

Statement of Gabriel Schoenfeld
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Before the House Permanent Select Committee
on Intelligence

Mr. Chairman, ranking member, members of the Committee, it is an honor to be invited here to testify today.

I have been an editor on the staff of Commentary magazine for the past twelve years. For more than two decades, I have written about foreign policy and intelligence issues for a variety of publications, including Commentary, the Wall Street Journal, the Washington Post, and the New York Times. As a journalist, I know firsthand that the press has a vital role to play not only in promoting vigorous debate about public policy but in exposing incompetence, abuse, and lawbreaking inside our government when they occur. I believe that a free press, the First Amendment, and the right to say what one thinks are among the glories of our constitutional order and our country.

But the ambit of freedom provided by the First Amendment is not unlimited. In particular, Americans--ordinary citizens and journalists alike--have long accepted a great many restrictions on our ability to express ourselves in print. Some of the limitations stem from the laws of privacy

and libel. Some concern commercial matters. Some concern public safety. And some pertain to matters of national security, defense, and intelligence.

The attacks of September 11 thrust our country into a new kind of war, a war in which intelligence is arguably the most important front. It is also a war in which, if our intelligence fails us, we as an open society are uniquely vulnerable. If we are to defend ourselves successfully in this war and not fall victim to a second and even more terrible September 11, it is imperative that our government and our intelligence agencies preserve the ability to conduct counterterrorism operations in secret.

In this regard, it should be obvious that if we allow the press to announce to our terrorist adversaries exactly what methods we are using to find, track, and apprehend them, they will take countermeasures to avoid detection. Our ability to fend off future and more terrible repetitions of September 11 will be gravely impaired.

But last December 16, the New York Times published an article reporting that shortly after September 11, 2001, President Bush authorized the National Security Agency to intercept electronic communications between al Qaeda operatives and individuals inside the United States and providing

details about how the interceptions were being conducted.

Before publishing the NSA story, the publisher and top editors of the New York Times visited the White House, where, according to their own account, they were directly warned by President Bush that disclosing the NSA program would compromise ongoing operations against al Qaeda. After this warning, the New York Times decided to withhold publication and sat on the story for approximately a year. But in the end, shortly before the publication of a book containing details about the program by James Risen, one of its own reporters, the Times chose to run the story, opting to drop the revelation into print on the very day that the closely contested Patriot Act was up for a vote in the Senate.

The 9/11 Commission identified the gap between our domestic and foreign intelligence gathering capabilities as one of our primary weaknesses in protecting our country against terrorism. The NSA terrorist surveillance program aimed to cover that gap. The program, by the Times's own account of it, was one of our country's most closely guarded secrets in the war on terrorism. I am not privy to the workings of the program. I consequently do not understand many things about it, including why it could not have been set up to work within the purview of

the FISA court. But I do know that a broad range of government officials, including members of this committee, have said that the program was vital to our security and that the New York Times disclosure inflicted critical damage on a crucial counterterrorism initiative.

In its own recounting of this episode, the New York Times has attempted to downplay the harm caused by its conduct. The paper has stated that the NSA program "led investigators to only a few potential terrorists in the country" whom the U.S. did not know about from other sources. But this admission serves only to highlight the damage that was done.

Three of the four planes hijacked on September 11 were commandeered by only five men; one was commandeered by four. Together, these "few" terrorists caused massive destruction and took some 3,000 lives. If, in the post-September 11 era, the NSA surveillance program enabled our government to uncover even a "few" potential terrorists in the U.S., the NSA was doing its job, doing it well, and, depending on who exactly these few potential terrorists were, doing it perhaps spectacularly well.

Compounding the direct damage caused by the compromise of the NSA program is harm of a more general sort. In waging the war on terrorism, the U.S. depends heavily on

cooperation with the intelligence agencies of allied countries. When our own intelligence services, including the NSA, the most secretive branch of all, demonstrate that that they are unable to keep shared information under wraps, international cooperation dries up.

According to Porter Goss, director of the CIA in this period, his intelligence-agency counterparts in other countries informed him that our government's inability to keep secrets had led some of them to reconsider their participation in some of our country's most important antiterrorism activities. If counterterrorism were a parlor game--and that is how, in their recent cavalier treatment of sensitive intelligence secrets, the reporters and editors of the New York Times seem to regard it--Porter Goss's fretting could be easily dismissed. But every American was made aware on September 11 of the price of an intelligence shortfall. This is no game, but a matter of life and death.

President Bush has called the disclosure by the New York Times a "shameful act." I have argued in the pages of Commentary that the decision was also a crime, a violation of Section 798 of Title 18 of the U.S. Criminal Code. This provision was added to the law in 1950 by Congress. One of the factors behinds its passage was

the decision by a newspaper, the Chicago Tribune, to publish vital cryptographic secrets during World War II. It was designed to protect free speech by obviating the need for a blanket prohibition on the publication of secrets. It carved out an area of special sensitivity--cryptographic intelligence--for special protection. Among other provisions, it expressly forbids the publication of classified information pertaining to communications intelligence, precisely the subject of the Times story of December 16. Section 798 was endorsed at the time of its passage by the American Society of Newspaper Editors, an organization in which Times editors were active members.

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

If, by contrast, a newspaper like the New York Times, a private institution representing no one but itself, acts recklessly by publishing vital government secrets in the middle of a perilous war, it

should be prepared to accept the consequences as they have been set in law by the American people and its elected officials. The First Amendment is not a suicide pact.

Mr. Chairman, I have concentrated on the case of the New York Times, but I don't want to leave the impression that it is the only publication that has been acting recklessly with respect to vital secrets. The problem is becoming a general one. I respectfully request that the balance of my remarks--adapted from an article I published in the March issue of Commentary--be incorporated into the record.

Has the New York Times Violated the Espionage Act?

By Gabriel Schoenfeld

“Bush Lets U.S. Spy on Callers Without Courts.” Thus ran the headline of a front-page news story whose repercussions have roiled American politics ever since its publication last December 16 in the *New York Times*. The article, signed by James Risen and Eric Lichtblau, was adapted from Risen's then-forthcoming book, *State of War*.¹ In it, the *Times* reported that shortly after September 11, 2001, President Bush had “authorized the National Security Agency [NSA] to eavesdrop on Americans and others inside the United States . . . without the court-approved warrants ordinarily required for domestic spying.”

Not since Richard Nixon's misuse of the CIA and the IRS in Watergate, perhaps not since Abraham Lincoln suspended the writ of habeas corpus, have civil libertarians so hugely cried alarm at a supposed law-breaking action of government. People for the American Way, the Left-liberal interest group, has called the NSA wiretapping “arguably the most egregious undermining of our civil

liberties in a generation.” The American Civil Liberties Union has blasted Bush for “violat[ing] our Constitution and our fundamental freedoms.”

Leading Democratic politicians, denouncing the Bush administration in the most extreme terms, have spoken darkly of a constitutional crisis. Former Vice President Al Gore has accused the Bush White House of “breaking the law repeatedly and insistently” and has called for a special counsel to investigate. Senator Barbara Boxer of California has solicited letters from four legal scholars inquiring whether the NSA program amounts to high crimes and misdemeanors, the constitutional standard for removal from office. John Conyers of Michigan, the ranking Democrat on the House Judiciary Committee, has demanded the creation of a select panel to investigate “those offenses which appear to rise to the level of impeachment.”

The President, for his part, has not only stood firm, insisting on both the legality and the absolute necessity of his actions, but has condemned the *disclosure* of the NSA surveillance program as a “shameful act.” In doing so, he has implicitly raised a question that the *Times* and the President’s foes have conspicuously sought to ignore—namely, what is, and what should be, the relationship of news-gathering media to government secrets in the life-and-death area of national security. Under the protections provided by the First Amendment of the Constitution, do journalists have the right to publish whatever they can ferret out? Such is certainly today’s working assumption, and it underlies today’s practice. But is it based on an informed reading of the Constitution and the relevant statutes? If the President is right, does the December 16 story in the *Times* constitute not just a shameful act, but a crime?

II

Ever since 9/11, U.S. intelligence and law-enforcement authorities have bent every effort to prevent our being taken once again by surprise. An essential component of that effort, the interception of al-Qaeda electronic communications around the world, has been conducted by the NSA, the government arm responsible for signals intelligence. The particular NSA program now under dispute, which the *Times* itself has characterized as the U.S. government’s “most closely guarded secret,” was set in motion by executive order of the President shortly after the attacks of September 11. Just as the *Times* has reported, it was designed to track and listen in on a large volume of calls and e-mails *without*

applying for warrants to the Foreign Intelligence Security Act (FISA) courts, whose procedures the administration deemed too cumbersome and slow to be effective in the age of cell phones, calling cards, and other rapidly evolving forms of terrorist telecommunication.

Beyond this, all is controversy. According to the critics, many of whom base themselves on a much-cited study by the officially nonpartisan Congressional Research Service, Congress has never granted the President the authority to bypass the 1978 FISA Act and conduct such surveillance. In doing so, they charge, the Bush administration has flagrantly overstepped the law, being guilty, in the words of the *New Republic*, of a “bald abuse of executive power.”

Defenders answer in kind. On more than twelve occasions, as the administration itself has pointed out, leaders of Congress from both parties have been given regularly scheduled, classified briefings about the NSA program. In addition, the program has been subject to internal executive-branch review every 45 days, and cannot continue without explicit presidential reauthorization (which as of January had been granted more than 30 times). Calling it a “domestic surveillance program” is, moreover, a misnomer: the communications being swept up are international in nature, confined to those calls or e-mails one terminus of which is abroad and at one terminus of which is believed to be an al-Qaeda operative.

Defenders further maintain that, contrary to the Congressional Research Service, the law itself is on the President’s side.² In addition to the broad wartime powers granted to the executive in the Constitution, Congress, immediately after September 11, empowered the President “to take action to deter and prevent acts of international terrorism against the United States.” It then supplemented this by authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.” The NSA surveillance program is said to fall under these specified powers.³

The debate over the legality of what the President did remains unresolved, and is a matter about which legal minds will no doubt continue to disagree, largely along partisan lines. What about the legality of what the *Times* did?

III

Although it has gone almost entirely undiscussed, the issue of leaking vital government secrets in wartime remains of exceptional relevance to this entire controversy, as it does to our very security. There is a rich history here that can help shed light on the present situation.

One of the most pertinent precedents is a newspaper story that appeared in the *Chicago Tribune* on June 7, 1942, immediately following the American victory in the battle of Midway in World War II. In a front-page article under the headline, "Navy Had Word of Jap Plan to Strike at Sea," the *Tribune* disclosed that the strength and disposition of the Japanese fleet had been "well known in American naval circles several days before the battle began." The paper then presented an exact description of the imperial armada, complete with the names of specific Japanese ships and the larger assemblies of vessels to which they were deployed. All of this information was attributed to "reliable sources in . . . naval intelligence."

The inescapable conclusion to be drawn from the *Tribune* article was that the United States had broken Japanese naval codes and was reading the enemy's encrypted communications. Indeed, cracking JN-25, as it was called, had been one of the major Allied triumphs of the Pacific war, laying bare the operational plans of the Japanese Navy almost in real time and bearing fruit not only at Midway—a great turning point of the war—but in immediately previous confrontations, and promising significant advantages in the terrible struggles that still lay ahead. Its exposure, a devastating breach of security, thus threatened to extend the war indefinitely and cost the lives of thousands of American servicemen.

An uproar ensued in those quarters in Washington that were privy to the highly sensitive nature of the leak. The War Department and the Justice Department raised the question of criminal proceedings against the *Tribune* under the Espionage Act of 1917. By August 1942, prosecutors brought the paper before a federal grand jury. But fearful of alerting the Japanese, and running up against an early version of what would come to be known as graymail, the government balked at providing jurors with yet more highly secret information that would be necessary to demonstrate the damage done.

Thus, in the end, the *Tribune* managed to escape criminal prosecution. For their part, the Japanese either never got wind of the story circulating in the United States or were so convinced that their naval codes were unbreakable that they dismissed its

significance. In any case, they left them unaltered, and their naval communications continued to be read by U.S. and British cryptographers until the end of the war.⁴

If the government's attempt to employ the provisions of the 1917 Espionage Act in the heat of World War II failed, another effort three decades later was no more successful. This was the move by the Nixon White House to prosecute Daniel Ellsberg and Anthony Russo for leaking the Pentagon Papers, which foundered on the rocks of the administration's gross misconduct in investigating the offense. The administration also petitioned the Supreme Court to stop the *New York Times* from publishing Ellsberg's leaked documents, in order to prevent "grave and irreparable danger" to the public interest; but it did not even mention the Espionage Act in this connection, presumably because that statute does not allow for the kind of injunctive relief it was seeking.

Things took a different turn a decade later with an obscure case known as *United States of America v. Samuel Loring Morison*. From 1974 to 1984, Morison, a grandson of the eminent historian Samuel Eliot Morison, had been employed as a part-time civilian analyst at the Naval Intelligence Support Center in Maryland. With the permission of his superiors, he also worked part-time as an editor of *Jane's Fighting Ships*, the annual reference work that is the standard in its field. In 1984, dissatisfaction with his government position led Morison to pursue full-time employment with *Jane's*.

In the course of his job-seeking, Morison had passed along three classified photos, filched from a colleague's desk, which showed a Soviet nuclear-powered aircraft carrier under construction. They had been taken by the KH-11 satellite system, whose electro-optical digital-imaging capabilities were the first of their kind and a guarded military secret. The photographs, which eventually appeared in *Jane's Defence Weekly*, another publication in the *Jane's* family, were traced back to Morison. Charged with violations of the Espionage Act, he was tried, convicted, and sentenced to a two-year prison term.⁵

Finally, and bearing on issues of secrecy from another direction, there is a case wending its way through the judicial process at this very moment. It involves the American Israel Public Affairs Committee (AIPAC), which lobbies Congress and the executive branch on matters related to Israel, the Middle East, and U.S. foreign policy. In the course of these lobbying activities, two

AIPAC officials, Steven J. Rosen and Keith Weissman, allegedly received classified information from a Defense Department analyst by the name of Lawrence Franklin. They then allegedly passed on this information to an Israeli diplomat, and also to members of the press.

Both men are scheduled to go on trial in April for violations of the Espionage Act. The indictment, which names them as part of a “conspiracy,” asserts that they used “their contacts within the U.S. government and elsewhere to gather sensitive U.S. government information, including classified information relating to national defense, for subsequent unlawful communication, delivery, and transmission to persons not entitled to receive it.” As for Franklin, who admitted to his own violations of the Espionage Act and was promised leniency for cooperating in an FBI sting operation against Rosen and Weissman, he was sentenced this January to twelve-and-a-half years in prison, half of the maximum 25-year penalty.⁶

IV

Despite their disparate natures and outcomes, each of these cases bears on the NSA wiretapping story. In attempting to bring charges against the *Chicago Tribune*, both Frances Biddle, FDR’s wartime attorney general, and other responsible officials were operating under the well-founded principle that newspapers do not carry a shield that automatically allows them to publish whatever they wish. In particular, the press can and should be held to account for publishing military secrets in wartime.

In the case of the *Tribune* there was no indictment, let alone a conviction; in the Pentagon Papers case, the prosecution was botched. But *Morison* was seen all the way through to conviction, and the conviction was affirmed at every level up to the Supreme Court (which upheld the verdict of the lower courts by declining to hear the case). It would thus seem exceptionally relevant to the current situation.

In appealing his conviction, Morison argued along lines similar to those a newspaper reporter might embrace—namely, that the Espionage Act did not apply to him because he was neither engaged in “classic spying and espionage activity” nor transmitting “national-security secrets to agents of foreign governments with intent to injure the United States.” In rejecting both of these contentions, the appeals court noted that the law applied to “whoever” transmits national-defense information to “a person not

entitled to receive it.” The Espionage Act, the court made clear, is not limited to spies or agents of a foreign government, and contains no exemption “in favor of one who leaks to the press.”

But if the implication of *Morison* seems straightforward enough, it is also clouded by the fact that Morison’s status was so peculiar: was he convicted as a miscreant government employee (which he was) or, as he maintained in his own defense, an overly zealous journalist? In the view of the courts that heard his case, the answer seemed to be more the former than the latter, leaving unclear the status of a journalist engaged in the same sort of behavior today.

The AIPAC case presents another twist. In crucial respects, the status of the two defendants does resemble that of journalists. Unlike Morison but like James Risen of the *New York Times*, the AIPAC men were not government employees. They were also involved in a professional activity—attempting to influence the government by means of lobbying—that under normal circumstances enjoys every bit as much constitutional protection as publishing a newspaper. Like freedom of the press, indeed, the right to petition the government is explicitly stipulated in the First Amendment. Yet for allegedly taking possession of classified information and then passing such information along to others, including not only a representative of the Israeli government but also, as the indictment specifies, a “member of the media,” Rosen and Weissman placed themselves in legal jeopardy.

The AIPAC case thus raises an obvious question. If Rosen and Weissman are now suspended in boiling hot water over alleged violations of the Espionage Act, why should persons at the *Times* not be treated in the same manner?

To begin with, there can be little argument over whether, in the case of the *Times*, national-defense material was disclosed in an unauthorized way. The *Times*’s own reporting makes this plain; the original December 16 article explicitly discusses the highly secret nature of the material, as well as the *Times*’s own hesitations in publishing it. A year before the story actually made its way into print, the paper (by its own account) told the White House what it had uncovered, was warned about the sensitivity of the material, and was asked not to publish it. According to Bill Keller, the *Times*’s executive editor, the administration “argued strongly that writing about this eavesdropping program would give terrorists clues about the vulnerability of their communications and would deprive the government of an effective tool for the protection of

the country's security." Whether because of this warning or for other reasons, the *Times* withheld publication of the story for a year.⁷

Nor does James Risen's *State of War* hide this aspect of things. To the contrary, one of the book's selling points, as its subtitle indicates, is that it is presenting a "secret history." In his acknowledgements, Risen thanks "the many current and former government officials who cooperated" with him, adding that they did so "sometimes at great personal risk." In an age when government officials are routinely investigated by the FBI for leaking classified information, and routinely charged with a criminal offense if caught in the act, what precisely would that "great personal risk" entail if not the possibility of prosecution for revealing government secrets?

The real question is therefore not whether secrets were revealed but whether, under the espionage statutes, the elements of a criminal act were in place. This is a murkier matter than one might expect.

Thus, one subsection of the Espionage Act requires that the country be in a state of war, and one might argue that this requirement was not present. Although President Bush and other leading officials speak of a "war on terrorism," there has been no formal declaration of war by Congress. Similarly, other subsections demand evidence of a clear intent to injure the United States. Whatever the motives of the editors and reporters of the *New York Times*, it would be difficult to prove that among them was the prospect of causing such injury.

True, several sections of the Act rest on neither a state of war nor on intent to injure, instead specifying a lower threshold: to be found guilty, one must have acted "willfully." Yet this key term is itself ambiguous—"one of the law's chameleons," as it has been called. Does it mean merely acting with awareness? Or does it signify a measure of criminal purposiveness? In light of these and other areas of vagueness in the statutes, it is hardly surprising that, over the decades, successful prosecution of the recipients and purveyors of leaked secret government information has been as rare as leaks of such information have been abundant.

But that does not end the matter. Writing in 1973, in the aftermath of the Pentagon Papers muddle, two liberal-minded law professors, Harold Edgar and Benno C. Schmidt, Jr., undertook an extensive study of the espionage statutes with the aim of

determining the precise degree to which “constitutional principles limit official power to prevent or punish public disclosure of national-defense secrets.”⁸ Their goal proved elusive. The First Amendment, Edgar and Schmidt found, despite providing “restraints against grossly sweeping prohibitions” on the press, did not deprive Congress of the power to pass qualifying legislation “reconciling the conflict between basic values of speech and security.” Indeed, the Espionage Act of 1917 was just such a piece of law-making, and Edgar and Schmidt devote many pages to reviewing the discussion that led up to its passage.

What they show is a kind of schizophrenia. On the one hand, a “series of legislative debates, amendments, and conferences” preceding the Act’s passage can “fairly be read as *excluding* criminal sanctions for well-meaning publication of information no matter what damage to the national security might ensue and regardless of whether the publisher knew its publication would be damaging” (emphasis added). On the other hand, whatever the “apparent thrust” of this legislative history, the statutes themselves retain plain meanings that cannot be readily explained away. The “language of the statute,” the authors concede, “has to be bent somewhat to exclude publishing national-defense material from its [criminal] reach, and tortured to exclude from criminal sanction preparatory conduct necessarily involved in almost every conceivable publication” of military secrets.

Thus, in the Pentagon Papers case, four members of the Court—Justices White, Stewart, Blackmun, and Chief Justice Burger—suggested that the statutes can impose criminal sanctions on newspapers for retaining or publishing defense secrets. Although finding these pronouncements “most regrettable,” a kind of “loaded gun pointed at newspapers and reporters,” Edgar and Schmidt are nevertheless compelled to admit that, in this case as in many others in modern times, the intent of the espionage statutes is indisputable:

If these statutes mean what they seem to say and are constitutional, public speech in this country since World War II has been rife with criminality. The source who leaks defense information to the press commits an offense; the reporter who holds onto defense material commits an offense; and the retired official who uses defense material in his memoirs commits an offense.

For Edgar and Schmidt, the only refuge from this (to them) dire conclusion is that Congress did not understand the relevant

sections of the Espionage Act “to have these effects when they were passed, or when the problem of publication of defense information was considered on other occasions.”

Edgar and Schmidt may or may not be right about Congress’s incomprehension. But even if they are right, would that mean that newspapers can indeed publish whatever they want whenever they want, secret or not, without fear of criminal sanction?

Hardly. For in 1950, as Edgar and Schmidt also note, in the wake of a series of cold-war espionage cases, and with the *Chicago Tribune* episode still fresh in its mind, Congress added a very clear provision to the U.S. Criminal Code dealing specifically with “communications intelligence”—exactly the area reported on by the *Times* and James Risen. Here is the section in full, with emphasis added to those words and passages applicable to the conduct of the *New York Times*:

§798. Disclosure of Classified Information.

(a) *Whoever* knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or *publishes*, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States *any classified information*—

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or/

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) *concerning the communication intelligence activities of the United States* or any foreign government; or

(4) obtained by the processes of communication intelligence from the

communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

(b) As used in this subsection (a) of this section—
The term “classified information” means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms “code,” “cipher,” and “cryptographic system” include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term “foreign government” includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

The term “communication intelligence” means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term “unauthorized person” means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

Not only is this provision completely unambiguous, but Edgar and Schmidt call it a “model of precise draftsmanship.” As they state, “the use of the term ‘publishes’ makes clear that the

prohibition is intended to bar public speech,” which clearly includes writing about secrets in a newspaper. Nor is a motive required in order to obtain a conviction: “violation [of the statute] occurs on knowing engagement of the proscribed conduct, without any additional requirement that the violator be animated by anti-American or pro-foreign motives.” The section also does not contain any requirement that the U.S. be at war.

One of the more extraordinary features of Section 798 is that it was drawn with the very purpose of protecting the vigorous public discussion of national-defense material. In 1946, a joint committee investigating the attack on Pearl Harbor had urged a blanket prohibition on the publication of government secrets. But Congress resisted, choosing instead to carve out an exception in the special case of cryptographic intelligence, which it described as a category “both vital and vulnerable to an almost unique degree.”

With the bill narrowly tailored in this way, and “with concern for public speech having thus been respected” (in the words of Edgar and Schmidt), Section 798 not only passed in Congress but, perhaps astonishingly in hindsight, won the support of the American Society of Newspaper Editors. At the time, the leading editors of the *New York Times* were active members of that society.

VI

If prosecuted, or threatened with prosecution, under Section 798, today’s *New York Times* would undoubtedly seek to exploit the statute’s only significant loophole. This revolves around the issue of whether the information being disclosed was improperly classified as secret. In all of the extensive debate about the NSA program, no one has yet convincingly made such a charge.

The *Times* would also undoubtedly seek to create an additional loophole. It might assert that, unlike in the *Chicago Tribune* case or in *Morison*, the disclosure at issue is of an *illegal* governmental activity, in this case warrantless wiretapping, and that in publishing the NSA story the paper was fulfilling a central aspect of its public-service mission by providing a channel for whistleblowers in government to right a wrong. In this, it would assert, it was every bit as much within its rights as when newspapers disclosed the illegal “secret” participation of the CIA in Watergate.

But this argument, too, is unlikely to gain much traction in court. As we have already seen, congressional leaders of both parties have been regularly briefed about the program. Whether or not legal objections to the NSA surveillance ever arose in those briefings, the mere fact that Congress has been kept informed shows that, whatever legitimate objections there might be to the program, this is not a case, like Watergate, of the executive branch running amok. Mere allegations of illegality do not, in our system of democratic rule, create any sort of terra firma—let alone a presumption that one is, in turn, entitled to break the law.

As for whistleblowers unhappy with one or another government program, they have other avenues at their disposal than splashing secrets across the front page of the *New York Times*. The Intelligence Community Whistleblower Protection Act of 1998 shields employees from retribution if they wish to set out evidence of wrongdoing. When classified information is at stake, the complaints must be leveled in camera, to authorized officials, like the inspectors general of the agencies in question, or to members of congressional intelligence committees, or both. Neither the *New York Times* nor any other newspaper or television station is listed as an authorized channel for airing such complaints.

Current and former officials who choose to bypass the provisions of the Whistleblower Protection Act and to reveal classified information directly to the press are unequivocally lawbreakers. This is not in dispute. What Section 798 of the Espionage Act makes plain is that the same can be said about the press itself when, eager to obtain classified information however it can, and willing to promise anonymity to leakers, it proceeds to publish the government's communications-intelligence secrets for all the world to read.

VII

If the *Times* were indeed to run afoul of a law once endorsed by the American Society of Newspaper Editors, it would point to a striking role reversal in the area of national security and the press.

Back in 1942, the *Chicago Tribune* was owned and operated by Colonel Robert R. McCormick. In the 1930's, as Hitler plunged Europe into crisis, his paper, pursuing the isolationist line of the America First movement, tirelessly editorialized against Franklin Roosevelt's "reckless" efforts to

entangle the U.S. in a European war. Once war came, the *Tribune* no less tirelessly criticized Roosevelt's conduct of it, lambasting the administration for incompetence and much else.

In its campaign against the Roosevelt administration, one of the *Tribune's* major themes was the evils of censorship; the paper's editorial page regularly defended its publication of secrets as in line with its duty to keep the American people well informed. On the very day before Pearl Harbor, it published an account of classified U.S. plans for fighting in Europe that came close to eliciting an indictment.⁹ The subsequent disclosure of our success in breaking the Japanese codes was thus by no means a singular or accidental mishap but an integral element in an ideological war that called for pressing against the limits.

During World War II, when the *Chicago Tribune* was recklessly endangering the nation by publishing the most closely guarded cryptographic secrets, the *New York Times* was by contrast a model of wartime rectitude. It is inconceivable that in, say, June 1944, our leading newspaper would have carried a (hypothetical) dispatch beginning: "A vast Allied invasion force is poised to cross the English Channel and launch an invasion of Europe, with the beaches of Normandy being the point at which it will land."

In recent years, however, under very different circumstances, the *Times* has indeed reversed roles, embracing a quasi-isolationist stance. If it has not inveighed directly against the war on terrorism, its editorial page has opposed almost every measure taken by the Bush administration in waging that war, from the Patriot Act to military tribunals for terrorist suspects to the CIA renditions of al-Qaeda operatives to the effort to depose Saddam Hussein. "Mr. Bush and his attorney general," says the *Times*, have "put in place a strategy for a domestic anti-terror war that [has] all the hallmarks of the administration's normal method of doing business: a Nixonian obsession with secrecy, disrespect for civil liberties, and inept management." Of the renditions, the paper has argued that they "make the United States the partner of some of the world's most repressive regimes"; constitute "outsourcing torture"; and can be defended only on the basis of "the sort of thinking that led to the horrible abuses at prisons in Iraq." The *Times's* opposition to the Patriot Act has been even more heated: the bill is "unconstitutionally vague"; "a tempting bit of election-year politics"; "a rushed checklist of increased police powers, many of dubious value"; replete with provisions that "trample on civil liberties"; and plain old "bad law."

In pursuing its reflexive hostility toward the Bush administration, the *Times*, like the *Chicago Tribune* before it, has become an unceasing opponent of secrecy laws, editorializing against them consistently and publishing government secrets at its own discretion. So far, there has been only a single exception to this pattern. It merits a digression, both because it is revealing of the *Times*'s priorities and because it illustrates how slender is the legal limb onto which the newspaper has climbed.

The exception has to do with Valerie Plame Wilson. The wife of a prominent critic of the administration's decision to go to war in Iraq, Plame is a CIA officer who, despite her ostensible undercover status, was identified as such in July 2003 by the press. That disclosure led to a criminal investigation, in the course of which the *Times* reporter Judith Miller was found in contempt of court and jailed for refusing to reveal the names of government officials with whom she had discussed Plame's CIA status. In the end, Miller told what she knew to the special prosecutor, leading him to indict I. Lewis "Scooter" Libby, an aide to Vice President Cheney, for allegedly lying under oath about his role in the outing of Plame.

The *Times* has led the pack in deploring Libby's alleged leak, calling it "an egregious abuse of power" equivalent to "the disclosure of troop movements in wartime," and blowing it up into a kind of conspiracy on the part of the Bush administration to undercut critics of the war. That its hysteria over the leak of Plame's CIA status sits oddly with its own habit of regularly pursuing and publishing government secrets is something the paper affects not to notice. But if the Plame case reveals a hypocritical or partisan side to the *Times*'s concern for governmental secrecy, it also shows that neither the First Amendment nor any statute passed by Congress confers a shield allowing journalists to step outside the law.

The courts that sent Judith Miller to prison for refusing to reveal her sources explicitly cited the holding in *Branzburg v. Hayes* (1972), a critical case in the realm of press freedom. In *Branzburg*, which involved not government secrets but narcotics, the Supreme Court ruled that "it would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on . . . the reporter to violate valid criminal laws," and that "neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."

The Plame affair extends the logic of *Branzburg*, showing that a journalist can be held in contempt of court when the unauthorized disclosure of intelligence-related information is at stake.¹⁰ Making this episode even more relevant is the fact that the classified information at issue—about which Judith Miller gathered notes but never published a single word, hence doing no damage herself to the public interest—is of trivial significance in comparison with disclosure of the NSA surveillance program, which tracks the surreptitious activities of al-Qaeda operatives in the U.S. and hence involves the security of the nation and the lives of its citizens. If journalists lack immunity in a matter as narrow as Plame, they also presumably lack it for their role in perpetrating a much broader and deadlier breach of law.

“Unauthorized disclosures can be extraordinarily harmful to the United States national-security interests and . . . far too many such disclosures occur,” said President Clinton on one occasion, adding that they “damage our intelligence relationships abroad, compromise intelligence gathering, jeopardize lives, and increase the threat of terrorism.” To be sure, even as he uttered these words, Clinton was in the process of vetoing a bill that tightened laws against leaking secrets. But, his habitual triangulating aside, he was right and remains right. In recent years a string of such devastating leaks has occurred, of which the NSA disclosure is at the top of the list.

By means of that disclosure, the *New York Times* has tipped off al Qaeda, our declared mortal enemy, that we have been listening to every one of its communications that we have been able to locate, and have succeeded in doing so even as its operatives switch from line to line or location to location. Of course, the *Times* disputes that its publication has caused any damage to national security. In a statement on the paper’s website, Bill Keller asserts complacently that “we satisfied ourselves that we could write about this program . . . in a way that would not expose any intelligence-gathering methods or capabilities that are not already on the public record.” In his book, James Risen goes even further, ridiculing the notion that the NSA wiretapping “is critical to the global war on terrorism.” Government officials, he writes, “have not explained why any terrorist would be so naïve as to assume that his electronic communication was impossible to intercept.”

But there are numerous examples of terrorists assuming precisely that. Prior to September 11, Osama bin Laden regularly communicated with top aides using satellite telephones whose

signals were being soaked up by NSA collection systems. After a critical leak in 1998, these conversations immediately ceased, closing a crucial window into the activities of al Qaeda in the period running up to September 11.

Even after September 11, according to Risen and Eric Lichtblau in their December story, terrorists continued to blab on open lines. Thus, they wrote, NSA eavesdropping helped uncover a 2003 plot by Iyman Faris, a terrorist operative, who was apprehended and sentenced to 20 years in prison for providing material support and resources to al Qaeda and conspiring to supply it with information about possible U.S. targets. Another plot to blow up British pubs and subway stations using fertilizer bombs was also exposed in 2004, "in part through the [NSA] program." This is the same James Risen who blithely assures us that terrorists are too smart to talk on the telephone.

For its part, the *New York Times* editorial page remains serenely confident that the problem is not our national security but the overreaching of our own government. Condescending to notice that the "nation's safety is obviously a most serious issue," the paper wants us to focus instead on how "that very fact has caused this administration and many others to use it as a catch-all for any matter it wants to keep secret." If these are not the precise words used by Colonel McCormick's *Tribune* as it gave away secrets that could have cost untold numbers of American lives, the self-justifying spirit is exactly the same.

We do not know, in our battle with al Qaeda, whether we have reached a turning point like the battle of Midway (whose significance was also not fully evident at the time). Ongoing al-Qaeda strikes in the Middle East, Asia, and Europe suggest that the organization, though wounded, is still a coordinated and potent force. On January 19, after having disappeared from view for more than a year, Osama bin Laden surfaced to deliver one of his periodic threats to the American people, assuring us in an audio recording that further attacks on our homeland are "only a matter of time. They [operations] are in the planning stages, and you will see them in the heart of your land as soon as the planning is complete." Bin Laden may be bluffing; but woe betide the government that proceeds on any such assumption.

The 9/11 Commission, in seeking to explain how we fell victim to a surprise assault, pointed to the gap between our foreign and domestic intelligence-collection systems, a gap that over time had grown into a critical vulnerability. Closing that gap, in the

wake of September 11, meant intercepting al-Qaeda communications all over the globe. This was the purpose of the NSA program—a program “essential to U.S. national security,” in the words of Jane Harman, the ranking Democratic member of the House Intelligence Committee—the disclosure of which has now “damaged critical intelligence capabilities.”

One might go further. What the *New York Times* has done is nothing less than to compromise the centerpiece of our defensive efforts in the war on terrorism. If information about the NSA program had been quietly conveyed to an al-Qaeda operative on a microdot, or on paper with invisible ink, there can be no doubt that the episode would have been treated by the government as a cut-and-dried case of espionage. Publishing it for the world to read, the *Times* has accomplished the same end while at the same time congratulating itself for bravely defending the First Amendment and thereby protecting us—from, presumably, ourselves. The fact that it chose to drop this revelation into print on the very day that renewal of the Patriot Act was being debated in the Senate—the bill’s reauthorization beyond a few weeks is still not assured—speaks for itself.

The Justice Department has already initiated a criminal investigation into the leak of the NSA program, focusing on which government employees may have broken the law. But the government is contending with hundreds of national-security leaks, and progress is uncertain at best. The real question that an intrepid prosecutor in the Justice Department should be asking is whether, in the aftermath of September 11, we as a nation can afford to permit the reporters and editors of a great newspaper to become the unelected authority that determines for all of us what is a legitimate secret and what is not. Like the Constitution itself, the First Amendment’s protections of freedom of the press are not a suicide pact. The laws governing what the *Times* has done are perfectly clear; will they be enforced?

1 *State of War: The Secret History of the CIA and the Bush Administration*. Free Press, 240 pp., \$26.00.

2 The non-partisan status of the Congressional Research Service has been called into question in this instance by the fact that the study’s author, Alfred Cumming, donated \$1,250 to John Kerry’s presidential campaign, as was reported by the *Washington Times*.

3 What the U.S. government was doing, furthermore, differed little if at all from what it had done in the past in similar emergencies. “For as long as electronic communications have existed,” as Attorney General Alberto Gonzalez has pointed out, “the United States has conducted surveillance of [enemy] communications during wartime—all without judicial warrant.”

4 David Kahn concludes in *The Codebreakers* (1967) that in part, “the Japanese trusted too much to the reconditeness of their language for communications security, clinging to the myth that no foreigner could ever learn its multiple meanings well enough to understand it properly. In part they could not envision the possibility that their codes might be read.”

5 In January 2001, a decade-and-a-half after his release, and following a campaign on his behalf by Senator Daniel Patrick Moynihan, Morison was granted a full pardon by President Bill Clinton on his final day in office.

6 If Franklin continues to cooperate with the authorities, his sentence will be reviewed and probably reduced after the trial of Rosen and Weissman.

7 According to Jon Friedman’s online Media Web, the *Times*’s publisher, Arthur Sulzberger, Jr., also met with President Bush before the NSA story was published.

8 “The Espionage Statutes and Publication of Defense Information,” *Columbia Law Review*, Vol. 73., No. 5., May 1973.

9 If the Japanese were not paying close attention to American newspapers, the Germans were. Within days of Pearl Harbor, Hitler declared war on the United States, indirectly citing as a *casus belli* the American war plans revealed in the *Tribune*.

10 Whether Plame was in fact a secret agent—according to *USA Today*, she has worked at CIA headquarters in Langley, Virginia since 1997—remains an issue that is likely to be explored fully if the Libby case proceeds to trial.