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National Security, the Law and the Media: Shaping Public Perceptions

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The American news media play a significant role in shaping public perceptions of national security policies and their legality, and therefore have a great responsibility to carry out their function with the highest possible degree of professionalism. Since the September 11, 2001 terrorist attacks, many complex and sensitive issues involving national security and the law have arisen, which have increased the challenge for the news media to perform its role with diligence and accuracy. Some of the cases reflect inherent tensions between principles of civil liberties, privacy rights, due process and national security; for example when public disclosure and debate can conflict with national security imperatives that may require secrecy for success of a policy that aims to protect citizens. A given policy's legality may be called into question, or there may be no settled law or legal interpretation governing that policy. While media coverage of national security policies can provoke controversy, it can also result in legislative, judicial or executive action to clarify legal gray areas. This has been the case with detention and interrogation policies for those captured in Iraq, Afghanistan, and in connection with the war on terrorism. In some cases, the media is alleged to mislead the public with distorted, partial or erroneous characterizations of national security policies or events. This issue has arisen with regard particularly to the coverage of the war in Iraq. Media

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and government practices may contribute to the perception that the “full story” is not being told. Systemic trends in the news media business have made it more difficult in many instances to meet professional standards, which have been traditionally embraced but are not formally codified. Finally, a polarized and partisan political climate in the country has contributed to a public discourse marked by more heat than light.

The press sees itself as performing a watchdog function to protect the public’s interest and to inform the public on the vital issues of the day. It has been a hallmark of the news media to guard its independence and to investigate alleged wrongdoing, particularly on the part of government and those in positions of power. Such a predisposition should not, however, become a presumption of wrongdoing. Journalists should aggressively pursue the facts and let them speak for themselves. When covering national security issues, journalists may encounter dilemmas over handling classified information or information that may provide assistance to those who would do the country harm. While there are certainly many cases where information is overly classified with scant justification, as was acknowledged in the 9/11 commission report,¹ the news media have a responsibility to carefully weigh the consequences of publishing classified information.

Two news stories amply illustrate the challenges of reporting on national security law. The *New York Times* reported that the National Security Agency (NSA) was conducting warrantless surveillance of Americans inside the United States, relying on a classified legal opinion that it was legal to do so when the NSA had reason to believe that the person was in contact with a suspected agent of a foreign power or terrorist entity. The article reported concerns by other US officials that the policy, which was adopted after the 9/11 attacks, violated the 1978 Foreign Intelligence Surveillance Act (FISA)² by not obtaining warrants from the FISA court. The law requires warrants for eavesdropping on “U.S. persons,” but the policy’s legal proponents considered that the executive branch has the authority needed so long as one of the parties was outside the United States.³

In this very complicated case, there is a clear legal gray area that is now under review by the Justice Department, and which was questioned by the head FISA court judge and by some legislators who were briefed on the policy. Technology has also evolved since the 1978 law was written and subsequently amended. Yet the administration did not seek its revision by Congress or judicial review for fear of compromising the secrecy it felt the program required. The *New York Times* withheld publication of some details that the executive branch argued would harm US national security interests, but it disagreed with the government’s contention that the very disclosure of the program would render it ineffective and decided to publish the story.⁴ The extremely sensitive nature of the case led the executive branch to

restrict the explanations it offered to both the public and to Congress. In 2007 the Bush administration decided to submit requests for surveillance warrants to the FISA court rather than contest the legality of its program.

Another news story that generated a great deal of controversy (as well as accolades, for like the NSA story, it too won a Pulitzer prize) was the *Washington Post's* revelation that the Central Intelligence Agency (CIA) had been holding suspected terrorists at secret detention sites in several countries since 9/11.⁵ The policy of extraordinary renditions has been in effect since the previous decade, but in the days after 9/11 the executive branch decided to detain US suspects outside US territory to keep them out of the US courts' jurisdiction. Those suspects have now been remanded to their countries of origin or transferred to Guantanamo Bay Naval Base in Cuba, to a US detention facility run by the US military and monitored by the International Committee of the Red Cross. Court rulings led to legislation establishing new legal processes for detainees, and military policy on interrogation tactics has been changed to explicitly prohibit some of the practices (such as simulated drowning or "waterboarding") allegedly used at the CIA sites.

There has been no determination in the US justice system of the legality of the practices of rendition and secret detention, although some of the detainees are pursuing the matter in court. Investigations were also conducted in Europe, where some of the secret sites were allegedly located. The exposure of a practice in which US and foreign intelligence agencies have cooperated has led to controversy and strains in those countries. The description of alleged coercive interrogation techniques by the CIA also coincided with the ongoing controversy over interrogation and detention practices in Iraq. The abuses of detainees at Abu Ghraib prison in Iraq, as recorded on digital photos that a US soldier turned over to investigators, led to prosecution of some of the US soldiers involved. The photos had already been circulating among soldiers, but the publication and dissemination of them caused widespread outrage and attention to the issue. Investigations and congressional hearings brought to light many of the administrative and policy shortcomings that contributed to the occurrence of the abuses. While the issuance of new rules for detention and interrogation practices may help prevent recurrences and mitigate the perceptions created abroad, the Abu Ghraib scandal and the wide coverage it received remains one of the symbolic events of the Iraq war.

There have been criticisms more generally that the press coverage of the Iraq war has been inaccurate and has undermined Americans' support for the war. In addition, US officials have been frustrated in their efforts to respond to the very effective use of media by adversaries in Iraq and in the al Qaeda movement. Their pronouncements and their videotapes of attacks on US soldiers or of their captives quickly find their way onto the Internet and the airwaves, enabling the

adversaries to disseminate their message and, in many instances, give the first account of events.

Regarding the quality of American news coverage of the war in Iraq, the allegation of bias in coverage can be partly attributed to a “shoot the messenger” phenomenon, since the war effort has been bedeviled by numerous setbacks and errors of commission and omission. In this reporter’s judgment, however, the media can also be fairly criticized for emphasizing violent attacks over less salacious and often positive events such as reconstruction efforts. But the more serious lapses have occurred either through media ignorance of military affairs or a failure to seek and weigh all the relevant data and analyses to produce in-depth, comprehensive examinations of the war’s conduct. The public policy debate would greatly benefit from more sustained efforts to understand what is an extremely complicated conflict that has eluded easy answers.

The US government, including the US military, has lamented that it is losing the “battle of ideas” and that it often has a much longer response time than its adversaries. Frequently, the decision-making chain regarding release of information is long and cumbersome. Yet the military in particular has adopted some effective policies that help provide news media with access to the battlefield, senior officials and other events and voices that merit coverage. Embedding media with military units has provided journalists with firsthand information that they cannot obtain elsewhere. While the process of embedding media has been criticized by some as a means to control journalists, in this reporter’s experience, the ground rules imposed primarily restrict the timing of news dispatches to protect operational security and, in some instances, specific tactics whose effectiveness would be compromised by detailed description. In any event, embedded reporting provides one avenue for reporting and should not be the sole means of news gathering. US commanders have in some cases taken extraordinary steps to provide access or information, allowing selected reporters wide access to battlefields and commanders’ deliberations. In one case the commander of the Multi-National Force–Iraq released video footage of a Predator that was tracking insurgents in order to provide fuller news coverage of an attack on the US embassy in Baghdad, when the partial coverage had led the news media to dwell on the attack even after its perpetrators had been identified and apprehended.⁶

Providing more access and information often helps the press produce better informed and more in-depth coverage and analysis, provided that it invests the necessary time to take advantage of the opportunity for sustained research. Unfortunately, many pressures within the news business today militate against such “best practices.” At times the news media is driven by competing pressures, and while journalists should

always insist on the time and resources to do work that meets professional standards, they can be forced into less than ideal compromises.

There are several developments and trends that affect the nature and quality of news gathering and interpretation, many of which are not widely known or understood outside news media circles. Some of the country's largest newspapers, which have suffered declining circulation, have been sold or are for sale. The quest for continued double-digit profit margins continues despite the fact that revenues are shrinking along with advertising bases. Most notably, the number of personnel and the size of budgets for news gathering have declined markedly in the past decade. Foreign news gathering has been de-funded to a significant degree. News organizations now rely more heavily on contract and freelance personnel known as "stringers" and "fixers" and contract video footage. These contract personnel, who are sometimes foreign nationals, may not have the same training, experience or professional standards that prevail in the mainstream US media.

Even as personnel have been reduced, the demand for output has grown. The evolution of the media has produced more outlets that have to be supplied with news "content": typically a journalist will file stories to his or her primary publication or broadcast show, but be required as well to supply stories to one or more websites, blogs, newsletters, and commentary or analysis to other media outlets which may be owned by the parent company or merely as part of the growing phenomenon known as "media convergence." Fortunately, senior reporters at national publications can often secure the time and resources necessary for complex and sensitive stories, but the pressures are real and growing. The rise of 24-hour cable news and now the Internet's proliferating platforms have created enormous demand for "content" which must be supplied and updated regularly.

Commentary frequently fills this demand since it costs virtually nothing to produce, compared to reported content. All "expert" opinion is not equal, however, and often the commentators do not fully understand the complex issues on which they speak. Ratings pressures can also feed this tendency toward opinion journalism, which was ushered in by the rise of talk radio stations. While the news media have always included columnists and editorials, which feature opinions, some practitioners feel that opinion and bias can creep into news coverage if reporters and editors are not vigilant in maintaining the traditional distinction between reportage and opinion writing.⁷

Americans' sources of information have diversified in the past decade, but the traditional news media remain a primary source of and conduit for information, analysis and commentary about national security issues, even as nontraditional media such as blogs and webzines continue to grow. The continuing influence of the "mainstream media," particularly large-circulation daily newspapers, national

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newsmagazines and network and cable news is such that they play a powerful role in framing the national debate, defining top news stories and shaping public opinion through the approaches they take to these stories. In cases where the news media breaks a story, they single-handedly inject a new topic into the national debate and force others to react to the issue as framed by the media. The tremendous influence that the news media wields makes it incumbent on them to practice their craft according to the highest standards of professionalism. If the media is perceived as inaccurate or biased, it will lose credibility and find its ability to perform a useful societal function greatly diminished.

Notes

1. 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.
2. 50 US Code sec. 1801–1811 (2000).
3. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, NEW YORK TIMES, Dec. 16, 2005, at A1.
4. *Id.*
5. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASHINGTON POST, Nov. 2, 2005, at A1.
6. Thomas F. Metz et al., *Massing Effects in the Information Domain: A Case Study in Aggressive Information Operations*, MILITARY REVIEW, May–June 2006, at 2.
7. John Carroll, then editor of the *Los Angeles Times*, expressed this concern in an internal memo that he sent to his editors on May 22, 2003, which was widely commented on in media circles. The memo is available at www.laobserved.com/carrollmemo.html (last visited Jan. 22, 2007).