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The First Amendment and National Security

Floyd Abrams

Henry Mark Holzer

Don Oberdorfer

Richard K. Willard

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FLOYD ABRAMS*
HENRY MARK HOLZER**
DON OBERDORFER***
RICHARD K. WILLARD****

I. HENRY MARK HOLZER

When we talk about national security or national security interests, we are referring to the government's legitimate concern with defending itself against violent overthrow or subjugation by domestic subversion or external aggression. Indeed, the term "national defense" derives meaning and texture from cases interpreting the Espionage Act.[1]

I want to remind you at the outset that the title of the panel is

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* Floyd Abrams is a partner in the New York law firm of Cahill, Gordon & Reindel. He has taught courses at Yale Law School, Columbia Graduate School of Journalism, and Columbia Law School. He has argued many cases relating to freedom of the press before the Supreme Court and has received numerous awards for his work. He is also the author of numerous articles in newspapers, magazines and professional journals.

** Henry Mark Holzer is a faculty member at Brooklyn Law School where he has taught constitutional law courses, appellate advocacy, and legal ethics. Prior to teaching, he was in private practice, specializing in constitutional, administrative, and general appellate law, where he was involved in many precedent-setting cases. Professor Holzer is the author of numerous books, articles and essays on a variety of legal issues.

*** Don Oberdorfer is a Pulitzer Prize winning reporter for the *Washington Post*. He is the *Post's* Diplomatic Correspondent assigned to the State Department. He taught at Princeton University as the Ferris Professor of Journalism in 1977, 1982, and 1986.

**** Richard K. Willard is a partner in the Washington, D.C. law firm of Steptoe & Johnson. He served as Assistant Attorney General in charge of the Civil Division of the U.S. Department of Justice, 1983-1988. He also served as a judicial clerk for Justice Harry A. Blackmun of the Supreme Court of the United States and Judge Anthony M. Kennedy of the United States Court of Appeals for the Ninth Circuit.

1. Ch. 645, §§ 793-794, 62 Stat. 736-37 (1948) (codified as amended at 18 U.S.C. §§ 793-794 (1982 & Supp. IV 1986)).

"The First Amendment and National Security." Therefore, there are a lot of things that we will not talk about, such as loyalty tests, travel restrictions, domestic surveillance, and the acquisition of information. Rather, we will speak about the disclosure or the dissemination of material as it relates to a first amendment right of free speech and press.[2] Indeed, because the topic is the first amendment and national security, I am not going to be talking about things like dirty pictures, but rather I am going to be talking about things as a matter of survival.

The United States of America has national security and national defense concerns because the world in the 20th century, as well as in the foreseeable future, is an extremely dangerous place. There are people out there who want to hurt us—from the Soviet empire and the Iranian fanatics to freelance gangsters like Qadhafi and Abu Nidal.

The nondisclosure aspect of our national security and national defense concerns is directly related to our survival. Many reasons are given for our espionage laws, and for our official secrets and acts. Our allies will not deal with us, unless they can rely on us. When you exhaust the laundry list of practical concerns—and it is a long one—it comes down very simply to a question of national survival. Yet despite certain disclosures which actually and potentially threaten our survival, there are all sorts of people with differing motives who wish to reveal, and who have revealed, a variety of information to various recipients. They are spies like Colonel Abel,[3] self-styled patriots like Daniel Ellsberg,[4] journalists like Woodward,[5] traitors like the Walkers[6] and the Rosenbergs,[7] zealots like Pollard,[8] former government employees like Pelton,[9] Snepp,[10] Morison,[11] Turner,[12] and Agee.[13] If

2. U.S. CONST. amend. I.

3. Rudolf Abel, convicted of espionage activities in the United States, was given to the Soviet Union in exchange for downed American U-2 pilot Gary Powers in 1962. *See Abel for Powers*, TIME, Feb. 16, 1962.

4. While employed by a Defense Department consultant, Ellsberg leaked the Pentagon Papers to a reporter for the *New York Times*. *See* Abrams, *The Pentagon Papers a Decade Later*, N.Y. Times, June 7, 1981, § 6 (Magazine), at 25.

5. *See infra* note 34 and accompanying text.

6. John, Arthur and Michael Walker, and Jerry Alfred Whitworth were participants in the "Walker Family Spy Ring," which sold classified U.S. Navy information to the Soviet Union. *See, e.g.*, United States v. Whitworth, 856 F.2d 1268 (9th Cir. 1988); *see also Spies Come to Judgment*, U.S. NEWS & WORLD REPORT, Nov. 11, 1985, at 13.

7. *See infra* note 22 and accompanying text.

8. Jonathan J. Pollard, a former United States naval intelligence analyst, was sentenced to life in prison, in 1987, for espionage activities he performed on behalf of Israel. *See Jay Pollard's Peculiar Tale*, U.S. NEWS AND WORLD REPORT, June 1, 1987, at 23.

9. *See infra* note 59 and accompanying text.

10. *See infra* note 39 and accompanying text.

you like, you can put Agee on the list of traitors. They are politicians like Pat Leahy,[14] or, as I like to think of him, "Leaky" Pat Leahy.

Their motives vary: anti-Americanism, pro-communism, political advantage, "scholarship," power, ego, greed, and fame. The information released runs the gamut: codes, surveillance, covert projects, atomic bomb secrets, technical information, reports like the Pentagon Papers,[15] and something I will come back to called the Special Navy Control Program.[16] The recipients of all of this information are usually our enemies, ultimately the USSR, and, of course, sometimes even our allies.

How does it work? First, there is acquisition. A prospective discloser may somehow obtain material either illegally, or legally, through employment. In other words, he steals it, or he gets it from a thief. At this point in the scenario, it is a general criminal law problem. The motive may, or may not, mitigate the theft, but the first amendment does not yet approve of stealing. I have not seen the advance sheets, nor have I read some of what our distinguished Supreme Court Justices have said on the subject lately, but as of yesterday, at least, the first amendment did not protect stealing. Today, however, we are not concerned with acquisition.

The second stage is that the government sometimes learns that something is about to be disclosed, as in the Pentagon Papers situation. At that point, the issue of prior restraint arises. I will address that in a few moments.

The third stage is disclosure. Disclosure to whom? Disclosure may be to the KGB or the GRU, to the resident at the Soviet Consulate, to the *New York Times* or the *Washington Post*, to the *Daily Worker* or *Newsweek* Magazine, to Israel, or Dan Rather. Because a Julius Rosenberg loves communism, or because a Pat Leahy wants to be a big shot, or because a Philip Agee hates America, or because the Walkers need money, we lose secrets and become even more at risk.

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11. Samuel Loring Morison, a former military intelligence analyst, was convicted for violation of the Espionage Act for the unauthorized sale of classified government documents to a private British magazine. *See* United States v. Morison, 844 F.2d 1057 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 259 (1988).

12. Stansfield Turner, a former Navy Admiral and former Director of the CIA under President Carter, authored SECRECY AND DEMOCRACY: THE CIA IN TRANSITION, which describes his views of the CIA.

13. *See infra* note 40 and accompanying text.

14. Patrick J. Leahy, a Democratic Senator from Vermont and former vice-chairman of the Senate Intelligence Committee.

15. *See* New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (commonly referred to as the Pentagon Papers case).

16. *See infra* note 21 and accompanying text.

We do have somewhat of an arsenal to protect against harming America's national security by disclosure of sensitive information. I won't give you the laundry list, but suffice it to say that there are some narrow, precise situations, like atomic energy, which are covered by specific acts. The former CIA employee is covered by yet another set of very narrow safeguards, such as the employment contract. There is, of course, punishment for what I would like to call straight espionage. Believe it or not, however, other than these and two other situations which I will mention in a moment, that is it.

Another safeguard is 18 U.S.C. § 641,[17] which covers theft and embezzlement in the government. It is not an easy statute to use, in regards to the disclosure of national security and national defense information. The other weapon is a prior restraint preliminary injunction, which was contemplated by *Near v. Minnesota*[18] and *New York Times Co. v. United States*.[19] This, however, currently is a judicial weapon. It is only something that can be sought and obtained, if at all, from a court, and it does not rest on any statutory or significant basis.

Where do we stand with regard to spies like Abel? Actually, we are in pretty good shape. What about traitors like the Rosenbergs, the Walkers, or Pelton? Again, we are in pretty good shape. What about the zealots, people who are, for one reason or another, determined to give sensitive information to foreign governments, or even to friendly governments? We are basically all right there as well.

What do we do about the leakers and their henchmen in the media? I am sure virtually everybody at this symposium knows that this is a very serious problem. What do you do about an alleged do-gooder like Ellsberg? You cannot apply the Espionage Act, nor can you apply a specific atomic energy-type statute. It really cannot be classified as theft, and even if it is, that does not go to the disclosure. He did not work for the CIA, so we do not have an employment contract, as in the Marchetti[20] and Snepp situations. In those situations, you could not enjoin them. What do you do about Woodward? On October 26, 1987, as many of you know, *Insight* Magazine referred to one of the most closely held secrets in American intelligence, "the Special Navy Control Program," which apparently Tur-

17. Act of June 25, 1948, ch. 645, § 641, 62 Stat. 725 (codified as amended at 18 U.S.C. § 641 (1982 & Supp. IV 1986)).

18. 283 U.S. 697 (1931).

19. 403 U.S. 713 (1971) (per curiam).

20. Victor L. Marchetti, a former CIA employee turned author, unsuccessfully challenged the constitutionality of the secrecy agreements that he signed when entering and leaving his employment with the CIA. *See* United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972).

ner gave them.[21] Is there a statute that fits that? I think not. What do you do about "Leaky" Leahy when he shoots off his big mouth about the Achille Lauro and some sensitive operations in Egypt? How do you deal with that? I think the way you deal with it is by enlarging present laws, or by getting new laws enacted to cover unauthorized disclosures of national security and defense information that are not currently embraced by these statutes. In other words, leaks by anyone—including the heretofore specially privileged media—should be, first, permanently enjoined with substantial financial and other penalties for violation of the injunction, and second, should be punished criminally.

Obviously, statutes like the one I just proposed have to be drawn to avoid vagueness problems. They must narrowly define key terms, such as unauthorized, disclosure, national security, and national defense. Furthermore, the legislative intent should be very clear.

What do we do about the first amendment? The first amendment is no bar. In the first place, there cannot be a right to speech or press that allows affirmative steps to disclose information, which in the hands of America's enemies, could violate the legitimate rights of Americans to survive. In other words, there is no right to violate a right. Second, the Supreme Court never has held that the first amendment is entitled to a privileged position in either the Bill of Rights, or in the entire constitutional constellation of which the first amendment and the Bill of Rights are but a part. And third, federal courts have held, at least in the case of the Rosenbergs,[22] that there is no first amendment right to pass atomic secrets to the Soviets. Indeed, one can extrapolate that Axis Sally had no right to free speech or free press to broadcast pro-Nazi, anti-American propaganda for the Germans, nor did Tokyo Rose for the Japanese, nor Ezra Pound, with his anti-Semitism, for the Italian Fascists.

In the United States and in the world today, there are many limitations on speech, and though some of us may disagree with some or all of them, they have been held constitutional and are the law of the land. Some of these limitations concern infinitely less important material than national security. Obscenity and hard-core pornography laws are limitations on speech. Defamation laws are a limitation on speech. Laws against dirty words are a limitation on speech. The doctrine of commercial speech is a limitation on speech. Special environment, time, place, and manner restrictions are, likewise, restric-

21. Epstein, *Gripping Tale of Struggle for Power*, INSIGHT/THE WASH. TIMES, Oct. 26, 1987, at 61.

22. *See* Rosenberg v. United States, 346 U.S. 273 (1953).

tions on speech. The Hatch Political Activity Act,[23] which bars political activity, is a restriction on speech. The Logan Act[24] on free-lance foreign policy, except when it applies to Congressmen, is a limitation on speech.

National security and national defense issues are related to foreign affairs. The foreign affairs power of the Federal Government, held by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*[25] to be plenary, is especially plenary when the President and the Congress act jointly. In balancing interests, for those who like to do that sort of thing, it is not difficult to find a compelling state interest here.

What about prepublication restraint? In principle, there is nothing constitutionally infirm about a prepublication injunction. The Supreme Court in *Near v. Minnesota*,[26] does not say that you can never get one. In fact, in the Pentagon Papers case, Justice Brennan himself recognized, in principle, the availability of a prepublication injunction.[27] Also, in *United States v. Progressive, Inc.*,[28] which dealt with the recipe for the atomic bomb, a federal district court issued a preliminary injunction.

Yes, our laws relating to the disclosure of national security defense information are inadequate. They must be enlarged to cover leakers and their arrogant henchmen in the media, who presume to decide for the American people, who have elected a President and a Congress, what is in the national interest concerning security. Furthermore, those laws must be vigorously enforced. People like Morison, who give secret photos to a British magazine, should be prosecuted as he was.[29] Those like Agee, who blow the cover of CIA agents, ought to be tried, not only for the disclosure under the new statute, but perhaps also for treason, and for being an accessory to murder, given the death of Mr. Welch in Athens. Mr. Welch, I might add, no longer has any freedom of speech. The former government employees and journalists who compromise secret papers and projects must be indicted, tried, convicted, and sent to prison. The self-serving, holier-than-thou newsmen, who would jeopardize American security by exposing a planned Grenada invasion or a hostage rescue

23. Pub. L. No. 87-753, 76 Stat. 750 (1962).

24. Ch. 645, § 953, 62 Stat. 744 (1948) (codified as amended at 18 U.S.C. § 953 (1982)).

25. 299 U.S. 304 (1936).

26. 283 U.S. 697 (1931).

27. New York Times Co. v. United States, 403 U.S. 713, 726 (1971) (per curiam).

28. 467 F. Supp. 990 (W.D. Wis. 1979).

29. *See* United States v. Morison, 844 F.2d 1057 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 259 (1988).

operation, must be enjoined and severely punished if they violate that injunction. Our survival in this very dangerous world requires no less. To paraphrase William Jennings Bryan, it seems to me that we can no longer allow America's security to be crucified on the cross of free speech.

II. FLOYD ABRAMS

Each society chooses the risks it is prepared to take. Each society chooses most carefully, in the areas of national security and freedom of expression, the risks that it is prepared to take in either direction. As a general matter, this country, more than any other in the history of the world, has chosen the risks of allowing free speech, rather than the risks of suppressing it. That is true in almost all areas. It is certainly true in the area of national security.

I have not the slightest hesitation in telling you that I am continually confronted with a look that is usually reserved for people who are slightly mad when I travel abroad and tell people about cases that I have worked on, or cases that the courts have decided. It is the received wisdom of the Western world, not only the totalitarian world, that we have gone much too far, that we do not understand the value of order, that we should be more concerned than we are about momentary spasms of public opinion, and that, as Professor Holzer would have it, we should do something about the press when it publishes something that Professor Holzer believes it should not. But Professor Holzer's America is not mine. And the rest of the world's view is not ours.

Let me urge upon you a few lessons. One is that when people talk specifically about the harm that will be done, or has been done, by something that has been published in a newspaper or broadcast on television, you should be very wary about whether any harm will actually result. We have, after all, had some experience in this area. The Pentagon Papers were indeed secret in classification terms. They were Top Secret documents prepared under the offices of Secretary of Defense MacNamara in an effort to determine why we entered the war in Vietnam, and whether we should stay in that war. They were made available to the *New York Times*, and ultimately to other newspapers as well. The argument for a prior restraint failed in that case.[30] The Supreme Court did not say that all prior restraints thereafter would be unconstitutional. It did, however, make it just about impossible for any prior restraint to be issued, in almost any case that

30. *New York Times Co.*, 403 U.S. at 714.

we can imagine. The fact that there had been no efforts by the government to seek a prior restraint on national security grounds prior to 1971, and that there had been no such cases since 1971, save the *Progressive* case,[31] which did not reach the Supreme Court, should tell us something about how real life works. It should be an indication of how much harm people think publication can do—indeed, how much harm it does do. The Pentagon Papers case is only one case, but it is not a bad test case. There, under oath, the Secretary of the Army swore to every court in this country that publication of the papers would do grave and irreparable harm to this nation and its people. All those papers, which were in the hands of newspapers, were ultimately published, some of them not by the newspapers themselves.

No one has ever tried to argue that any harm came about as a result of that publication. Ten years after that case, I interviewed every witness I could find who had testified for the government about the harm that would befall us as a result of publication.[32] None of them thought that any harm had come about, and one of them, Mr. Macomber, former Assistant Secretary of State, later Ambassador to Jordan and other countries, said that he now thought the government's position was wrong, even though he thought it should have brought the case. He thought the *Times* should have won the case and said that he had come to the view, more strongly out of government than in it, that the first amendment protects our national security, as well as always running the risk of imperiling it. I think that teaches us a lesson about this.

Professor Holzer refers to Mr. Woodward and asks, I hope hypothetically: "What do you do about Woodward?"[33] First, if you are serious about punishing leakers, you should ask: "What should we do about the Caseys?" If you mean that you really want to punish and jail people that leak information, then you have to mean it on a bipartisan basis—whether the people come from the left or the right, and whether you agree with them or not. Mr. Woodward's book is a good example of that because no one can read that book and not believe that the information relied upon in it came from high-ranking officials in the intelligence establishment of the United States.[34]

We live in a country all but totally free of prior restraints.[35] We

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31. *Progressive, Inc.*, 467 F. Supp. 990.

32. *See* Abrams, *The Pentagon Papers a Decade Later*, N.Y. Times, June 7, 1981, § 6 (Magazine), at 22.

33. *See supra* p. 64.

34. *See* B. WOODWARD, VEIL: THE SECRET WARS OF THE CIA, 1981-1987 (1987).

35. *See* Abrams, *Prior Restraints*, PRAC. L. INST. 3 COMM. LAW 5, 11 (1987).

live in a country which hardly ever punishes speech after it is made[36] and which rarely—very rarely—imposes liability on third parties who receive and disseminate information, even when the information was intended to be secret.[37] Should that be the law? Put aside, for a moment, the first amendment issues. Should we choose to order a society in a fashion that lets us, once we have information, use it as we see fit?

My answer is yes. I think my answer comes from some of the same roots as the first amendment case law. In part, it is a matter of practicality. Once secrets are out, they are out. You cannot rebottle old secrets, nor can you effectively ban the use of information once it is out of the control of the government, which is trying to prevent its dissemination. That is exactly what happened in a different part of the Pentagon Papers case. One newspaper after another got the information, and one newspaper after another was briefly enjoined from printing it. Fortunately, the case ended with a victory for the press. But for a time we were going down a road similar to the absurd situation the United Kingdom is in today. The book *Spycatcher,*[38] which we can buy at any bookstore in America, and which any Englishman can bring into England, cannot be printed in the United Kingdom either in its entirety, or in excerpts. Such an approach does not work and should not work. Who are we protecting? What are we protecting? We should at least admit that if information is out, we can assume that our adversaries have access to it. That is not overreaching. You do not need traitors for that, let alone the sadly unreal world that Professor Holzer urges is upon us. It is common sense, not barbarism, that leads us to conclude that once something is no longer a secret, we should not enjoin anyone from printing it.

Some component of freedom of expression should be put on our public policy scales, as well as those which we use to determine first amendment law. Are we really prepared to say that if information becomes available which is relevant to public policy decisions, as a lot of this information is, we may not use it? Are we really prepared to say that you will be jailed, or should be jailed, if you disclose such information to someone else?

Washington lives on leaks. Mr. Willard said in a discussion, which he and I had some years ago, that it was one of the purposes of

36. *See* Bridges v. California, 314 U.S. 252, 263 (1941); *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

37. *See* Smith v. Daily Mail Co., 443 U.S. 97, 102 (1979); *see also* Landmark Communications, Inc., v. Virginia, 435 U.S. 829, 843-45 (1978).

38. P. WRIGHT, SPYCATCHER (1987).

this administration to end that regime. It has failed. All administrations so far have failed at that effort. I do not condemn them for that. I simply say that no administration has found it possible to do that for a variety of reasons, which are deeply imbedded in the American psyche, and which particularly come to the fore when we do not agree on basic premises of policy within and without government. To say that we should jail people who get information from high-ranking government officials who often have the authority to leak is to nullify one of the primary means by which the American people learn what is going on in, or about, their government. Although that is not an ordered way to run a society, and although it is not the way one would start out writing law in terms of how society ought to work, it is the way we have developed for a variety of reasons. It is often the way information gets out.

I do not oppose criminal laws that punish certain people in government who reveal certain information. I do not object to laws that result in the firing of other people who are in government and who leak information. When I hear people ask what we should do about Woodward, however, my answer is that we should honor him. I think he has made a serious and substantial contribution to public debate concerning the most serious public matters that confront us. If we were drafting a new first amendment, we should draft it to protect Bob Woodward. If we were drafting a new espionage law, then we should draft it to ensure that the Woodwards of the world are not jailed because of what they do.

I conclude by emphasizing to those who really care about personal liberties that passing legislation that bans, suppresses, or punishes speech would be profoundly unwise, historically un-American, and—fortunately—indisputably unconstitutional.

III. RICHARD K. WILLARD

I am happy about the government's record in the Supreme Court. Recently, we have been winning cases in which the first amendment and national security interests come into conflict. I would just like to briefly summarize these cases. The trend started in 1980, during the Carter administration. In *Snepp v. United States*,[39] the Supreme Court rejected a first amendment challenge by upholding the Central Intelligence Agency's right to review the unclassified writings of ex-employees, prior to their publication. The following year, the Court, in *Haig v. Agee*,[40] again rejected a first amendment chal-

39. 444 U.S. 507 (1980).
40. 453 U.S. 280 (1981).

lenge and upheld the ability of the government to revoke Mr. Agee's passport because of his activities. Then, several years later, in *Regan v. Wald*,[41] the Court rejected another first amendment challenge and upheld government regulations which inhibited travel to Cuba.

I had the pleasure of representing the government in *Central Intelligence Agency v. Sims*.[42] This was a Freedom of Information Act case, in which the Court upheld the ability of the Director of Central Intelligence to withhold information about intelligence sources, even though it was unclassified. Then, in 1985, the Court upheld the power of military commanders to bar people from open houses who wanted to demonstrate on a military base.[43] The Court further upheld the ability of the government to engage in a prosecution policy that targeted people who had protested against the Military Selective Service Act by refusing to register with the Selective Service.[44] Finally, there was *Meese v. Keene*,[45] the "Canadian films" case, in which the Supreme Court upheld the ability of the government to compel foreign films to be registered if they met the criteria for the statutory term "political propaganda."

The only case in which the government has had a problem in this area recently was *Abourezk v. Reagan*.[46] We lost that case in the court of appeals, and it was affirmed by an equally divided Court—three to three, with three members of the Court absent.[47] I am not sure, however, that the case really stands for much of anything, in light of the limited participation of the Court.

It is significant that the Court's decisions have not been close in these national security cases. Only one of them, *Regan v. Wald*,[48] was a five to four case, and there, the four dissenters based their dissent solely upon statutory grounds. Most of these cases were decided seven to two, or six to three. In fact, the only Justices to vote against the government's position in all seven of the cases were Justices Brennan and Marshall. Justices Stewart, O'Connor, Burger, White, and Rehnquist voted for the government in all of the cases in which they participated. Justice Powell voted for the government in six out of seven of these cases, while Justices Stevens and Blackmun voted for

41. 468 U.S. 222 (1984).

42. 471 U.S. 159 (1985).

43. United States v. Albertini, 472 U.S. 675 (1985).

44. Wayte v. United States, 470 U.S. 598 (1985).

45. 481 U.S. 465 (1987).

46. 785 F.2d 1043 (D.C. Cir. 1986), *aff'd*, 108 S. Ct. 252 (1987) (per curiam).

47. Reagan v. Abourezk, 108 S. Ct. 252 (1987) (per curiam), aff'g 785 F.2d 1043 (D.C. Cir. 1986).

48. 468 U.S. 222 (1984).

the government in five out of seven. Overall, the government has a clear record of success in litigating first amendment cases involving national security issues in the Supreme Court.

Perhaps I ought to be content, but the fact is that I am very unhappy about the state of our government's ability to protect national security information. A few years ago, I was hopeful that the Reagan administration could change the traditional Washington pattern of rampant leaks, in which national security was constantly being compromised by the flow of unauthorized information to the media. I now recognize that we have failed miserably in protecting vital national security secrets. Consequently, the rampart leaks have caused great damage to our intelligence programs and capabilities, thereby, making it harder for us to conduct diplomatic activities, and endangering the lives of American servicemen around the world.

I would like to focus on one particular harm because this is one that I predicted and, unfortunately, have been here long enough to say "I told you so." It is the harm to the decisionmaking process. We were told that in planning for the Iranian hostage rescue mission, the Carter administration had a fear of leaks that kept the planning to only a tight circle. As a result, they could not take advantage of expertise that might have helped the mission succeed. The people who had the expertise and could have been helpful, were kept out of the process because the administration was afraid that if they involved too many people, there would be a leak.[49] That led to the foreign policy fiasco of the Carter administration. Unfortunately, the same fear led to the foreign policy fiasco of the Reagan administration. I am referring to the Iran-Contra affair. The Tower Commission Report makes the point quite well:

> The obsession with secrecy and preoccupation with leaks threaten to paralyze the government in its handling of covert operations. Unfortunately, the concern is not misplaced. The selective leak has become a principal means of waging bureaucratic warfare. Opponents of an operation kill it with a leak; supporters seek to build support through the same means.
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> We have witnessed over the past years a significant deterioration in the integrity of process. Rather than a means to obtain results more satisfactory than the position of any of the individual departments, it has frequently become something to be manipulated to reach a specific outcome. The leak becomes a primary instrument in that process.

49. *See infra* notes 65-66 and accompanying text.

This practice is destructive of orderly governance.[50]

That is a fair comment on the bureaucratic climate that helped to contribute to the Iran-Contra fiasco. The question is what do we do about it. Some suggest that we should give up and recognize that leaks are an inevitable phenomenon of Washington; however, I do not think that is an adequate solution. Those of us who are in government would be abdicating our responsibility to safeguard the national security if we were to tolerate a situation in which our government could not keep a secret when it counted.

I also do not think that the first amendment has much to do with the solution. In my view, the solution requires painstaking work on the fundamentals of security. Success in government is like success in invention—one percent inspiration, and ninety-nine percent perspiration. Success here, especially in the national security area, is about ten percent policymaking and ninety percent policy effectuation.

We need to have a balanced program to develop a security posture that pays attention to all the fundamentals. In my view, there are five areas: first, a sound classification system; second, a personnel security system that works properly to limit access to those who are trustworthy; third, a program for protective security to limit access to information to those who are in fact authorized to have it; fourth, a counterespionage program; and fifth, an enforcement program to punish, and hopefully deter, those who are violators of the system.

Although we have made some progress in many of these areas in the Reagan administration, we simply have not made enough progress in the last area. It is not really a matter of developing new legal weapons, but an ability to use the ones we have. The most celebrated defeat for the government in this area involved the effort to obtain prepublication restraint through an injunction in the Pentagon Papers case.[51] That is not what we needed to solve our problem. I am willing to accept the challenge that was laid down by Justices Stewart and White in that case. They emphasized that it is the responsibility of the executive branch to enforce secrecy by having a sound security program and to punish and fire people who violate their trust.[52]

It is in the area of executive branch programs that the fight is going on right now. For example, our efforts to get employees to sign secrecy agreements are now under attack in lawsuits, in the media, and in Congress. Some in Congress think that "whistle blowers"

50. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD (Tower Commission), part V, 5-6 (Feb. 26, 1987).

51. New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

52. *Id.* at 729 (Stewart, J., concurring).

ought to be protected if they disclose classified information. There is a recent proposal to let the Merit Systems Protection Board, which has no security responsibilities, review a decision by the Executive to deny access to classified information.

I am willing to accept the challenge of the courts and the scholars, who assert that national security information should be protected in a manner consistent with the first amendment, by focusing on the Executive's responsibility to get its own house in order. We cannot do that, however, if our critics continually undermine such efforts. If we are to succeed, or have any hope of success, we must pull together and focus on implementing a sound security program. If our critics prevent us from enforcing security requirements within the executive branch, then I think the only other alternative is some kind of Official Secrets Act. I do not think that is a good idea, and many of our critics may regret undermining our efforts to develop a sound security regime because the alternative may be much worse from the standpoint of the first amendment.

IV. DON OBERDORFER

I want to tell you how a member of the press feels about these issues as a person who has to deal with them on a day to day basis, in a mundane or occasionally dramatic fashion. First, I would like to make a disclaimer: No one can speak for the American press. It is diverse in character and opinion. I speak for myself, not for the press, and not for the *Washington Post*. We, as journalists, deeply believe in the first amendment, which is the foundation of what we do. It is of primary importance to us that the press is the only business in this country— and it is a business—that is protected by the Constitution of the United States. There is a reason of great significance for this. In our democratic system, a free people would be unable to effectively exercise their citizenship rights if they were not well and independently informed, or at least did not have the potential of being well and independently informed. Our function as members of the press is to inform them.

The press lives by disclosures. Our job is to tell as much as we can, as well as we can, and as often as we can. This is not, as you may think, a special pleading for a special cause. If you think about it for a moment, the governmental and the political processes at local, state, and national levels rely to a tremendous extent on this constant stream of public and published information. It is the foundation for political interchange, accountability, and public opinion. The independence and the diversity of the press are, therefore, of vital impor-

tance. If you need a reminder, just visit an authoritarian or totalitarian country, look at the press, and you will see the difference. Despite the tenor of what I have just said, and some of what I will say next, the general public and many of us in the business believe that our greatest fault is in not finding out and publishing enough. There is much less concern that we may publish too much because it is manifestly true that there is so much that we do not know and report.

We in the press may seem like many, but from our ranks, we appear as a very thin line trying to cover a vast amount of territory. What we learn about security matters is often partial and after-the-fact. We are faced not only with secrecy, but often with lies, half-truths, evasions, and recently, attempts at deliberate misinformation. The Iran-Contra affair is an example of our shortcomings. We knew nothing about it for more than a year, despite major discussions and decisions within the government, and despite large scale movements of money, weapons, and emissaries around the world. The affair also reveals the dangers inherent in obsessive secrecy, which leads to unaccountable government operations beyond the tolerance of Congress, or the American public.

Most of us in the press also recognize that in compelling and unusual circumstances, there are limits to what we can, or should, publish. We are not totally independent actors or institutions. We are also citizens. Generally speaking, we do not publish the names of rape victims, nor do we generally interfere with the tactical phase of law enforcement or military operations. In Vietnam, for example, reporters, myself included, accepted ground rules not to disclose pending military operations.

How then do we deal with the disclosure of government secrets or pseudo-secrets? I mention the latter because in my experience, nearly every action, recommendation, or policy decision in the foreign policy or national security field is classified as a secret by someone at some time, often without valid reason, except for bureaucratic convenience. Howard Simons, former Managing Editor of the *Washington Post*, often said that it is not just improbable, it is impossible for a person to report on the foreign policy beat in Washington without bumping into a secret every day.

The abuse of secrets is far more serious on the government side than in the press. Although a lot has been said about leaks, much of it is total nonsense. We have to decide what a leak is. A great deal of information comes out of the government every day with no name attached to it. This is not a leak. For example, the Institute of Politics of the John F. Kennedy School of Government at Harvard con-

ducted a study[53] about the press and government managers, in which the authors defined leaks as government sources telling a reporter something they would not want their boss to know they told him.[54] After much research, that definition was finally the best one that the study could come up with. The study also found that forty percent of former senior government officials said that, at one time or another, they had leaked information for their own reasons, which they found to be valid.[55]

Some disclosures of important matters raise legitimate and substantive questions for the press in this field because of the potential consequences of publication. We usually know which ones these are. I am not talking about the *Aviation Week* type of technical material, which the government could stop if it wanted to. I am talking about major policy issues. Generally speaking, there is also a dialogue between the government and the press before publication. This is an ad hoc, informal system that has developed over time, especially since this has become an issue between the government and the press over the last ten years.

Some of the most notable examples from my own experience on the *Washington Post* were Bob Woodward's 1977 disclosure that King Hussein of Jordan had long been on the CIA payroll;[56] Mike Getler's 1980 disclosure of U.S. aid to the Afghan rebels;[57] my 1982 disclosure, followed by a more extensive one by Bob Woodward and Pat Tyler, regarding President Reagan's authorization of U.S. aid to an anti-Sandinista force in Nicaragua, which later became known as the Contras;[58] and Woodward's 1985 discovery, published in the *Post* eight months later, of U.S. eavesdropping operations off the Soviet coast, which had been revealed to the Soviets prior to that time, for pay, by government employee Ronald Pelton.[59]

In each of these cases, the government was put on notice by the newspaper and had an opportunity to make its views known if it objected to publication. In most of the cases, a high level dialogue ensued that sometimes involved such figures as the President, the Secretary of State, the National Security Adviser, the Director of the Central Intelligence Agency, or the National Security Agency, and the publishers and editors of the newspaper. In these dialogues, the

53. M. LINSKY, IMPACT (1986).
54. *Id.* at 202.
55. *Id.* at 197-98.
56. The Wash. Post, Feb. 18, 1977, at 1, col. 1.
57. The Wash. Post, Feb. 15, 1980, at 1, col. 2.
58. The Wash. Post, Mar. 10, 1982, at 1, col. 5.
59. The Wash. Post, May 21, 1986, at 1, col. 2.

government figures had an opportunity to state their objections or misgivings and to spell out the reasons against publication of the information, either in whole, or in part, or for a certain period of time. The press, in this case the *Washington Post*, had an opportunity to point out surrounding facts and circumstances and state its views to the government. Yet, the decisions of whether to publish, when to publish, and how much to publish were ultimately for the press to make.

This is an essential point. If it were not our final decision, there would be no such process, simply a flat and nearly automatic "no," as under the British Official Secrets Act, or the workings of authoritarian or totalitarian governments in many places in the world. It would be a resounding and ever-encroaching "no," which would likely do far more damage to the United States political and governmental system over time than any disclosure of the moment. In the same vein, it seems to me that nearly all of the proposed remedies for governmental leaks, such as the application of espionage or theft laws to leaks by the press, would dangerously interfere with the press' ability to function in our system.

The government has the right and the duty to protect its secrets against unauthorized disclosure. That is its job. Indeed, I find Mr. Willard's program of painstaking and hard work on the essentials of security to be a legitimate government effort. And his suggestions sound to me, at first hearing, like they are the kind of action that the government should take to protect its secrets.[60] It should take such action, however, without threatening or damaging the press' right and duty to inform the public. Blunderbuss measures that have not been approved by Congress, or justified to the American people, are not the way to go.

The functioning of the press is essential to our democratic system. Our shortcoming is our inability to know enough and publish enough. Our job is to publish. In extreme, compelling, and unusual circumstances, however, there may be overriding reasons to withhold publication of information. Freedom of the press is a balancing act, not an absolute right, although the weight should be heavily on the side of publication. In fact, an informal, ad hoc system has been developed that allows stories that are seen as particularly troublesome for the government on national security grounds to be discussed before they are published. The system works, and I might add that there has been no showing of grave damage to U.S. national security when it has been used. Finally, the ultimate decision to publish is,

60. *See supra* Section III.

and must be, in the hands of the press. If we are wrong, there will be severe public and political consequences. Publishers, editors, and reporters are well aware of that. We live here too.

V. REBUTTAL STATEMENTS

A. *Henry Mark Holzer*

We hear a great deal, particularly from liberals, about how activity *A*, law *B*, or decision *C*, may "chill" free expression. We never hear, however, the very related point that there is also a fear of leaks. Speaking broadly, there is the fear that sensitive, classified, and highly important national security and national defense information may get out and cast a terrible chill on planning activities that are important to American national interests.

Mr. Oberdorfer said that the press is the only business protected by the Constitution.[61] I would suggest that the "business" of survival is very much protected by the Constitution in provisions that, among others, provide Congress with the authority to provide for the national defense. Not to introduce a note of acrimony, but I am becoming very tired of hearing that the first amendment is virtually the only provision in the American Constitution. There are provisions in the body of the Constitution that are of equal, if not greater, importance than the one that supposedly creates a right to express "information" to the effect that the American military is planning to liberate Grenada.

B. *Floyd Abrams*

I would like to give this administration credit for some of the things it has not done. It is meaningful, and it says something about the strength of our tradition, the force of our laws, and the commitment of the people in this administration to the first amendment that there have been no efforts at prior restraint by this administration, and that there have been no criminal prosecutions of journalists by this administration. For those of us, myself included, who have been critical of the administration, it is worth saying that these things have not occurred, and it is important that they have not occurred.

The battle is now being fought a number of steps away from the hard core, first amendment terrain. It is being fought about the rights of leakers. There is no constitutional right to leak information. On the other hand, there is a first amendment interest in having certain information available. What should the rights of a whistle blower be?

61. *See supra* p. 74.

As a societal matter, and not as a first amendment matter, I think that it is extremely important for us to encourage people to disclose wrongdoing in government. I am not here, however, to argue that now. Rather, I would argue that this administration is obsessed with secrecy. It is worth saying again, at least as a very general and very real life proposition, that the reason we have so little litigation in these hard core areas is that we always have shared the view that direct restraints and punishment of the press, of speakers, and the like is unacceptable.

It is worth discussing one or two more examples of the sort of "secrets" that are published, and that people may object to having published. Mr. Woodward's book, for example, disclosed, I think for the first time, details about the bombing of a Nicaraguan airport just before two American Senators arrived.[62] That bombing was done, as Mr. Woodward suggests, and I believe it to be true, in a fashion that was supported by the Central Intelligence Agency. There are serious questions about illegal actions by the CIA in Nicaragua. Even if Mr. Woodward's statement was not true, there are serious public policy questions about whether that sort of thing should have gone on, and about the degree to which this government should have been involved. So far as I am concerned, it is a good thing, not a bad one, that that sort of disclosure was made.

A second example is an assassination attempt in Beirut that Mr. Woodward said was made on behalf of the United States.[63] Although the target of the attempt was not killed, some seventy or eighty other people were. I would make the same two points. First, assassination is illegal, and if we try to do it on behalf of this government, it is against the law. That does and should matter to us. Second, and more broadly, there are serious issues of public policy involved there. This is not a question of what the press should do in advance of a rescue effort, or what the press should do in advance of an invasion, or even what the press should do in advance of an assassination attempt, if that should occur. This is reporting, and I believe that it is important, serious, and valuable reporting. It is information that is "classified," but the classification system does not bind you, me, or the press. It cannot, and it never has bound anyone except governmental officials.

The government has a perfect right in the two examples above not to speak. Indeed, the government might have violated its duty to its citizens if it had done so. But although the government is within

62. B. WOODWARD, *supra* note 34, at 271-76.
63. *Id.* at 397.

its legal rights not to disclose these matters, the press is not only within its legal rights but, in my view, serves the public by disclosing them.

C. *Richard K. Willard*

The debate in Washington is not over government efforts to put newspaper reporters in jail, or to engage in direct censorship of the press. Rather, it is about the government's efforts to get its own house in order, to have a good security system that will work, and to find government employees who are violating the security rules and punish them appropriately.

That is where the battle is being fought, and it is a little disingenuous for some people to say: "You should get your own house in order, rather than go after the press." Then, they attack you for doing precisely what they suggested. That is where we are now.

We have been repeatedly criticized for trying to implement adequate security measures. They say that we cannot use polygraphs to find out whether people are security risks. They say that we cannot make decisions of security clearance, unless we can justify them with judicial review. They say that we cannot require secrecy agreements of government employees as a condition of giving them access to classified information. Finally, they say we cannot punish government employees who violate their obligations in this regard. I would suggest that if we fail in these relatively modest efforts at security discipline, then we are going to have to consider draconian kinds of solutions. I hope that we do not have to do so. I think the more harsh solutions have constitutional problems, as well as practical problems.

I wish the administration had confronted this problem more forcefully in 1984, when efforts were underway to implement NSDD 84,[64] a presidential directive that was aimed, not at the media, but entirely at internal government security practices. The political heat got too strong, however, and the administration backed off and effectively abandoned any effort to develop a program to combat leaks. The abandonment of this effort was one of the factors that led to the kind of fiasco we had in the Iran-Contra affair. Unless you have a disciplined system for national security decisionmaking, you are going to discourage the use of the process.

I would like to close by reading a brief passage from Colonel

64. National Security Decision Directive (NSDD) 84. *See Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the Subcomm. on Civil and Constitutional Rights*, 98th Cong., 1st and 2nd Sess. 114 (1983-84).

Beckwith's book,[65] which although it speaks of the Carter administration ten years ago, it could just as easily be said today about Washington. He said:

> Early on in the planning of the mission I was embarrassed to learn that Delta could not coordinate with our State Department those contact points we had taken a lot of time and effort to establish. Because of State's notorious reputation for not being able to keep a secret, DOD [Department of Defense] ordered Delta not to talk to State. Somehow this problem with the State Department must be overcome. In the future, every appropriate agency in our government must be used.[66]

I would suggest that the problem has not yet been overcome.

D. *Don Oberdorfer*

I do not want my silence about Woodward to be misconstrued, not that he needs any defense from me. He is one of the most respected journalists in Washington. He does wonderful, credible work, which I honor and respect.

VI. QUESTIONS AND ANSWERS

SPEAKER: Mr. Oberdorfer, You did sound like the soul of sweet reason, and in fact you were even quite moving when you said, "We live here too." I must differ, however, with regard to your opinion on self-enforced prior restraint by the press. You have described the high level negotiations that take place between government officials and the press regarding national security. Yet, you failed to recognize that only one of the parties to this dialogue, government officials, have been elected by the people and investigated by the FBI concerning their past and loyalties. The other party to this dialogue, the press, ultimately decides whether to disclose material security secrets, yet there are no such safeguards built in. The people who become editors of newspapers, and therefore hold this very important power in their hands, undergo no such screening. I am wondering how you would respond to the possibility, just the hypothetical situation, of a lunatic becoming editor of the *New York Times*?

MR. OBERDORFER: We are not elected. We know we are not elected. We realize that the government has many powers and responsibilities that we do not have. What I have described is reality concerning many of the sensitive questions that people get excited

65. C. BECKWITH & D. KNOX, DELTA FORCE (1985).
66. *Id.* at 298.

about. You may find things that are ironic, difficult, or inappropriate about it, but we are rather practical about it.

If there is something about a story that is so potentially damaging to the security of the United States that we should not publish it, not publish all of it, or withhold it for a certain period of time, we think that it makes more sense to find that out before, rather than after, the article is published. So there is a dialogue. It's for the government to decide how far up the chain of governmental command that the response should come from. I do not think there is any alternative for the press, if it is going to be both a free and responsible press, other than to carry on this kind of dialogue with the government. I do not believe there is much likelihood of a lunatic becoming editor of the *New York Times, Washington Post*, or CBS. We have institutions, and we have ways up the ladder. I do not think that would ever happen.

SPEAKER: I have two questions for Mr. Willard. First, how many employees of the Department of Justice have been fired for unauthorized leaks of information in the seven years that you have been there, whether it be the leaking of national security or other secrets? Second, how many political appointees have been asked to leave or resign, or have been fired, for unauthorized leaks?

MR. WILLARD: The numbers are not very good at all. I know of only one case involving a Justice Department employee. There may be others that I just do not know about because I am not in this business. Early in this administration, William French Smith fired a United States Attorney in California for an unauthorized disclosure of classified information. That contrasts favorably with the record of a number of other departments, where people who have been caught leaking classified information have been allowed to either keep their jobs, or steal off silently into the night with their retirement benefits intact. All too often, this administration has been unwilling to discipline employees, both political appointees and career appointees, who violate the security rules.

SPEAKER: It seems that your reliance on policing your own house is a rather hollow remedy. Only one U.S. Attorney was fired for unauthorized leaks. There must have been many more leaks in this administration, or in any administration. You have only one person that you can point to?

MR. WILLARD: I understand the problem. With regard to leaks, of course, most leakers do not advertise who is doing the leaking. The definition we heard earlier is a good definition of a leaker. It is someone who provides information that he does not want his boss

to know he is providing. Part of the problem is finding out who the leakers are. A logical way to solve a leak case would be to take the person who knows something about it and ask him questions. That person is usually the reporter. The reporter, however, will not tell you, even if you take him before the grand jury. He will become a martyr. Therefore, it is very difficult to use traditional criminal investigative tools to find out who is doing the leaking.

You can solve some of the cases, and we have. Part of our problem, however, is an unwillingness to impose appropriate sanctions in those cases where we do catch the leakers. We ought to do a better job of it. On the other hand, when we do catch them, they should not be protected from discipline by a whistle-blower law, the Merit System Protection Board, or anything else.

SPEAKER: Mr. Abrams, are there any categories of information at all that you would consider to be appropriate for either prior restraint or post-publication criminal penalties? If so, what standard would you apply? I would ask the same question specifically with respect to the following categories of information: weapons systems, technical aspects of weapons systems, troop movements, pending invasions, and commercial trade secrets and codes. Finally, what is your position on whether criminal penalties should be applied to any member of the press who knowingly causes property to be stolen, or receives stolen property, and who knowingly publishes it?

MR. ABRAMS: In general, I think that if I were able to reorder all of this, I would try to make a very short list of the materials that a member of the press could be punished for publishing. We already have at least one list created by statute. This list provides penalties for the publication of certain atomic energy matters and certain code matters. Both of those have raised some serious policy issues in our society. A few years ago, I loosely would have phrased my list to include certain technological details of weapons systems. Yet, we should take note of the fact that as technology changes and as arms control agreements, for example, become more and more dependent on verification, it becomes more important to be able to talk about these things. You cannot talk about them without talking about them technically.

One of the problems I had with NSDD 84[67] was my view that lifetime censorship agreements with government employees would deprive us of the chance of having people who leave the government knowing about these technological matters comment on, and deal

67. *See supra* note 64.

with them, in a way that is meaningful to us. The idea that NSDD 84 was lifetime in scope was a little too long for me.[68] I would also have to be assured that we would still have the benefit of the views of the people best able to give them to us. Therefore, as a general proposition, while I shall agree that there is a small category of materials that, if published, could appropriately and constitutionally lead to punishment, we had best draft any such statute very narrowly indeed.

As to prior restraints, that is an even smaller category. In fact, I am content to live in a regime in which we continue to have our present prior restraint law. The prior restraint law we now have is something of a fraud because it says we can have prior restraints, when the reality is that our law all but totally bans prior restraints. That is one of the reasons why I am comfortable with current law. The fact is that it is very difficult for the government to engage in prior restraint. If Justice Stewart's opinion in the Pentagon Papers case,[69] which is the most recent national security press case, is the law, or the best statement of the law, then what is required, at least absent a statute, is direct proof that publication will surely result in direct, immediate, and irreparable harm to the country. Justice Stewart's opinion is suffused with first amendment meaning. Under the standard set forth by him, there is hardly a case in which the government will be able to prove successfully that it needs a prior restraint. That should be the law.

We cannot, in any event, rely on prior restraints as a method of protecting secrets. Not only are they idiosyncratic in the sense that they can only be used when the government learns prior to publication of the intention to publish, but the government only learns this because we live in a society free of prior restraints. Consider the paradox. The only way the government can obtain a prior restraint is if it knows in advance of publication that the press is going to publish something. The only way the government generally learns this is if the press calls for comment. But if we lived under a regime of prior restraint, the press would simply not call for comment. It is not a good way to keep secrets, it is not a smart way to keep secrets, and it is a very troubling way to keep secrets. Therefore, there is a list that I could sign on to, but it is not very long.

SPEAKER: I got the impression that Mr. Oberdorfer agrees that the government should be able to keep secrets when it can. Is a

68. *See* Abrams, *The New Effort to Control Information*, N.Y. Times, Sept. 25, 1983, § 6 (Magazine), at 22.

69. New York Times Co. v. United States, 403 U.S. 713, 727-30 (1971) (Stewart J., concurring).

surprise military operation, such as that in Grenada, one of those areas where you think it is appropriate for the government to keep a secret if it can?

MR. OBERDORFER: Yes, I do think that it is the right and responsibility of the government to keep legitimate secrets. That is their job. My job is something else. With regard to military operations, I mentioned that I accepted the need for that in Vietnam. I do not think the American press should publish or broadcast something in a tactical situation, such as American troops going into battle. I think to do that would be the height of absurdity.

SPEAKER: As the colloquy has pointed out, this administration has not stopped leaks. No previous administration has stopped leaks, and no future administration is likely to stop leaks, for the simple reason that it is extremely difficult to identify who is doing the leaking. By contrast, it is relatively easy to identify persons who are about to publish or disseminate information that already has been leaked. Therefore, as a practical matter, the only effective way of reducing leaks to any significant degree may be to reduce the incentive to leak by making it extremely costly to disseminate, publish, or do anything with the information.

MR. WILLARD: That is not necessarily true. For one thing, it has been our experience that, for practical reasons, prior restraints are very unwieldy and ineffective weapons. As the government learned in *United States v. Progressive*,[70] during the Carter administration, just because you get an injunction does not mean that you have protected the secret.

I do think the government can make progress in identifying leakers if it uses good investigative techniques without having to require reporters to disclose their sources. This requires a commitment of resources to do the investigations, and then the backbone to follow up and fire people, or impose some other kind of heavy penalty for violating the rules. This must be done, regardless of whether they are career or political appointees. It is also easier to find the leakers if you use the polygraph, as the Carter administration discovered in the Abscam leak probe.

Many of these security measures are controversial. An effort to cut back on leaks and improve our security posture would pay off in the future, but the administrative and political costs must be incurred now. It means that an administration must have enough foresight to recognize the necessity of investing political capital in a program to

70. 467 F. Supp. 990 (W.D. Wis. 1979).

prevent future problems from occurring. That is always a very difficult concept to sell in Washington, when the focus is usually this afternoon's deadline for the evening news.

PROFESSOR HOLZER: If you cannot get prior restraints on the recipient of the leak, you can still nail the one who uses it, and perhaps discourage him or others in the future from using leaked material, thus drying up some of the leaks. I do not agree with the theory that if you obtain the information, you can use it. That is a notion comparable to getting good title from a thief.

MR. WILLARD: I believe in using criminal statutes to prosecute fences, whether they are fences of stolen property, or fences of stolen information. The press, however, faces the difficulty that in many cases they do not know whether they are, in fact, receiving stolen goods. There are few cases where you can prove that a journalist is knowingly receiving stolen property, and where it may be appropriate to impose liability under criminal law. In most situations, the responsibility really should be put on the government official who violates his oath of office and the trust of the American public in disclosing the information.

MR. ABRAMS: There is a major issue as to whether the government owns the information. I start with the proposition that, absent some extraordinary circumstance, the press is free to use information it receives. People in the government, however, are different. They have different obligations.

SPEAKER: It is my recollection that the condition for imposing a prior restraint is direct, immediate, and irreparable harm. I believe that immediacy is an unfortunate, excessive, and undesirable limitation. Surely, the government has not only weapons technology, but military documentation developed over many years, composed of the characteristics of billions of dollars worth of equipment. Disclosure of such technology may not result in immediate harm to the United States, but certainly, should be enjoinable by prior restraint. If not, that rule of law is unwise, just as *Brandenburg v. Ohio*[71] is unwise in holding that advocacy of the violent overthrow of the United States Government cannot be restrained, unless it is directed to producing imminent lawless action, and is likely to produce it.

PROFESSOR HOLZER: I do not think that you can find a clear-cut majority, or even plurality, opinion in the Pentagon Papers case.[72] It is a short per curiam opinion of three paragraphs.[73] Subse-

71. 395 U.S. 444 (1969).
72. New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).
73. *Id.* at 714.

quently, six Justices went off on frolics and detours of their own. Consequently, I am not sure what is the law there.

MR. ABRAMS: The usual way that most practicing lawyers determine the law is to pick the concurring opinion that affords the least protection to the press, and to say that at least the press has that protection. In the Pentagon Papers case, which was decided in 1971, and was the last case that the Supreme Court decided on the issue of whether the government may obtain a prior restraint, the concurring opinion that provided the press with the least amount of protection was the Stewart-White opinion.[74] The most important word in that formulation is the word "immediate."[75] There is also no more important word in the *Brandenburg* opinion, with which I agree, than the word "imminent."[76]

Previously, I focused on the word "surely," but surely what? The words "surely" and "immediate" are what makes it so very difficult to overcome the first amendment rights. I disagree with the thrust of the questioner, although I think his question is acute. If you have to prove that publication of something will result, let alone surely result, in some immediate harm of enormous damage, it is very unlikely that you are going to be able to do it.

The question, if we are talking about policy now, is whether the test should be that hard? I think it should. Anything less than that will inevitably result in a series of speculative assumptions by government officials who are deferred to by judges, and will be deferred to by judges on the grounds that these officials have greater expertise on the effects of publication.

PROFESSOR HOLZER: The difference between the Pentagon Papers case and the *Progressive* case at the district court level relates to the fact that the Government in the Pentagon Papers case was not able to rely on a statute in seeking that injunction.[77] In the *Progressive* case,[78] there was the Atomic Energy Act,[79] and it was very clear that the district judge could rely on it. Therefore, if we could promulgate a statute that gave more latitude to these things, we might see a different result in another Pentagon Papers-type case.

SPEAKER: It has been said that the publication of the Pentagon Papers and other such leaks have not caused any harm. Several harms, however, have been suggested, such as the harm to the deci-

74. *Id.* at 727-30.
75. *Id.* at 730.
76. *Brandenburg*, 395 U.S. at 449.
77. New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).
78. *Progressive, Inc.*, 467 F. Supp. 990.
79. Ch. 1073, § 230, 68 Stat. 959 (1954) (codified as amended at 42 U.S.C. § 2280 (1982)).

sionmaking process. Another is the harm that results from the refusal of other governments to cooperate with the United States in future diplomatic, foreign relations, or military matters. Is this a serious concern? Do you have any reason to believe that this is another potential problem with these type of leaks, and that this is a potential concern that should be addressed in the law?

MR. WILLARD: That is a legitimate concern. There are additional problems posed by the leaks, including the budgetary impact. The fact is that a leak can compromise a very expensive intelligence system on which we have spent millions or billions of dollars, and which becomes worthless as a result of the leak. The problem you suggest about international cooperation is also valid. It is difficult to quantify that kind of problem because, in most cases, you do not know what you are losing as a result of your poor security posture.

MR. OBERDORFER: There is a problem for the government, but it is easily overblown. Henry Kissinger said that the Pentagon Papers leak was so devastating to U.S. contacts overseas that we could not have decent relations, for example, with China. Well, we have fine relations with China. In fact, we have had all kinds of cooperation with China. It is easy to theorize about the terrible things that are going to happen in some particular case because of a leak, but it usually turns out to be wrong.

SPEAKER: Let us suppose that first amendment case law and the journalistic practice of editors and reporters deferring to the judgments of government officials on national security were in the same state today as they were in the late 1950's and the early 1960's. Let us also suppose that, as a result of this, we did not have Leninist regimes in Indochina, Afghanistan, Angola, Mozambique, Ethiopia, and Nicaragua. Mr. Abrams, would you prefer to have that situation, or the one that we have today?

MR. ABRAMS: That is the strangest choice I have ever had to make. I cannot understand a question that asks whether I would rather have a system of cooperation, and sometimes collaboration, between the press and the government as it existed at a time before the government started lying to the press and the public on a consistent day-by-day basis about the progress and the nature of the war in Vietnam, on the one hand, and the absence of Leninist governments on the other hand. I would wish that Leninist governments did not exist, but I would never wish for a return to the days of the 1950's or 1960's, in terms of the nature of press coverage of government. One of the reasons why those days of press-government cooperation ended was that the press could no longer trust the government to tell the

truth. If that cooperation had not ended, I do not know what would have happened, but I do not think that it would have impacted on the Leninist state in the countries you mentioned.

SPEAKER: I take it that you are saying that the government was lying on a more consistent and more outrageous basis under the Johnson administration than under the Eisenhower administration.

MR. ABRAMS: That is correct.

SPEAKER: If the Reagan administration and the next administration were, in your view, as truthful as you think the Eisenhower administration was, would you urge journalists to become less adversarial than they are today?

MR. ABRAMS: I keep my clients by not giving them advice on journalism. If they really wanted to know my political view, however, I would say that if the government could be trusted more, the press would not need to be as adversarial as it is sometimes. My own view is that the press is not adversarial enough, and that we would be better served by a press even more adversarial than the one we have now.

SPEAKER: Mr. Willard, you mentioned the loyalty oath that the administration wanted government employees to sign so that they would not leak classified materials. On its face, that would seem fine. There have been times in the past, however, and there will be times in the future, when the classified stamp is abused in order to cover up either the administration's embarrassment, or an individual's corruption. Do you recognize those possible dangers of this loyalty oath given the importance of not only keeping the *Washington Post* happy, but of also keeping our government running as efficiently as possible?

MR. WILLARD: Those are legitimate concerns. President Reagan's executive order[80] on classification forbids the use of classification to cover-up wrongdoing or embarrassment. In addition, we now have available mechanisms for getting at that problem, including the availability of judicial review under the Freedom of Information Act[81] to decide whether information has been properly classified, as well as other mechanisms, such as the office of Inspector General. Therefore, I do not think it is necessary for people who confront that phenomenon in government to resort to self-help through leaks, in order to obtain redress.

Furthermore, the decision about what is, or is not, proper is not one that should always be subject to the lowest common denominator of disclosure by anyone who feels like doing so. There are frequently

80. Exec. Order No. 12356, 47 Fed. Reg. 14,874 (1982).

81. Pub. L. No. 89-554, § 552, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1982 & Supp. II 1984)).

disagreements about whether something is properly classified. Those should be addressed by an orderly process, rather than on an ad hoc basis by leaks.

SPEAKER: The review process sometimes involves the very people who may be covering up either embarrassment, or corruption, does it not? In fact, there has been corruption in the Inspector General's office, and even at the state level. Looking at just the federal level, there is the danger that as government grows, by its very nature it becomes more intrusive and oppressive, and it is harder to get the truth out of the government. Sometimes the lower levels are the best source, that is, the government worker who has integrity and is concerned about the quality of the government that the people are receiving.

MR. WILLARD: It depends on what your perspective is. We have heard different ones here. My own perspective is that our government keeps far too few secrets, rather than far too many. My experience is that almost nothing stays a secret, or it does not stay a secret for long. If you tell more than one other person, and sometimes if you tell just one other person, you might as well go ahead and publish it. Those few instances where we are able to keep something secret are far too rare, rather than too common.