* They require that the information sought by the subpoena must be "essential to a successful investigation, particularly with reference to establishing guilt or innocence," that before issuing the subpoena, "all reasonable efforts should be made to obtain the desired information from alternative sources," and that when the issuance of a subpoena to a member of the media is contemplated, the government should "pursue negotiations with the relevant media organization." *Id.* The guidelines do not create a legally enforceable right. *Id.* The Department of Justice maintains that the Department issues subpoenas to journalists "very rarely," having sought subpoenas for reporters' confidential sources only 19 times since 1991. See Kiely, *supra* note 69, at 5A. However, the Reporters Committee for Freedom of the Press says that special prosecutors and attorneys for private clients seek the most subpoenas, and that at least 40 reporters have been subpoenaed to turn over confidential information in the past three years. See *id.*

keep secret on national security grounds, but in the end the media not infrequently decides to publish the information. While the disclosure of such information may be seen as sometimes impeding the government in its "war on terrorism," the positive side of the equation is that the disclosure of this information means that the government's actions are subject to public scrutiny and criticism and that the pressure of public opinion may force a change in governmental policy. Finally, we have discussed the sometimes symbiotic and sometimes adversarial relationship between the media and the government with respect to obtaining information from each other that may affect the national security.

In the final analysis, we live under the First Amendment, and the doctrines and values of the First Amendment govern the media and national security in American society.