

The End to an Unspoken Bargain? National Security and Leaks in a Post-*Pentagon Papers* World

David McCraw and Stephen Gikow*

INTRODUCTION

In 1971, when famed First Amendment scholar Alexander Bickel argued *The Pentagon Papers*¹ case on behalf of *The New York Times* (“*The Times*”), he pinpointed the inherent tension between national security secrecy and the freedom of the press, a system that he later described as “the disorderly situation.”² Bickel’s phrase captured the natural conflict between a government that wants to keep secrets and a press driven to reveal what the government is up to. As Bickel saw it, American law ceded to the government broad powers to keep secrets but afforded news organizations broad freedom to publish secrets once those secrets were in the hands of journalists, largely irrespective of how those secrets got there.³ At least at a theoretical level, it is a system that both overprotects and underprotects secrets and serves up no legal principle or overarching policy for deciding what should be disclosed and what should not.

Yet far from igniting titanic clashes between the government and the press, for most of the past forty years, this paradigm provided the framework for a political and legal reality most notable for the rarity of real conflict, in which the government and the press settled into an informal *détente*. Leaks of government information took place, secrets were judiciously disclosed, national security was not obviously harmed, and the courts and Congress remained on the sidelines. There was, in effect, an unspoken bargain of mutual restraint in which the press embraced an ethos of responsibility and the government generally treated leaks as an accepted, if not fully condoned, part of modern democratic governance. It was a bargain that made sense to both sides: the executive branch often needed to leak information as a way to advance its agenda (or to wage intra-executive battles), and it had little desire for unseemly public First Amendment fights, either with the press or

* David McCraw is Vice President and Assistant General Counsel of the New York Times Company. Stephen Gikow is the 2012–13 First Amendment Fellow at *The Times*. The views expressed here are those of the authors and are not intended to be a statement of the legal or editorial positions of *The Times*.

¹ N.Y. Times Co. v. United States (*The Pentagon Papers*), 403 U.S. 713 (1971).

² ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 80 (1975) (“It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values — privacy or public discourse — which are ultimately irreconcilable.”).

³ See *id.* at 79–80.

with legitimate whistleblowers. Correspondingly, the press saw little to be gained by overplaying its political hand and appearing to be unduly hostile to the government on matters of national security or by straying too near the line where disclosure might actually risk lives or endanger the nation's security.

In the last five years, however, that unspoken bargain has come under attack from both directions. On the government side, the Obama Administration has shown an unprecedented willingness to prosecute individuals who leak classified information, and the government's penchant for overclassification has continued unabated. On the publishers' side, new media publishers outside the mainstream press — most noticeably, WikiLeaks and its imitators — have largely refused to buy into the ethos of responsibility and restraint. These pressures have made clear that the "disorderly situation" has worked not because of a balance created by the countervailing powers of government and the press, but because of the tacit willingness of both the press and the government not to test the boundaries of the disorder.

It remains to be seen whether these developments constitute a passing phase — merely a reset in the press/government relationship, to be followed by business as usual. If not — if we are at the end of the post-*Pentagon Papers* détente that had been marked by mutual restraint — there will inevitably be demands for sharper legal lines to be drawn in a host of intersecting areas of law — from the legal protection afforded to leakers and the government's classification authority to the First Amendment rights of publishers to disclose secrets and the effectiveness of the Freedom of Information Act ("FOIA")⁴ in affirmatively granting access to governmental information. It is an exercise in line drawing that will offer few easy answers and will require Congress and the courts to think about secrecy and leaks in different and more pragmatic ways.

This Article proceeds in four parts. In Part I, we describe Bickel's "disorderly situation," in which critical legal questions have been left unresolved. Although such indeterminacy could have foretold a system of institutionalized conflict, we argue in Part II that, by and large, the system worked for decades with predictable results because of an unspoken bargain of self-restraint. In Part III, we show why this unspoken bargain may be breaking down as a result of three trends in particular: an ever-growing appetite for classification on the part of the government, the rise of nontraditional publishers like WikiLeaks, and a troubling increase in the prosecution of low-level leakers. In Part IV, we explore why it might now be desirable to have greater definition in the law to assure a proper balance between secrecy and transparency, even though drawing any workable legal lines will be difficult.

⁴ 5 U.S.C. § 552 (2006).

I. THE DISORDERLY SITUATION

In 1975, Bickel succinctly laid out the foundational premise that undergirds his concept of the disorderly situation: “If we should let the government censor as well as withhold, that would be too much dangerous power, and too much privacy. If we should allow the government neither to censor nor to withhold, that would provide for too little privacy of decision-making and too much power in the press”⁵ Rather than try to sort out when secrecy should be allowed — that is, when the press should be restrained or punished for disclosing classified information, and who should make decisions about secrecy or disclosure — Bickel’s model instead suggested that an acceptable balance between secrecy and transparency will result from the competition between a government that seeks to withhold and a press that seeks to publicize. Bickel saw a system in which the government should have broad powers to classify material as secret but little power to restrain or punish press outlets that obtained government secrets and sought to publish them. Cass Sunstein has termed this “an equilibrium theory” of the First Amendment.⁶ While deeply skeptical of its efficacy, Sunstein describes its fundamental premise: competition between the press and the government “ensures that if both follow their self-interest, the resulting system will work, as if by an invisible hand, to benefit the public as a whole.”⁷

In the words of Harold Edgar and Benno Schmidt, Jr., the law enshrined a “benign indeterminacy.”⁸ The most secure freedoms, Bickel wrote, are those that are “neither challenged nor defined.”⁹ The value of indefiniteness illuminates *The Pentagon Papers* decision itself.¹⁰ In June 1971, *The Times* began publishing the government’s secret history of the Vietnam War, which Daniel Ellsberg, a government contractor, had leaked to the paper.¹¹ After the first installments ran, the Justice Department took the unprecedented step of seeking a court order to stop further installments from being published.¹² *The Times* argued that no such prior restraint could be permitted under the First Amendment, even in the context of national secur-

⁵ BICKEL, *supra* note 2, at 80.

⁶ Cass R. Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 899 (1986).

⁷ *Id.*

⁸ Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 936 (1973); *see also* William H. Freivogel, *Publishing National Security Secrets: The Case for “Benign Indeterminacy,”* 3 J. NAT’L SECURITY L. & POL’Y 95 (2009).

⁹ Alexander M. Bickel, *The “Uninhibited, Robust, and Wide-Open” First Amendment: From “Sullivan” to the Pentagon Papers*, COMMENT., Nov. 1972, at 60, 61.

¹⁰ For background on *The Pentagon Papers*, *see generally* DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE* (1996); SANFORD J. UNGAR, *THE PAPERS & THE PAPERS: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS* (1989).

¹¹ *See* UNGAR, *supra* note 10, at 3–5.

¹² RUDENSTINE, *supra* note 10, at 2.

ity.¹³ An accelerated appeal followed, and in short order, the Supreme Court was presented with a clear opportunity to define under what circumstances the government could act to prevent the publication of classified information.¹⁴

Instead, the Court retreated into a four paragraph per curiam opinion, which said little more than that the government “carries a heavy burden” to justify a prior restraint and had failed to do so in its effort to prevent *The Times* from publishing the government’s classified analysis of Vietnam War policy.¹⁵ The specifics of the Court’s analysis were left undefined. What test applies in assessing whether the burden has been carried? What standards must the government meet in establishing the validity of the classification at issue? What was the scope and nature of post-publication press liability, if any, for the disclosure of classified information? While the raft of concurring and dissenting opinions filed in the case thrust and parried about such things, the Court itself was officially mum. Whether by design or as the result of a standoff within the Court, the decision reaffirmed one of the two jurisprudential pillars of Bickel’s disorderly situation: that the press enjoyed broad freedom to decide whether to publish material in its possession, even classified information obtained through leaks.

The other pillar — that the government enjoyed broad authority to decide what to classify and to punish governmental employees who leak secrets — is found in both the freedom-of-information jurisprudence and in an array of statutes designed to maintain a wall of secrecy around classified information. There is no affirmative public right of access to governmental information under the Constitution except for the narrow First Amendment right of access to judicial proceedings and some court records.¹⁶ Congress granted the public some rights of access under the Freedom of Information Act,¹⁷ but FOIA specifically exempts from disclosure any documents that are “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order.”¹⁸ It further excludes from disclosure documents that are “specifically exempted from disclosure by statute,”¹⁹ thereby incorporating the sweeping secrecy provi-

¹³ See RUDENSTINE, *supra* note 10, at 103–04; see also UNGAR, *supra* note 10, at 125.

¹⁴ RUDENSTINE, *supra* note 10, at 3–4.

¹⁵ *N.Y. Times Co. v. United States (The Pentagon Papers)*, 403 U.S. 713, 714 (1971) (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

¹⁶ *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (affirming First Amendment right of access to judicial proceedings); *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (“This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.”); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006) (upholding constitutional right to judicial documents in civil case).

¹⁷ Freedom of Information Act, 5 U.S.C. § 552 (2006).

¹⁸ *Id.* § 552(b)(1)(A).

¹⁹ *Id.* § 552(b)(3).

sions of such statutes as the Central Intelligence Act²⁰ and the National Security Act.²¹ While the courts regularly assert their authority to review governmental claims that information must be withheld for reasons of national security,²² the scope of that review is in fact quite limited, and judges routinely accept agency assertions that classification is necessary and proper.²³ As the D.C. and Second Circuits have noted, courts have “consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review.”²⁴

FOIA’s inadequacy as a vehicle for asserting a right to obtain national security information is further exacerbated by a smorgasbord of federal statutes criminalizing the leaking of information, beginning most importantly with the Espionage Act,²⁵ and spilling out into the Atomic Energy Act,²⁶ statutes addressing the theft of government property,²⁷ removal and retention of classified information,²⁸ removal of government records,²⁹ disclosure of critical infrastructure information,³⁰ and revelation of the identities of intelligence officers.³¹ The sweep of these statutes, taken as a whole, is impressive and at least one allows prosecution when there is no specific intent,³² eschewing any requirement that the leaked information have caused actual injury or provided assistance to a foreign power.³³ Documents need not be

²⁰ Central Intelligence Agency Act, 50 U.S.C. § 403g (2006).

²¹ National Security Act, 50 U.S.C. § 102A(i)(1) (2006). *See, e.g.*, *Larson v. Dep’t of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (holding that through FOIA Exemption 3, National Security Act is a basis for agency withholding of information); *Baker v. Cent. Intelligence Agency*, 580 F.2d 664, 667 (D.C. Cir. 1978) (holding CIA Act’s secrecy provisions incorporated into FOIA via Exemption 3).

²² *See, e.g.*, *Wilner v. Nat’l Sec. Agency*, 592 F.3d 60, 69 (2d Cir. 2009); *Halpern v. Fed. Bureau of Investigation*, 181 F.3d 279, 293 (2d Cir. 1999); *Campbell v. Dep’t of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998).

²³ *See, e.g.*, *Cent. Intelligence Agency v. Sims*, 471 U.S. 159, 179 (1985) (recognizing substantial deference is due agency declarations when FOIA requests touch on national security); *Carney v. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (“Affidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency’s burden.”).

²⁴ *Am. Civil Liberties Union v. Dep’t of Justice*, 681 F.3d 61, 70 (2d Cir. 2012) (quoting *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003)). Likely due to the D.C. Circuit’s stature in FOIA cases, lower courts in other jurisdictions have also adopted the same framework. *See, e.g.*, *Davis v. U.S. Dep’t of Def.*, No. 3:07-cv-492-RJC-DSC, 2010 U.S. Dist. LEXIS 44665, at *23–24 (W.D.N.C. May 6, 2010); *L.A. Times Commc’ns, LLC v. Dep’t of the Army*, 442 F. Supp. 2d 880, 899 (C.D. Cal. 2006).

²⁵ 18 U.S.C. §§ 793–794 (2006).

²⁶ 42 U.S.C. §§ 2274–2278a(b) (2006).

²⁷ *E.g.*, 18 U.S.C. § 641 (2006).

²⁸ *E.g., id.* § 1924 (2006).

²⁹ *E.g., id.* § 2071 (2006).

³⁰ *E.g.*, 6 U.S.C. § 133 (2006).

³¹ *E.g.*, 50 U.S.C. §§ 421–26 (2006).

³² *See, e.g.*, Stephen I. Vlodeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL’Y REV. 219, 223 (2007) (discussing 18 U.S.C. § 793(a) (2006)).

³³ *See, e.g.*, *United States v. Morison*, 844 F.2d 1057, 1065 (4th Cir. 1988) (discussing how 18 U.S.C. § 793(d) criminalizes disclosure to anyone not authorized to receive it, as opposed to an actual foreign agent).

“properly marked ‘Top Secret’ or for that matter . . . marked secret at all” to provide a basis for prosecution.³⁴

Whether one sees this two-pillar paradigm as deeply flawed³⁵ or as an imperfect but preferable system for balancing legitimate secrecy needs and transparency,³⁶ it is worth considering what is exactly “disorderly” or “indefinite” in the model. First, there is ambiguity in the law itself; significant issues of law went unaddressed and have continued to go unaddressed. For example, the Espionage Act remains dense, contradictory, and essentially unexplored as to whether it can be applied to publishers (as opposed to governmental employees) and how.³⁷ No case has yet tested whether the First Amendment would provide a constitutional defense for a publisher charged with violating its provisions prohibiting dissemination of national security information. In *United States v. Rosen*,³⁸ a district court recognized some First Amendment limits on an Espionage Act prosecution, but the case involved lobbyists, not publishers, who were accused of passing classified information from a government employee to reporters. The court held that the prosecutors must show that the information pertained to national defense, that its disclosure was potentially harmful to the country, and that the defendants knew of the potential harm.³⁹ Whether that standard, or some higher standard, would apply to publishers remained unanswered.

Similarly, it is unclear whether decisions applying First Amendment limits to federal statutes — most notably, *Bartnicki v. Volper*⁴⁰ — would provide a constitutional basis for a challenge to an Espionage Act prosecution of a publisher. In *Bartnicki*, the Supreme Court found that a radio station had a First Amendment right to play recordings of illegally intercepted cell phone calls despite a federal law barring the disclosure of such intercepts.⁴¹ While the Court embraced the “*Daily Mail* principle” — a publisher who “lawfully obtains truthful information about a matter of public significance may not” be punished “absent a need . . . of the highest order”⁴² — and while there is a sound constitutional case to be made for applying *Bartnicki* in a national security context, the narrowness of *Bartnicki* cannot be ignored. Among other things, in reaffirming *Daily Mail*, the Court did

³⁴ *United States v. Lee*, 589 F.2d 980, 990 (9th Cir. 1979).

³⁵ See Sunstein, *supra* note 6, at 902–03 (critiquing the equilibrium model and claiming, among other things, that it relies on assumptions that are both “odd and inaccurate”).

³⁶ See BICKEL, *supra* note 2, at 80; see generally Freivogel, *supra* note 8.

³⁷ See generally Sunstein, *supra* note 6 (discussing the types of legal issues that could be applied to publishers); see also Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POLY REV. 185, 213 (2007) (suggesting possible guidelines to determine when the government can “constitutionally punish journalists for encouraging unlawfully public employees to disclose classified information”).

³⁸ 445 F. Supp. 2d 602 (E.D. Va. 2006).

³⁹ *Id.* at 641.

⁴⁰ 532 U.S. 514 (2001).

⁴¹ *Id.* at 517–18.

⁴² *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979).

not attempt to define what would fall within the purview of a “need . . . of the highest order.”⁴³

The paradigm is “disorderly” in a second way as well. It profoundly minimizes the rule of law. It implicitly concedes that law is ineffective as a means of calibrating governmental power and press freedom and curbing unchecked power on both sides. If the government is able to maintain something as secret, its authority to keep that secret — whether it should be secret or not — is virtually unassailable. Only if a government employee is willing to engage in the illegal act of leaking the information and risk the consequences for doing so will the secrecy be checked. Conversely, publishers are largely free to publish the information they obtain — whether it should be disclosed or not. While all law is imperfect in advancing the public good, what is striking in this paradigm is the absence of any attempt to integrate consideration of the public interest into the applicable legal framework — whether as a defense for a leaker, or as a basis for requiring disclosure of national security information through FOIA, or for determining whether a publisher should be subject to a prior restraint or post-publication penalty. Instead, on its face, the paradigm permits and encourages the government to cloak its actions with the greatest amount of secrecy possible, while permitting publishers to disclose information for any reason or no reason, irrespective of where the public good might lie and without the intervention of a court or other neutral decisionmaker. Whatever the virtue of that paradigm, it is a model based more on the notion of “because we can” than on the rule of law, calibrated to advance the public good.

II. THE BARGAIN OF MUTUAL RESTRAINT

For all of the paradigm’s disorderliness or lack of determinacy as a legal matter, the actual interplay between the press and the government in national security matters has been marked paradoxically by a large degree of predictability and certainty for most of the last forty years. There were the occasional exceptional cases, and they tended to receive much attention. But overwhelmingly — until the start of the Obama Administration — both sides could count on the following to be true with respect to press coverage of classified documents and operations:

1. There would be no prior restraints.
2. There would be no prosecution of publishers.
3. Overclassification would be a persistent but not insurmountable problem for reportage on national security matters.

⁴³ *Bartnicki*, 532 U.S. at 527–28 (quoting *Daily Mail*, 443 U.S. at 103). Vladeck points out that the Espionage Act criminalizes the receipt of certain information, bringing into question whether the “lawfully obtain[ed]” element of *Bartnicki* would be met and whether the First Amendment would even apply when the act at issue was receiving information rather than publishing it. Vladeck, *supra* note 32, at 233–34.

4. A largely unseen system that developed between the press and the government for vetting leaks would permit a reasonable amount of accommodation of secrecy and disclosure, at least for those matters that were leaked.
5. National security would not truly be threatened by the disclosures of classified information that actually took place.
6. Leakers would rarely be prosecuted, if ever.
7. Most potential battles over the identity of confidential sources would go unfought.

Put simply, rather than the unchecked, extrajudicial clash between the government and the press that might have been envisioned under the “disorderly situation” model, the system had been marked by mutual restraint — the government refraining from indiscriminately using its wide-ranging authority to stop or to punish leakers, and the press exhibiting concern for the consequences of disclosures and withholding information that might reasonably jeopardize lives or security. That is not to say that the public good has always been optimally served. Unnecessary governmental secrecy remains a pernicious problem, but it is impossible to prove that point empirically because of the very nature of secrecy: we do not know what the government knows and cannot assess whether some of the information currently out of public view should be disclosed for the benefit of democratic self-governance.⁴⁴ Nonetheless, the system has operated successfully in another more limited sense: the incentives have been structured in such a way that persons within the government have been willing to leak information when secrecy has been misused, and publishers have felt free to disseminate those secrets when, in their judgment, the public interest would be served. While far from perfect, this system provided some assurance to the public that serious malfeasance and illegality shielded by secrecy would eventually find its way into the public discourse.

That workable system, which contained checks both on unnecessary, imprudent secrecy and reckless disclosure, arose not from the brutish unleashing of countervailing powers, but from each side’s willingness to exhibit self-restraint. In fact, Bickel himself conceded that the disorderly situation at times depended on “forbearance” and “restraint or self-discipline” on both sides.⁴⁵ But he saw that as a minor consideration, a way to avoid the bleakest of conflicts between government and the press.⁴⁶ Experience has shown it to be a central characteristic of the system, necessary to its effective operation.

Repeatedly over the decades between *The Pentagon Papers* decision and the start of the Obama Administration, there have been highly significant stories that were based on leaks of classified information but that led to

⁴⁴ See *infra* Part III.A.

⁴⁵ BICKEL, *supra* note 2, at 87–88.

⁴⁶ See *id.* at 87.

no showdown between the government and the press. In the last decade alone, to cite some of the most prominent examples, the press has revealed consequential stories about the CIA's use of secret prisons to interrogate terrorism suspects,⁴⁷ the now well-documented abuses at Abu Ghraib,⁴⁸ and the government's secret monitoring of the international banking exchange known as the Society for Worldwide Interbank Financial Telecommunication ("SWIFT").⁴⁹ While some in government condemned these revelations, none of them ignited a direct legal confrontation between publishers and the government, and the leak investigations ended without charges.⁵⁰ Stories built on classified information have been a mainstay of American journalism in modern times.⁵¹

No incident may be as emblematic of the bargain of mutual restraint as the circumstances surrounding the publication of *The Times* story revealing the warrantless wiretapping of Americans by the National Security Agency ("NSA").⁵² In 2004, *The Times* learned of a classified program under which the NSA was monitoring phone calls that came into the United States from abroad as part of a program to track suspected terrorists.⁵³ The operation, done without any court oversight, raised serious questions about possible

⁴⁷ See, e.g., Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST (Nov. 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

⁴⁸ See, e.g., Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (May 10, 2004), http://www.newyorker.com/archive/2004/05/10/040510fa_fact.

⁴⁹ See, e.g., Eric Lichtblau & James Risen, *Bank Data Is Sifted by U.S. in Secret to Block Terror*, N.Y. TIMES (June 23, 2006), <http://www.nytimes.com/2006/06/23/washington/23intel.html?hp&ex=1151121600&en=18f9ed2cf37511d5&ei=5094&partner=homepage>.

⁵⁰ See, e.g., William (Bill) Binney & J. Kirk Wiebe, *NSA Whistleblowers*, GOV'T ACCOUNTABILITY PROJECT, <http://www.whistleblower.org/program-areas/homeland-security-a-human-rights/surveillance/nsa-whistleblowers-bill-binney-a-j-kirk-wiebe> (last visited Mar. 2, 2013) (noting that "[t]he FBI launched an expansive — and fruitless — investigation into the sources of the [NSA wiretapping] article, which at one time consumed five full-time prosecutors and 25 FBI agents"); *Bush Condemns Leak of Bank Program*, CNN (June 27, 2006, 10:02 AM), <http://edition.cnn.com/2006/POLITICS/06/26/snow.bank.tracking/>; Greg Miller, *Fired CIA Officer Likely Won't Face Charges Over Leak*, L.A. TIMES (Apr. 26, 2006), <http://articles.latimes.com/2006/apr/26/nation/na-cia26> (discussing how charges were unlikely to be brought against a CIA official accused of leaking information about CIA black sites); *Statement from DoD Spokesperson Mr. Lawrence Di Rita*, U.S. DEPT OF DEF. (May 15, 2004), <http://www.defense.gov/releases/release.aspx?releaseid=7372> (decrying *The New Yorker's* story on Abu Ghraib as "outlandish, conspiratorial, and filled with error"); *Testimony of Stuart Levey, Under Secretary Terrorism and Financial Intelligence U.S. Department of the Treasury Before the House Financial Services Subcommittee on Oversight and Investigations, Department of the Treasury*, U.S. DEPT OF THE TREASURY (July 11, 2006), <http://www.treasury.gov/press-center/press-releases/Pages/hp05.aspx> (describing the disclosure of the SWIFT terrorist tracking program as "very damaging").

⁵¹ See Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1041–43 (2008).

⁵² James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/politics/16program.html?page-wanted=all>.

⁵³ Paul Fahri, *At the Times, a Scoop Deferred*, WASH. POST (Dec. 17, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/16/AR2005121601716.html>.

violations of citizens' civil rights.⁵⁴ Yet *The Times* chose to hold the story for more than a year after consulting with government officials who convinced editors that revelation of the system would seriously undermine an important tool in the fight against terrorism.⁵⁵ It was only a year later, when *The Times* learned that there was a serious debate within the Justice Department and elsewhere in the government about the legality of the program, that the story finally appeared, focusing on that legal debate rather than the operational details. The government did not pursue a prior restraint before publication, and while a leak investigation commenced, it closed with no government official being charged. *The Times's* conduct was subject to criticism afterwards,⁵⁶ but the episode gave the public a window into how the secrecy/transparency system had come to work, imperfect as it was.

The operation of the system of mutual restraint from the press side was captured well by Bill Keller, former executive editor of *The Times*, in his essay recounting *The Times's* handling of the WikiLeaks documents in 2010.⁵⁷ Confronted with the initial war logs release, Keller recalled how the paper "felt an enormous moral and ethical responsibility to use the material responsibly."⁵⁸ To that end, *The Times* relied on three reporters "with considerable experience of handling military secrets" to help redact sensitive information.⁵⁹ The second release of embassy cables was another, "more explosive" matter — it was here that *The Times* met with government officials prior to publication to discuss what the paper intended to publish.⁶⁰ Officials pressed *The Times* not to publish material in three categories: revelations that could lead to harm to individuals, revelations that could disrupt sensitive operations, and revelations that might embarrass U.S. diplomats or foreign allies.⁶¹ In the end, *The Times* agreed to withhold information in category one, some of the information in category two, and little of the information in category three.⁶² According to Keller, the process was generally productive, and "the relevant government agencies actually engaged with [*The Times*] in an attempt to prevent the release of material genuinely damaging to innocent individuals or the national interest."⁶³ It is a benefit of the system of mutual restraint that the government was willing to engage in a

⁵⁴ See Risen & Lichtblau, *supra* note 52.

⁵⁵ Fahri, *supra* note 53.

⁵⁶ See, e.g., Byron Calame, *Behind the Eavesdropping Story, a Loud Silence*, N.Y. TIMES (Jan. 1, 2006), <http://www.nytimes.com/2006/01/01/opinion/01publiceditor.html?pagewanted=all> (lamenting the silence from *The Times's* top brass about the reasons for the paper's delay and its subsequent decision to publish); Fahri, *supra* note 53 (describing "some friction within *The Times's* Washington bureau" because of the decision to withhold the article).

⁵⁷ Bill Keller, *The Boy Who Kicked the Hornet's Nest*, in OPEN SECRETS: WIKILEAKS, WAR AND AMERICAN DIPLOMACY 2, 3–22 (Alexander Star ed., 2011).

⁵⁸ *Id.* at 8.

⁵⁹ *Id.*

⁶⁰ *Id.* at 12.

⁶¹ *Id.* at 13.

⁶² *Id.*

⁶³ *Id.* at 15.

process that would inevitably lead to the publication of materials that officials would have preferred to keep secret and that journalists were confident enough in their legal protection and power to open the door to such meetings.

The round of government consultation was a component of the larger initiative by the paper to balance the public's need to know about U.S. military and diplomatic efforts abroad with concerns about legitimate secrecy. It is this balancing act that Bill Keller and Dean Baquet captured five years earlier in an opinion piece on the publishing of secrets.⁶⁴ A newspaper's process for handling sensitive information is almost startlingly simple: its reporters will work hard to get an accurate report, the paper's representatives will listen to the government's objections, and then the editors and reporters will make a judgment call.⁶⁵ As Keller and Baquet said then, "[t]here is no magic formula," and decisions are made both to publish and to withhold.⁶⁶

The tradition of restraint played out in a fashion in the publication of the Pentagon Papers themselves, only it was neither the government nor the press that showed that restraint. Daniel Ellsberg, while passing along forty-three volumes of the Defense Department's history of the Vietnam War, chose not to share with journalists four volumes dealing with diplomatic relations.⁶⁷ He later said that he feared disclosure of those materials would undermine U.S. diplomacy.⁶⁸

The one significant outlier case prior to the Obama Administration was the prosecution of White House aide I. Lewis ("Scooter") Libby, which included the long battle over subpoenas to the press and the jailing of *The Times* reporter Judith Miller when she refused to disclose her sources.⁶⁹ That case has legal importance — principally in that it highlighted how little legal protection the press has when grand juries seek the identities of confidential sources — but it stands out because of how unusual it was.⁷⁰ The case arose when the name of an undercover CIA operative, Valerie Plame, was leaked to journalists and published by the columnist Robert Novak.⁷¹ The leak, ultimately traced to Libby, was apparently designed to discredit Ms. Plame's husband, a diplomat who had raised questions about the Bush Administration's push for a war against Iraq.⁷² The leak investigation that followed was

⁶⁴ Dean Baquet & Bill Keller, *When Do We Publish a Secret?*, N.Y. TIMES (July 1, 2006), <http://www.nytimes.com/2006/07/01/opinion/01keller.html?pagewanted=all>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Floyd Abrams, *Why WikiLeaks Is Unlike the Pentagon Papers*, WALL ST. J. (Dec. 29, 2010), <http://online.wsj.com/article/SB10001424052970204527804576044020396601528.html>.

⁶⁸ *Id.*

⁶⁹ Joel Seidman, *Plame Was 'Covert' Agent at Time of Name Leak*, NBC NEWS (May 29, 2007, 4:24 PM), <http://www.nbcnews.com/id/18924679/#.UTN482BKhtl>.

⁷⁰ See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006).

⁷¹ For more background on the Plame case, see Seidman, *supra* note 69.

⁷² See *Key Players in the CIA Leak Investigation*, WASH. POST (July 3, 2007, 11:53 AM), http://www.washingtonpost.com/wp-srv/politics/special/plame/Plame_KeyPlayers.html.

unlike any that had been seen up to that point and led to the indictment and conviction of Libby. The investigation was handled by a special prosecutor, who was not bound by the same institutional and political restraints of the Department of Justice. It was also a leak that was overtly political and designed to harm an individual, and it came with none of the public interest trappings that are more typical of leak-based stories.⁷³

Despite the anomalous Libby case and the cries of concern from public officials following most high-profile leaks, leaks have in fact been an important tactic used by government officials to advance political agendas. Max Frankel once described the relationship between reporter and official as “co-operative, competitive, antagonistic and arcane,”⁷⁴ one in which officials regularly try to use the reporter “for loyal purposes of government.”⁷⁵ As one example of this dynamic, Frankel tells of how he was given permission to run certain secret quotes from President Kennedy about the building of the Berlin Wall because the President wanted to appear tough on Communism.⁷⁶ At the same time, the government was able to avoid heated and politically costly confrontations with the press and public — a cost that became evident in the battle over the subpoena served on Judith Miller.⁷⁷ Whatever complaints the public may have about the news media, the government’s attacks on the press typically get framed as inappropriate overreaching by those in power.

On the other side, the mainstream media likewise depends on the goodwill of the public, not only as a consumer of their content but ultimately as the political bulwark against restrictive laws. To publish recklessly is to create the appearance that the media has put its own interests above the public’s interest in security; with such recklessness may come a call for greater government control over the press. The press also benefits from hearing the government’s side of the security story, thereby avoiding some of the truly consequential security decisions while being in a better position to judge the consequences for itself.⁷⁸

⁷³ Even *The Times* editorialized in favor of the investigation. *Investigating Leaks*, N.Y. TIMES (Oct. 2, 2003), <http://www.nytimes.com/2003/10/02/opinion/investigating-leaks.html>.

⁷⁴ Affidavit of Max Frankel ¶ 3, *United States v. N.Y. Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971) (No. 71 Civ. 2662), available at <http://www.pbs.org/wgbh/pages/frontline/newswar/part1/frankel.html>.

⁷⁵ *Id.* at para. 16.

⁷⁶ *Id.* at para. 8. See also Mary-Rose Papandrea, *The Publication of National Security Information in the Digital Age*, 5 J. NAT’L SEC. L. & POL’Y 119, 121 (2012) (“As the saying goes, the ship of state is the only known vessel that leaks from the top.”).

⁷⁷ See, e.g., Howard Kurtz & Carol D. Leonnig, *Criminal Contempt Could Lengthen Reporter’s Jail Stay*, WASH. POST (July 16, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/15/AR2005071502080.html> (describing the escalating battle between the prosecutor, government, and reporters).

⁷⁸ After all, the decision whether to publish ultimately rests with the press. As Bill Keller noted, the White House told him that he would share responsibility for the next terrorist attack on America if *The Times* disclosed the NSA wiretapping program. Keller, *supra* note 57, at 15. While *The Times* ultimately decided to go to press with that story, the tale inevitably resonates: it is not unreasonable to figure that there will be times when it is impossible for

III. THE RISE OF DISRUPTIVE FORCES

Even as significant national security stories continued to be published, a noticeable shift was occurring. First, in the wake of 9/11, the government significantly increased its classification of documents — one symptom of the government’s increased interest in controlling information.⁷⁹ Second, and responsive at least in part to the government’s insistence on more secrecy, we have seen the rise of nontraditional publishers like WikiLeaks, the loosely structured online organization that has specialized in publishing secret information provided by anonymous sources.⁸⁰ Third, and most recently, the government has prosecuted an unprecedented number of leakers.⁸¹ These three developments threaten the model of mutual restraint that has characterized the press/government relationship in the years following *The Pentagon Papers*.

A. *Increased Classification and the Government’s Control of Information*

In his opening remarks at a congressional hearing on issues raised by the publication of certain State Department cables by WikiLeaks, Representative John Conyers paraphrased the words of Thomas S. Blanton, the Director of the National Security Archive: “[O]ur problem with our security system . . . is [that we have] low fences around a vast prairie because the government classifies just about everything. What we really need are high fences around a small graveyard.”⁸² Representative Bill Delahunt put it more succinctly: “[W]e are at a moment in our history where there is an overwhelming overclassification of material And the process itself is arcane, and there is no accountability.”⁸³

Many others — including those in the national security sphere — have backed up those statements. According to Blanton’s prepared testimony at the WikiLeaks hearing, security officials — including Secretary of Defense Donald Rumsfeld’s Deputy for Counterintelligence and Security and the 9/11 Commission co-chair — estimate that anywhere between 50% and 90% of documents are misclassified.⁸⁴ Such estimates are typically the best insight we have into misclassification because the public rarely has access to the underlying documents. One infamous example, however — the

journalists to know the full consequences of a national security story and for that reason they may be less willing to go near that line.

⁷⁹ See *infra* Part III.A.

⁸⁰ See *infra* Part III.B.

⁸¹ See *infra* Part III.C.

⁸² *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 2 (2010) [hereinafter *House WikiLeaks Hearing*] (opening remarks of Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary).

⁸³ *Id.* at 4 (remarks of Rep. William D. Delahunt).

⁸⁴ *Id.* at 84 (prepared statement of Thomas S. Blanton, Dir., Nat’l Sec. Archive, George Washington Univ.).

WikiLeaks release of State Department cables — certainly seems to back up the estimates. Analyses of subsets of documents revealed rampant overclassification,⁸⁵ and it is reasonable to conclude that thousands, if not hundreds of thousands, of documents in the dump were improperly classified. The government's general reluctance to open itself up to scrutiny where national security is concerned provides further evidence — for example, in the Senate's recent refusal to pass any pro-transparency amendments⁸⁶ to the Foreign Intelligence Surveillance Act ("FISA").⁸⁷

Overclassification persists in spite of internal acknowledgement by government officials that many of the documents would not harm national security in any meaningful way.⁸⁸ It robs society of a meaningful democratic discourse on issues of national security and on the merits of secrecy itself.⁸⁹ Representative Conyers rightly asserted that "we are too quick to accept government claims that risk the national security and far too quick to forget the enormous value of some national security leaks."⁹⁰

Yet the government, and particularly the executive, continues to overclassify information. David Pozen has described how an acceptance of the "mosaic theory" within government has led to broader classification of information, ostensibly in the interest of national security.⁹¹ According to

⁸⁵ See Julian Hattam, *WikiLeaks and the Classification Follies: Thank You Notes, Picnic Menus — Are These Really Official Secrets?*, CTR. FOR PUB. INTEGRITY (Mar. 14, 2011, 4:32 PM), <http://www.publicintegrity.org/2010/12/22/2239/wikileaks-and-classification-follies>.

⁸⁶ See Trevor Timm, *Congress Disgracefully Approves the FISA Warrantless Spying Bill for Five More Years, Rejects All Privacy Amendments*, ELEC. FRONTIER FOUND. (Dec. 28, 2012), <https://www.eff.org/deeplinks/2012/12/congress-disgracefully-approves-fisa-warrantless-eavesdropping-bill-five-more>. The proposed amendments were by no means earth-shattering. Senator Ron Wyden's amendment would have required that intelligence agencies give a general estimate of the number of Americans affected by the surveillance program. *Id.* Senator Jeff Merkley's amendment "would have encouraged (not even forced!) the Attorney General to declassify portions of secret FISA court opinions — or just release summaries of them if they were too sensitive." *Id.*

⁸⁷ 50 U.S.C. §§ 1801–85 (2006).

⁸⁸ See, e.g., *House WikiLeaks Hearing*, *supra* note 82, at 2 (opening remarks of Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary) (describing Defense Secretary Robert Gates's reaction to the WikiLeaks cable dump and noting that Secretary Gates thought the release was embarrassing but that any harm would be "fairly modest").

⁸⁹ As Paul Gowder explains:

This reason-giving is impossible to accomplish when the full nature of the acts which will be done pursuant to the norms agreed-upon are concealed by some parties to the discourse. Secrecy is inconsistent with any minimal approximation of an ideal speech situation, even in a discourse about secrecy, because even a far-from-ideal speech situation presupposes a chance to examine the effects, both past and planned, of a norm.

Paul Gowder, *Secrecy as Mystification of Power: Meaning and Ethics in the Security State*, 2 *I/S: J.L. & POL'Y FOR INFO. SOC'Y* 1, 22 (2006).

⁹⁰ *House WikiLeaks Hearing*, *supra* note 82, at 2 (opening remarks of Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary).

⁹¹ David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 *YALE L.J.* 628, 631 (2005). As Pozen says, mosaic theory "describes a basic precept of intelligence gathering: Disparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other

Pozen, the problem lies in the frequent inability to gauge accurately the potential harm in disclosure.⁹² This is because information may only be harmful in the context of other information, and it is often difficult, if not impossible, to know what that context may be.⁹³ Given the Global War on Terror and the perpetual state of “national anxiety” it inspires,⁹⁴ the government may be inclined to overclassify information that officials are not able accurately to assess.⁹⁵

This picture, however, is complicated by the fact that the “executive branch enjoys virtually unbridled authority to control the flow of national security information to the public.”⁹⁶ This control not only gives the government considerable power but, perhaps more importantly, perverse incentives. As one scholar has noted, “secrecy skews the incentives for those in control of the secret information . . . [and] modifies the power relationship between the holder of the secret information and the object of secrecy.”⁹⁷ Professor Paul Gowder elaborates: “Assuming that such holders have an incentive to hang on to that power, we can expect them to take advantage of the unavailability of information about the functions and effects of their power to present a falsely positive view of their actions to future discourse-participants.”⁹⁸ This, then, provides another, more nefarious reason for the government’s overclassification: it allows the government to perpetuate its own power.⁹⁹

The government’s expansive view of classification is a shot across the bow of the press and, ultimately, the public. Although it may be consistent with Bickel’s notion of governmental power, it threatens the viability of the détente that has been critical to the proper functioning of the system.

items of information. Combining the items illuminates their interrelationships and breeds analytic synergies, so that the resulting mosaic of information is worth more than the sum of its parts.” *Id.* at 630.

⁹² *Id.* at 638–39.

⁹³ *Id.* at 630. Indeed, as Pozen notes, “[t]he relevant pieces of information might come from the government, other public sources, the adversary’s own sources, or any mixture thereof.” *Id.*

⁹⁴ *House WikiLeaks Hearing*, *supra* note 82, at 8 (testimony of Geoffrey R. Stone, Prof. and Fmr. Dean, Univ. of Chicago Law Sch.).

⁹⁵ This instinct, although understandable, may lead to greater harm than good. Ralph Nader, for example, testified that “[t]he suppression of information has led to far more loss of life, jeopardization of American security, and all the other consequences that are now being attributed to WikiLeaks and Julian Assange.” *Id.* at 87–88 (testimony of Ralph Nader).

⁹⁶ Papandrea, *supra* note 76, at 120.

⁹⁷ Gowder, *supra* note 89, at 23.

⁹⁸ *Id.*

⁹⁹ There are strong arguments that overclassification actually undermines our ability to keep those secrets that are really important. As early as 1997, the Commission on Protecting and Reducing Government Secrecy concluded that “[t]he best way to ensure that secrecy is respected, and that the most important secrets *remain* secret, is for secrecy to be returned to its limited but necessary role.” REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at xxi (1997). The idea is that overclassification may lead to indiscriminate leaking. This idea will be taken up more thoroughly *infra* Part III.B.

B. *The Rise of Nontraditional Publishers*

As the government ratcheted up its classification efforts, a new type of organization was developing to combat government secrecy: the nontraditional publisher. WikiLeaks is easily the most famous example of this outlet, but there are others, including Balkan Leaks and OpenLeaks. The potential number of such nontraditional publishers is limitless; they are the product of new technology and new distribution channels, and they appear to be constrained only by the number of people willing to create them.¹⁰⁰ Even if they prove to be less menacing in reality, these nontraditional publishers present an existential threat to national security, government power, and the viability of the model of mutual restraint.

As noted, WikiLeaks is the primary example of a nontraditional publisher, though the lessons drawn from its example apply more broadly. Described by its founder Julian Assange, WikiLeaks exists in order to “expose injustices in the world and try to rectify them.”¹⁰¹ It believes in greater transparency, particularly concerning U.S. wars in the Middle East.¹⁰² WikiLeaks says that it is responding to what it perceives as troubling and persistent secrecy. Others are more cynical. Judge Louie Gohmert, now a U.S. Representative from Texas’s First Congressional District, has said that WikiLeaks’s “real motivation is self-promotion and increased circulation.”¹⁰³

Why are WikiLeaks and other nontraditional publishers such a threat to the government and ultimately to the balance between transparency and secrecy that was struck after *The Pentagon Papers*? It is a matter of control — whether the government can exert control, and if not, whether the publishers have self-control. The government inevitably seeks to monopolize national security information through classification, and nontraditional publishers directly threaten its ability to do so. What is more, nontraditional publishers are subject to less control than other media outlets, and it is unclear whether these new publishers will exert any kind of restraint whatsoever, even when the public interest would best be served by keeping information secret.

There are three aspects of these nontraditional publishers that are particularly threatening to the government’s attempt to keep secrets. First and foremost, these organizations transcend traditional geographical boundaries. “The Internet’s ability to cross national borders seamlessly and at a low cost concomitantly reduces the traditional power of nation-states to limit information distribution.”¹⁰⁴ This supranational structure makes offshore Internet publishers able to withstand legal and other attacks. The U.S. government,

¹⁰⁰ This may not, in fact, be the case. See *infra* note 122.

¹⁰¹ Ellen Nakashima & Joby Warrick, *Wikileaks Takes New Approach in Latest Release of Documents*, WASH. POST (July 26, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/25/AR20100725033356.html>.

¹⁰² See *id.*

¹⁰³ *House WikiLeaks Hearing*, *supra* note 82, at 3 (statement of J. Louie Gohmert).

¹⁰⁴ Derek E. Bambauer, *Consider the Censor*, 1 WAKE FOREST J.L. & POL’Y 31, 35 (2011).

for example, was aware that certain State Department cables had been leaked before any of the documents were published, but it “did not seek to enjoin WikiLeaks from publication because doing so would have been fruitless.”¹⁰⁵ It is equally difficult for the law to reach such an organization after publication given the organization’s indefinite and imprecise structure;¹⁰⁶ and technical and business measures — including denial-of-service attacks and the withdrawal of technical support by several major U.S. companies — did not stem the tide of WikiLeaks’s releases.¹⁰⁷

Second, advances in the state of technology and the ease of distribution make a leak that actually does threaten national security potentially disastrous. It seems likely that the days are gone when a newspaper could publish damaging information and enemies would seemingly fail to see it.¹⁰⁸ As former Secretary of State Hillary Clinton put it, “dangerous information can be sent around the world with the click of a keystroke.”¹⁰⁹ And few constraints on the transmission of leaked information exist. WikiLeaks had the ability to reveal over 250,000 cables,¹¹⁰ although it initially released only a fraction of that number.¹¹¹ Such a vast dump of information makes it that much harder for the government to know precisely what has been leaked and what the harm of that leak could be.¹¹²

Third, and perhaps most important for the threatened model of mutual restraint, WikiLeaks and other nontraditional publishers have not defined

¹⁰⁵ *Id.* at 38.

¹⁰⁶ For more on WikiLeaks’s structure and precautionary measures, see Andy Greenberg, *Wikileaks Servers Move To Underground Nuclear Bunker*, FORBES (Aug. 30, 2010, 3:27 PM), <http://www.forbes.com/sites/andygreenberg/2010/08/30/wikileaks-servers-move-to-underground-nuclear-bunker/>; Raffi Khatchadourian, *No Secrets*, NEW YORKER (June 7, 2010), http://www.newyorker.com/reporting/2010/06/07/100607fa_fact_khatchadourian?currentPage=all. Greenberg notes that WikiLeaks stores some of its information at a “data center . . . 30 meters below ground inside a Cold-War-era nuclear bunker carved out of a large rock hill in downtown Stockholm.” Greenberg, *supra*. He also notes that “it’s not clear exactly why [the Swedish Pirate Party, which hosts WikiLeaks’ IT operations, has] chosen to move WikiLeaks’ servers to the . . . facility. The threat of law enforcement physically seizing or destroying the organization’s equipment, after all, is much less likely than a legal attempt to gain direct access to WikiLeaks’ data.” *Id.*

¹⁰⁷ Bambauer, *supra* note 104, at 36.

¹⁰⁸ See, e.g., Gabriel Schoenfeld, *Has the “New York Times” Violated the Espionage Act?*, COMMENT., Mar. 2006, at 23, 24–25, available at <http://www.commentarymagazine.com/article/has-the-%E2%80%9Cnew-york-times%E2%80%9D-violated-the-espionage-act/> (noting that despite the fact that the *Chicago Tribune* printed an article showing the United States had broken the Japanese codes, the Japanese did nothing to change the codes, apparently having not seen the article or dismissed its significance).

¹⁰⁹ Hillary Rodham Clinton, U.S. Sec’y of State, *Internet Rights and Wrongs: Choices & Challenges in a Networked World*, Speech at George Washington University (Feb. 15, 2011).

¹¹⁰ See Joshua Hersh, *WikiLeaks Secret Diplomatic Cables Released in Full*, HUFFINGTON POST, (Sept. 2, 2011, 12:44 PM), http://www.huffingtonpost.com/2011/09/02/wikileaks-diplomatic-cables_n_946574.html.

¹¹¹ See Ashley Fantz, *Fraction of 1 Percent of WikiLeaks Cables Released*, CNN (Dec. 8, 2010, 2:29 PM), <http://news.blogs.cnn.com/2010/12/08/fraction-of-1-percent-of-wikileaks-released/>.

¹¹² As discussed above, the consensus seems to be that the harm was insignificant. See *supra* Part III.A.

their ethical and moral obligations in the same way that traditional publishers have. One of the key understandings underpinning the bargain of mutual restraint is that traditional publishers exercise discretion and avoid publications that would risk serious harm to national security.¹¹³ WikiLeaks and other nontraditional publishers are not bound by this ethos or any journalistic professional code.¹¹⁴ To the extent that there is a guiding principle for new, nontraditional publishers, it is that transparency itself is a compelling and justifiable good. As Alan Rusbridger of *The Guardian* said of WikiLeaks, “the website’s initial instincts were to publish more or less everything.”¹¹⁵ In a world where anyone can be a nontraditional publisher, this lack of insight into publishing standards is understandably problematic for the government and the public.¹¹⁶

It is perhaps unsurprising then that the government’s reaction to WikiLeaks has been exceedingly harsh. The response of Harold Koh, then the Legal Adviser to the State Department, to WikiLeaks’s attorney, Jennifer Robinson, is emblematic: “You have undermined your stated objective by disseminating this material widely, without redaction, and without regard to

¹¹³ See Part II *supra*.

¹¹⁴ See, e.g., Bambauer, *supra* note 104, at 39 (explaining that WikiLeaks has failed to “describe[] the criteria it uses to determine what to publish, [and the criteria it uses] to redact — if at all — information that creates risk without offsetting benefit”). Unlike with traditional, journalistic publishers, there is also no broad consensus on ethical standards among new publishers. Just because one publisher — like WikiLeaks — has engaged in ethical disclosure does not guarantee that the next nontraditional publisher will. The mainstream media, on the other hand, has often attempted to articulate the standards that guide its decisions to reveal classified information. See, e.g., Baquet & Keller, *supra* note 64; Bambauer, *supra* note 104, at 39–40.

¹¹⁵ Alan Rusbridger, *WikiLeaks: The Guardian’s Role in the Biggest Leak in the History of the World*, *GUARDIAN* (Jan. 28, 2011, 3:02 PM), <http://www.guardian.co.uk/media/2011/jan/28/wikileaks-julian-assange-alan-rusbridger>. Ironically, despite its hacker/anarchist roots, WikiLeaks came to exhibit old-media-like restraint in its handling of the Manning documents, in part in response to criticism from human rights advocates who feared that WikiLeaks’s unredacted disclosure of documents detailing the cooperation of foreign dissidents and others with the United States would bring reprisals. See *id.*; *US: Don’t Prosecute WikiLeaks Founder*, *HUMAN RIGHTS WATCH* (Dec. 15, 2010), <http://www.hrw.org/news/2010/12/15/us-don-t-prosecute-wikileaks-founder>. WikiLeaks representatives made an effort to engage with the United States government directly over possible redaction of sensitive information but were rebuffed. See Letter from Harold Koh, U.S. Dep’t of State, to Jennifer Robinson, Attorney for Julian Assange (Nov. 27, 2010), available at http://www.foreignpolicy.com/files/fp_uploaded_documents/101129_US-Department-of-State-to-Assange-27-Nov.pdf [hereinafter Letter from Harold Koh to Jennifer Robinson]. Nonetheless, “WikiLeaks decided unilaterally to delay the release of some documents because of the possibility that putting them out immediately could cause harm.” Nakashima & Warrick, *supra* note 101. When it did release the State Department cables, WikiLeaks gave them first to major news media organizations and then initially adopted those organizations’ redactions as its own. Hersh, *supra* note 110 (noting that WikiLeaks eventually posted a complete set of unredacted records). All of this has led one scholar to state that “[a]s a factual matter, it is inaccurate to argue that WikiLeaks does not engage in any editorial practices.” Papandrea, *supra* note 76, at 124.

¹¹⁶ For a discussion of how traditional journalistic mores illuminated *The Pentagon Papers* decision and how the rise of nontraditional publishers threaten the existing legal framework, see generally Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 *YALE L.J.* 1448 (2012).

the security and sanctity of the lives your actions endanger. We will not engage in a negotiation regarding the further release or dissemination of illegally obtained U.S. Government classified materials.”¹¹⁷ Senator Joseph Lieberman said the WikiLeaks cable dump was “the most serious violation of the Espionage Act in our history” and called for the extradition of Julian Assange.¹¹⁸

This extreme reaction was not limited to those within the government; major U.S. companies actively opposed WikiLeaks. Amazon.com stopped hosting the website on its servers, ostensibly because WikiLeaks violated its terms of service.¹¹⁹ Visa and PayPal, among others, stopped processing payments to the organization,¹²⁰ and many — including some journalists — attacked the organization as illegitimate.¹²¹ As David Carr put it in *The Times*, the backlash against WikiLeaks “would seem unthinkable had it been made against mainstream newspapers.”¹²²

Not to be overlooked is the curious place of the public in all of this. If the post-*Pentagon Papers* model is viewed as a sort of unspoken pact between the press and the government, WikiLeaks-type publishers are most easily viewed as a clear external threat to the system. But if the tacit bargain was really between the government and the public, with the press acting as its proxy, then the rise of nontraditional publishers requires a more nuanced analysis. In that case, WikiLeaks and its progeny can be seen as the escalation of the public’s side of the bargain — members of the public can publish what they want without the intermediation of the mainstream press. Significantly, it does not matter whether the public as a whole endorses leaks like

¹¹⁷ Letter from Harold Koh to Jennifer Robinson, *supra* note 115, at 2.

¹¹⁸ Paul Owen et al., *WikiLeaks: U.S. Senator Joe Lieberman Suggests New York Times Could Be Investigated*, GUARDIAN (Dec. 7, 2010, 1:11 PM), <http://www.guardian.co.uk/world/2010/dec/07/wikileaks-joe-liebberman-new-york-times-investigated>. Senator Lieberman also suggested that *The Times* was similarly culpable. *Id.*

¹¹⁹ See Geoffrey A. Fowler, *Amazon Says WikiLeaks Violated Terms of Service*, WALL ST. J. (Dec. 3, 2010, 12:32 PM), <http://online.wsj.com/article/SB10001424052748703377504575651321402763304.html>; Lance Whitney, *Amazon Cuts Off WikiLeaks*, CNET (Dec. 2, 2010, 8:05 AM), http://news.cnet.com/8301-13578_3-20024376-38.html.

¹²⁰ Andy Greenberg, *Visa, MasterCard Move To Choke WikiLeaks*, FORBES (Dec. 7, 2010, 10:16 AM), <http://www.forbes.com/sites/andygreenberg/2010/12/07/visa-mastercard-move-to-choke-wikileaks/>; *PayPal Says It Stopped Wikileaks Payments on U.S. Letter*, BBC NEWS (Dec. 8, 2010, 1:02 PM), <http://www.bbc.co.uk/news/business-11945875>.

¹²¹ David Carr, *WikiLeaks Taps Power of the Press*, N.Y. TIMES (Dec. 12, 2010), <http://www.nytimes.com/2010/12/13/business/media/13carr.html>.

¹²² *Id.* Whatever concerns the government and others may have about WikiLeaks’s ethics and sense of responsibility, trust may be WikiLeaks’s greatest accomplishment. Evgeny Morozov argues: “To get leaks, a site needs to have a public profile and look trustworthy. Who would want to leak documents to a honey pot run by some secret government agency? Who would want to help analyze them? So trust and prominence are essential — but they are also hard to achieve if the leaking platform itself remains completely anonymous.” Evgeny Morozov, *And the Firewalls Came Tumbling Down*, N.Y. TIMES (Oct. 12, 2012), <http://www.nytimes.com/2012/10/14/books/review/this-machine-kills-secrets-by-andy-greenberg.html>.

This is an important insight, as it may mean that these nontraditional publishers are not as easy to create as feared. As Morozov puts it, “[a]llowing whistle-blowers to leak anonymously is a crucial first step — but it might also be the easiest step.” *Id.*

those published by WikiLeaks. All that matters is that a small portion of the public, a portion that is willing to publish, endorses those values. In other words, we live in a world where only part of the public needs to signal its unwillingness to abide by mutual restraint.

This is not how the disorderly situation has been viewed historically, and it is not at all clear that the public is a direct party to the existing and evolving bargain — or even how the public as a whole feels about WikiLeaks-style disclosures. That said, the rise of nontraditional publishers is real, as is their relationship to a segment of the public that is increasingly fed up with secrecy and what they see as manipulation, both by the government and by the mainstream media.

C. Prosecuting the Leakers

Coupled with increasing overclassification and the rise of nontraditional publishers is the government's expanded effort to prosecute leakers. Prior to the Obama Administration, there had been only three prosecutions in the entire history of the Espionage Act.¹²³ Under President Obama, there have been six — Thomas Drake, John Kiriakou, Shamai Leibowitz, Stephen Kim, Jeffrey Sterling, and Bradley Manning¹²⁴ — as well as a handful of other investigations that led to no formal charges.¹²⁵ Although that number may still seem insignificant, the severity and high-profile nature of these prosecutions is not to be understated. These prosecutions provide a signal to would-be leakers that the risk/reward calculation has changed. The government does not have to engage in mass prosecutions of leakers to deliver its message: unapproved leaks will not be tolerated, so any lower-level officials who are thinking about leaking information should think twice about the risks involved.

The government's recent prosecutions have been characterized by two salient traits: severity and selectivity. Even when the prosecutions prove legally unsustainable, they inevitably ruin the life and livelihood of the leaker. Thomas Drake, a former NSA employee, ultimately had all of his felony charges dismissed; he pled guilty to a misdemeanor and was sentenced to one year of probation.¹²⁶ Nonetheless, his career in government

¹²³ Scott Shane & Charlie Savage, *Administration Took Accidental Path to Setting Record for Leak Cases*, N.Y. TIMES (June 19, 2012), <http://www.nytimes.com/2012/06/20/us/politics/accidental-path-to-record-leak-cases-under-obama.html?pagewanted=all>.

¹²⁴ See Ashley Hayes, *Toobin: Obama Has Been 'Very Tough' on Leakers*, CNN (June 7, 2012, 10:34 PM), <http://www.cnn.com/2012/06/07/politics/obama-leaks-prosecutions/index.html>; Matthew Miller, *Obama Is Right to Prosecute Leakers Who Are Not the Same as Whistle-Blowers*, DAILY BEAST (Mar. 10, 2012, 4:45 PM), <http://www.thedailybeast.com/articles/2012/03/08/obama-is-right-to-prosecute-leakers-who-are-not-the-same-as-whistleblowers.html>; Scott Shane, *U.S. Pressing Its Crackdown Against Leaks*, N.Y. TIMES (June 17, 2010), <http://www.nytimes.com/2011/06/18/us/politics/18leak.html>.

¹²⁵ See, e.g., Charlie Savage, *No Prosecution Seen for Official in N.S.A. Leak*, N.Y. TIMES (Apr. 26, 2011), http://www.nytimes.com/2011/04/27/us/27nsa.html?_r=0.

¹²⁶ Hayes, *supra* note 124.

was ruined — he even worked for some time at an Apple store¹²⁷ — and the judge noted at sentencing that the case had brought him “financial devastation.”¹²⁸ Others have been sentenced to serious jail time. John Kiriakou, a former CIA employee who played a major role in revealing the torture tactics used by the Bush Administration, pleaded guilty to violating the Intelligence Identities Protection Act¹²⁹ for his disclosure of an agent’s name and was sentenced to thirty months in prison.¹³⁰ At the most extreme end, leakers may face life in prison — as is the case with Bradley Manning, the soldier who leaked the State Department cables to WikiLeaks.¹³¹ A military judge found that Manning was also subject to excessively harsh treatment in military detention, for which he recently received a largely symbolic 112-day reduction in his eventual sentence.¹³²

The severity of the government’s push against leakers is also reflected in the legal positions the government has strenuously asserted in these prosecutions. In Manning’s case, the government is actively trying to prevent the defense from presenting evidence as to Manning’s motive¹³³ — even though the crime of which he has been accused (aiding the enemy) has an intent element.¹³⁴ What is more, the government is now relying on a Civil War–era case for the proposition that publishing information in a newspaper can constitute aiding the enemy.¹³⁵ As Amy Davidson of *The New Yorker* asked, “Can anyone aid the enemy by giving information to a reporter? Are report-

¹²⁷ Ellen Nakashima, *Former NSA Executive Thomas A. Drake May Pay High Price for Media Leak*, WASH. POST (July 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/13/AR2010071305992.html>.

¹²⁸ Scott Shane, *No Jail Time in Trial over N.S.A. Leak*, N.Y. TIMES (July 15, 2011), <http://www.nytimes.com/2011/07/16/us/16leak.html>.

¹²⁹ 50 U.S.C. §§ 421–26 (2006).

¹³⁰ Michael S. Schmidt, *Ex-C.I.A. Officer Sentenced to 30 Months in Leak*, N.Y. TIMES (Jan. 25, 2013), <http://www.nytimes.com/2013/01/26/us/ex-officer-for-cia-is-sentenced-in-leak-case.html>.

¹³¹ Associated Press, *Bradley Manning Prosecutors Cite Civil War Case in Arguing He Aided al-Qaida*, GUARDIAN (Jan. 9, 2013, 4:34 PM), <http://www.guardian.co.uk/world/2013/jan/09/bradley-manning-civil-war-alqaida>.

¹³² Ed Pilkington, *Bradley Manning Granted 112-Day Reduction in Possible Sentence*, GUARDIAN (Jan. 8, 2013, 5:23 PM), <http://www.guardian.co.uk/world/2013/jan/08/bradley-manning-112-day-reduction-possible-sentence>. A Marine inquiry came to a similar conclusion. Josh Gerstein, *Marine Inquiry Faults Bradley Manning Treatment*, POLITICO (July 14, 2011, 12:47 PM), <http://www.politico.com/news/stories/0711/58991.html>.

¹³³ Associated Press, *supra* note 131. Manning clearly stated his motive prior to arrest and in a private chat when he thought no one else was listening: “I want people to see the truth, regardless of who they are, because without information you cannot make informed decisions as a public.” Thomas A. Drake, *A Whistleblower Salutes Bradley Manning*, POLITICO (Jan. 10, 2013, 9:25 PM), <http://www.politico.com/story/2013/01/a-whistleblower-salutes-bradley-manning-86024.html>.

¹³⁴ 10 U.S.C. § 904(2) (2006) (defining “aiding the enemy” as, among other things, “knowingly . . . [giving] intelligence to . . . the enemy, either directly or indirectly”).

¹³⁵ See Associated Press, *supra* note 131.

ers aiding the enemy if they publish it — and who, by the way, is ‘the enemy’?”¹³⁶

Equally important, these prosecutions are highly selective and appear designed to instill fear in a certain type of leaker. Government officials leak materials and sanction other leaks every day. According to a study by the Senate Intelligence Committee, there were “147 disclosures of classified information that made their way into the Nation’s eight leading newspapers in one 6-month period alone [and] [n]one of these leaks resulted in legal proceedings.”¹³⁷ The six leakers who face prosecution, however, were lower-level federal employees.¹³⁸ And it is precisely this kind of leaker that the government seems determined to stop.

A salient example of the disparate treatment afforded to leakers can be seen in the repercussions reaped upon sources that provided confidential information to Bob Woodward for his book *Obama’s Wars*. In that book, Woodward disclosed “highly classified” information, including “the code names of previously unknown NSA programs, the existence of a clandestine paramilitary army run by the CIA in Afghanistan, and details of a secret Chinese cyberpenetration of Obama and John McCain campaign computers.”¹³⁹ This material was so secret “that [Director of National Intelligence Mike] McConnell, under orders from President George W. Bush, barred [President-elect] Obama’s own transition chief, John Podesta, from sitting in at the briefing.”¹⁴⁰ Despite disclosing such sensitive information, however, Woodward and his sources were never prosecuted. The attorney for Stephen Kim — a leaker charged with violating the Espionage Act — even wrote a letter to the Assistant Attorney General for National Security asking for clarification as to why Kim was being prosecuted and these sources were not.¹⁴¹ The common assumption, of course, is that the sources who leaked the confidential information to Woodward were high-ranking officials who had the tacit support of the Administration.¹⁴²

This imbalance is particularly troubling when the government is trying to silence the very leaks that the press and public find most valuable: those

¹³⁶ Amy Davidson, *Bradley Manning’s Civil War*, NEW YORKER (Jan. 9, 2013), <http://www.newyorker.com/online/blogs/closetoread/2013/01/bradley-mannings-civil-war.html>.

¹³⁷ *House WikiLeaks Hearing*, *supra* note 82, at 48 (testimony of Gabriel Schoenfeld).

¹³⁸ Hayes, *supra* note 124.

¹³⁹ Michael Isikoff, ‘Double Standard’ in White House Leak Inquiries?, NBC NEWS (Oct. 18, 2010, 6:26 AM), http://www.nbcnews.com/id/39693850/ns/us_news-security/t/double-standard-white-house-leak-inquiries/#.UVHG7oXYKqS.

¹⁴⁰ *Id.*

¹⁴¹ Letter from Abbe D. Lowell to David Kris, Assistant Attorney Gen. for Nat’l Sec., Dep’t of Justice (Oct. 12, 2010) [hereinafter Letter from Abbe D. Lowell to David Kris], available at http://msnbcmedia.msn.com/i/msnbc/sections/news/Lowell_letter.pdf. Kim’s lawyer purports to answer his own question: “The material from which the book was written is clearly provided by members of the Executive Branch to get their point of view known, to explain their positions, to curry favor with the media and the public, and for other reasons and motives.” *Id.*

¹⁴² See Isikoff, *supra* note 139.

that disclose what the government wants to keep secret for political reasons. Leaks that are provided by higher-level officials with the approval of the Administration may have some value, but they inherently provide only one side of the story — the Administration's. The Administration approves of those leaks because they advance its agenda and shape public discourse on a given issue.¹⁴³ Leaks by lower-level government employees are typically made without approval and often reveal serious wrongdoing in the government. To give just two examples, leaks about government-sponsored torture¹⁴⁴ and the government's widespread eavesdropping program did not appear to be sanctioned by high-level government officials.¹⁴⁵

For better or worse, one new wrinkle in these prosecutions is the rendering of journalists as bystanders. In the past, the government would need the testimony of the journalist in order to prove its case against a leaker, and the journalist typically took the position that he or she would refuse to testify (even if it meant contempt of court and possible jail time). Recently, however, the government has been able to rely entirely on electronic communications to prove its case, and the journalist is rarely called as a witness.¹⁴⁶ The journalist and the leaker used to face the risks of leaking and publishing classified material together, but now leakers are more likely to stand on their own.

The aggressive prosecution of leakers illustrates the difference between the theory of a disorderly situation and the reality of a system of mutual restraint. The prosecutions are a natural extension of Bickel's theory — the government is exercising its prerogative to protect secrets — but they are a direct attack on the system of mutual restraint.

IV. THE HARD CHOICES IN A NEW LEGAL PARADIGM

If, in fact, these disruptive trends continue to unravel the unspoken bargain of mutual restraint, it seems inevitable that there will be calls to reset the balance between disclosure and secrecy through law. Such line-drawing may prove a daunting task, irrespective of whether one tilts toward greater disclosure or toward more protection for governmental secrecy. Yet in

¹⁴³ See Letter from Abbe D. Lowell to David Kris, *supra* note 141; Glenn Greenwald, *Why Are Bob Woodward's WH Sources — or Woodward Himself — Not on Trial Next to Bradley Manning?*, GUARDIAN (Jan. 10, 2013, 8:02 AM), <http://www.guardian.co.uk/commentisfree/2013/jan/10/manning-prosecution-press-freedom-woodward>.

¹⁴⁴ Charlie Savage, *Former C.I.A. Operative Pleads Guilty in Leak of Colleague's Name*, N.Y. TIMES (Oct. 23, 2012), <http://www.nytimes.com/2012/10/24/us/former-cia-officer-pleads-guilty-in-leak-case.html>.

¹⁴⁵ Risen & Lichtblau, *supra* note 52.

¹⁴⁶ See Adam Liptak, *A High-Tech War on Leaks*, N.Y. TIMES (Feb. 11, 2012), http://www.nytimes.com/2012/02/12/sunday-review/a-high-tech-war-on-leaks.html?pagewanted=all&_r=0. In fact, journalists have been most recently called to testify by the *defense*. Josh Gerstein, *Three Journalists Subpoenaed by Defense in CIA Leak Case*, POLITICO (Oct. 11, 2012, 6:50 PM), <http://www.politico.com/blogs/under-the-radar/2012/10/three-journalists-subpoenaed-by-defense-in-cia-leak-138198.html>.

thinking about what distinctions should be made in the law, it is important not to embrace a false equivalency in assessing the disruptive forces' effects on public transparency and government secrecy. While renegade publishers like WikiLeaks are a threat to legitimate secrecy in the abstract, their actual power pales in comparison to the government's ability to enforce secrecy — through technology, control over employment, prosecutions, and the well-established processes of classified communication. None of that has been diminished as a result of WikiLeaks. The government's more aggressive approach toward leaks and leakers only enhances that ability to enforce secrecy, with the effects felt not only by anarchical online publishers but also by mainstream publishers. There is reason to be concerned that WikiLeaks will be used as an all-purpose excuse for expansion of the secrecy regime.

Accordingly, legal reforms aimed at maintaining an appropriate balance between transparency and secrecy should focus on ways to ensure greater access to information. Specifically, consideration needs to be given to expanding protection for leakers, broadening the power of the courts to review classification, and strengthening the legal privilege of reporters to keep sources confidential. At the same time, there needs to be renewed vigilance in respect to limiting the reach of the Espionage Act and maintaining prohibitions against prior restraints.

A. *Protection of Leakers*

Perhaps no single step would be a clearer acknowledgement that the Bickel paradigm has been called into question than the expansion of the now-limited legal protection enjoyed by leakers — in blunt terms, an acknowledgement of a “right to leak.”

Concededly, not all leaking of national security information is criminalized under the applicable federal statutes. Courts have recognized that provisions of the Espionage Act should not apply in situations where the government has not itself maintained the secrecy of the information.¹⁴⁷ The Supreme Court has also said that “bad faith” is necessary to sustain a prosecution under the Act, although exactly what that means remains unclear.¹⁴⁸ And under the two most significant provisions of the Espionage Act — Sections 793¹⁴⁹ and 794¹⁵⁰ — the government has the burden of showing that the

¹⁴⁷ See *United States v. Squillacote*, 221 F.3d 542, 578 (4th Cir. 2000).

¹⁴⁸ *Gorin v. United States*, 312 U.S. 19, 28 (1941). In *Gorin*, the Court said that bad faith must be shown. *Id.* The confusion over what that means was exhibited in *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006). The prosecution in the case understood “bad faith” to mean that the defendant has the “purpose to either harm the United States or to aid a foreign government.” *Id.* at 626. The court, however, defined the term to mean “with reason to believe the disclosure could harm the United States or aid a foreign government.” *Id.* at 635. The latter view is consistent with the Fourth Circuit’s decision in *United States v. Morrison*, 844 F.2d 1057 (4th Cir. 1988), in which the court found intent to harm was not required. *Id.* at 1073.

¹⁴⁹ 18 U.S.C. § 793 (2006).

disclosure of information “would be potentially damaging to the United States or might be useful to the enemy of the United States.”¹⁵¹ But “potentially damaging” or “useful to the enemy” has not been seen as a particularly daunting standard for the government to satisfy when classified information is involved.¹⁵² And courts have been notably unsympathetic to assertions by leakers that they have some sort of right to make secrets known. As the Fourth Circuit Court of Appeals icily put it in *United States v. Morison*:

[I]t seems beyond controversy that a recreant intelligence department employee who had abstracted from the government files secret intelligence information and had willfully transmitted or given it to [a media organization] . . . is not entitled to invoke the First Amendment as a shield to immunize his act of thievery. To permit the thief thus to misuse the Amendment would be to prostitute the salutary purposes of the First Amendment.¹⁵³

Other provisions, such as Section 798 of the Espionage Act,¹⁵⁴ which deals with disclosure of surveillance methods, appear to require even less proof by the government. Specifically, Section 798 applies facially when a disclosure of classified information is “in any manner prejudicial to the safety or interest of the United States.”¹⁵⁵ There is no requirement under Section 798 that a “disclosure be done with intent or reason to believe that the information be used to the injury of the United States.”¹⁵⁶

We are not suggesting that the protection of leakers should be coextensive with the First Amendment protection provided to publishers — a standard that itself remains to be fleshed out by the courts.¹⁵⁷ The authority of the government to curtail the free speech rights of its employees has been grounded in the notion that employment in the public sector carries with it an implicit waiver of employees’ rights freely to communicate information they learn as a result of their employment.¹⁵⁸ To extend to government employees a right to disclose comparable to the right enjoyed by publishers —

¹⁵⁰ *Id.* § 794.

¹⁵¹ *Morison*, 844 F.2d at 1071. See also *United States v. Dedeyan*, 584 F.2d 36, 39 (4th Cir. 1978); Stone, *supra* note 37, at 193–94.

¹⁵² Stone, *supra* note 37, at 194 (noting that the standard is a “far cry from requiring the government to prove that the employee knew the disclosure would create a clear and present danger of grave harm to the nation” — the standard that conceivably would apply in the case of a publisher or private citizen).

¹⁵³ *Morison*, 844 F.2d at 1069–70.

¹⁵⁴ 18 U.S.C. § 798 (West 2012).

¹⁵⁵ *Id.*

¹⁵⁶ *Clift v. United States*, 597 F.2d 826, 828 (2d Cir. 1979).

¹⁵⁷ Although untested, it is generally believed that the press is subject to the clear-and-present-danger standard stated in *New York Times Co. v. United States (The Pentagon Papers)*, 403 U.S. 713 (1971). See Geoffrey R. Stone, *On Secrecy and Transparency: Thoughts for Congress and a New Administration*, ACS ISSUE BRIEF at 1, 6 (June 2008).

¹⁵⁸ See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); see generally Stone, *supra* note 157.

in effect, to permit punishment and restraint of government employees' informational disclosures only in the face of a clear and present danger — undervalues secrecy.

But between that robust First Amendment grant of rights to publishers and the negligible protection currently afforded to employees, there exists a more appropriate calibration. Professor Geoffrey Stone has advocated for a First Amendment defense based on a balancing test in which the potential harm to national security is weighed against the value of disclosure.¹⁵⁹ That provides a useful starting point, even as it underscores the implicit line-drawing problems, as Stone himself acknowledges.

There is, for instance, a threshold question that is empirically impossible to answer: does legal protection matter? Put differently, do leakers actually calibrate their behavior — whether or not to leak — depending on the applicable legal paradigm? As one Washington reporter told the authors, “[l]eakers aren't reading the Fed Supp advance sheets.” Undoubtedly, people leak for many reasons that have nothing to do with the public interest or the state of the law — political expediency, a personal falling out with supervisors, policy disagreements, or personal agendas. Nor would a balancing test, by its very nature, truly allow government employees to predict pre-leak whether an intended disclosure would be protected. But individual motivations and incentives alone do not provide the entire picture. Attention must also be paid to the ecosystem of secrecy and transparency, and whether some legally imposed restraint on the government's pursuit of leakers would create conditions under which employees felt more secure in making disclosures because the Department of Justice would feel less confident in bringing prosecutions.

A public interest test would impose on the government, as a matter of law, what voluntary restraint has long provided informally: an operating assumption that not all leaks are created equal, and that those leaks that do not pose harm — think *The Pentagon Papers* — or that meaningfully enhance transparency — think disclosures of illegal operations — should not be a target for government sanction. Practically speaking, it would also allow courts to check the executive by giving judges a principled way to dismiss undue charges.

B. FOIA and the Classification System

Those of us who have fought for greater disclosure of national security information through FOIA know firsthand how grossly inadequate the statute is as a tool for fostering transparency. Our recent case, *The New York*

¹⁵⁹ Stone, *supra* note 157, at 3. Earlier, he had proposed that leakers should be entitled to protection as a matter of constitutional law when the disclosure reveals unlawful government conduct, even in the face of governmental protestations that the disclosure could inflict harm. Stone, *supra* note 37, at 195–96.

Times Company v. United States Department of Justice,¹⁶⁰ which sought access to the legal analysis used by the Obama Administration to justify lethal drone strikes away from the field of battle, underscored all that is wrong with the FOIA system. Judge Colleen McMahon issued a sixty-eight-page decision directly and caustically challenging the government's assertions that the targeted-killing program met the requirements of the Constitution and federal law, but ultimately concluded that — potential illegality notwithstanding — the government did not have an obligation under FOIA to share its reasoning with the public.¹⁶¹ The case, now on appeal, was a case study of the FOIA system's failures and frustrations: a FOIA request that goes unanswered for eighteen months, secret briefings to the court by the government, the passage of more than a year between the filing of the case and a decision,¹⁶² and reaffirmation of earlier decisions holding that a court's power to review classification decisions is exceedingly narrow.¹⁶³

The courts regularly speak, and often eloquently, of their right to review whether national security information has been properly withheld from the public.¹⁶⁴ As one judge has put it, “[s]liding with the Government in all cases where national security concerns are asserted would entail surrender of the independence of the judicial branch and abandonment of our sworn commitment to uphold the rule of law.”¹⁶⁵ The courts' duty to review a classification decision flows directly from FOIA's general requirement of *de novo*

¹⁶⁰ Nos. 11 Civ. 9336 (CM), 12 Civ. 794 (CM), 2013 WL 50209, at *1 (S.D.N.Y. Jan. 3, 2013).

¹⁶¹ *Id.*

¹⁶² *See id.* at *2–4.

¹⁶³ *See id.* at *19 (“It lies beyond the power of this Court to declassify a document that has been classified in accordance with proper procedures on the ground that the court does not think the information contained therein ought to be kept secret.”). Examples of previous decisions that have interpreted a court's power to review classification as being exceedingly narrow include: *Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61, 72 (2d Cir. 2012); *Cent. Intelligence Agency v. Sims*, 471 U.S. 159, 179 (1985).

¹⁶⁴ *See, e.g.,* *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 845 F. Supp. 2d 252, 257 (D.D.C. 2012) (“[The Government's] various arguments do not present a logical or plausible explanation for its determination [that disclosure would cause ‘damage to the national security’], and the record does not support a reasonable anticipation of harm from disclosure.”); *Am. Civil Liberties Union v. Office of Dir. of Nat'l Intelligence (ACLU II)*, No. 10 Civ. 4419 (RJS), 2011 WL 5563520, at *5 (S.D.N.Y. Nov. 15, 2011) (finding the government has “failed to make the required showing that the information withheld ‘logically falls’ within Exemption 1” (quoting *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009))); *Halpern v. Fed. Bureau of Investigation*, 181 F.3d 279, 295 (2d Cir. 1999) (declining to accept a “conclusory ‘catch-all’ assertion” that information is properly classified where the government did not provide a “sufficiently specific explanation”). These cases have arisen both in the context of FOIA challenges to classifications and in the review of books that former intelligence officers seek to publish. *See, e.g.,* *Wilson v. Cent. Intelligence Agency*, 586 F.3d 171, 185 (2d Cir. 2009) (“[I]f the Agency censors a manuscript because it contains classified information, the author is entitled to judicial review of that decision to ensure that the information in question is, in fact, properly classified”); *McGehee v. Casey*, 718 F.2d 1137, 1148–49 (D.C. Cir. 1983) (holding that courts “must nevertheless satisfy themselves from the record, *in camera* or otherwise” that classification meets the applicable legal standards).

¹⁶⁵ *United States v. Moussaoui*, 336 F.3d 279, 282 (4th Cir. 2003) (Wilkins, C.J., concurring).

review, and more specifically from the text of Exemption 1 of FOIA, which allows an agency to withhold only such information that is “in fact properly classified pursuant to such Executive order.”¹⁶⁶ The Executive Order explicitly circumscribes the Executive Branch’s power to classify, which may not be used (under Section 1.7) to “conceal violations of law, inefficiency, or administrative error” or to “prevent embarrassment to a person, organization, or agency.”¹⁶⁷

Yet the judicial reluctance to set aside classifications and order disclosure of material is apparent. At times, judges willingly embrace the notion that courts lack the expertise to make the national security call.¹⁶⁸ Others believe that the law does not permit them to question the Executive Branch’s determination, despite clear legal precedent to the contrary.¹⁶⁹ In fact, it is hard to imagine an issue for which judicial review is more appropriate and necessary.¹⁷⁰ The Executive Branch classifies information without any public or congressional oversight. Once that classification decision is made, it is largely unassailable by, and in most cases invisible to, Congress and the public. Although the government maintains the Mandatory Declassification Review Process, which allows a member of the public to seek review of a classification determination, the system ends with a decision that is not subject to judicial review.¹⁷¹

Practically speaking, the only real checks on overclassification are FOIA litigation and leaks. It makes little policy sense to have a system where the formal legal procedure for challenging undue secrecy is effectively crippled, thus forcing disclosures of high informational value to take place via illegal leaks. Leaks will always play an important role in enhancing transparency, but they should not be the sole effective mechanism for doing so in a democracy committed to the rule of law.¹⁷²

Whether FOIA can be revitalized to serve its intended purposes depends on the courts and their willingness critically to examine the government’s classification claims. A full discussion of the changes necessary to empower FOIA is beyond the scope of this Article. But we would highlight

¹⁶⁶ 5 U.S.C. § 552(a)(4)(B) (2006) (de novo review); *id.* § 552(b)(1).

¹⁶⁷ Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009).

¹⁶⁸ *See, e.g., Am. Civil Liberties Union*, 681 F.3d at 70–71; *Wilner*, 592 F.3d at 76.

¹⁶⁹ *See, e.g., United States v. Aref*, No. 04-CR-402, 2007 WL 603510, at *1 (N.D.N.Y. Feb. 22, 2007), *aff’d on other grounds*, 533 F.3d 72, 82 (2d Cir. 2008). *The Times* led a coalition of media amici in challenging the judge’s position that he had no authority to review the government’s decision to classify court documents (including a court order). On review, the Second Circuit, while speaking to the importance of transparency, found that it did not need to decide the issue because review of the materials showed that withholding was proper under any test proposed. *Aref*, 533 F.3d at 81–82.

¹⁷⁰ *See Meredith Fuchs, Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 156 (2006).

¹⁷¹ *See Exec. Order No. 13,526, 75 Fed. Reg. 707, § 3.5* (Dec. 29, 2009).

¹⁷² FOIA is often useful as a vehicle after leaks. *See Kreimer, supra* note 51, at 1041–42 (describing how a leak about the Abu Ghraib abuses led to FOIA requests, which in turn led to the disclosure of thousands of documents).

one legal change that would be immediately significant in national security FOIA cases: the law should set a much lower threshold for in camera review and should curtail a judge's discretion to eschew it. The current system largely discourages independent judicial review of the materials at issue because of the deference afforded to government affidavits swearing to the propriety of the classification at issue.¹⁷³ That cedes too much power to the classifiers. FOIA requesters are rarely in a position to know much about the specific content of the documents requested and therefore be able to challenge the government on whether classification is proper. As a result, the trigger for in camera review should be a prima facie showing by the requester-plaintiff that disclosure would be in the public interest, and that analysis should be made without regard to the asserted security concerns. Only after that review would the court move to a second step of its analysis: whether the government has shown that, despite the public interest in disclosure, secrecy is required to protect national security.

The prospect of facing more and more searching in camera review would check the natural instinct of an administration to classify more rather than less. Classifying authorities are put in a different legal position when they may have to justify the actual content of purportedly secret documents, as opposed to merely vouching for the decision to classify. And many times the determination a court is asked to make is not whether something is properly classified, but whether parts of the materials may be segregated and released after proper redaction.¹⁷⁴ Freeing courts to do in camera review in those cases would almost certainly lead to greater release of information.

C. *The Espionage Act*

In *The Pentagon Papers* case, Justice White wrote in his concurrence that he believed disclosure of the materials at issue would harm national security and that publishers could be prosecuted under the Espionage Act — even if they could not be subjected to prior restraints.¹⁷⁵ Four other justices appeared to agree that some sort of post-publication sanction was possible,¹⁷⁶ but no publisher has ever been subject to prosecution under the Act.¹⁷⁷ Therein lies the netherworld in which publishers now exist: the likelihood of prosecution remains remote, but the threat lingers in the air. Left unclear as well is whether the Espionage Act, as applied to a publisher, would be found unconstitutional under the First Amendment.

¹⁷³ See *supra* notes 22–24 and accompanying text.

¹⁷⁴ See, e.g., *N.Y. Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 312 (S.D.N.Y. 2012).

¹⁷⁵ *N.Y. Times Co. v. United States (The Pentagon Papers)*, 403 U.S. 713, 733–34 (1971) (White, J., concurring).

¹⁷⁶ See Bellia, *supra* note 116, at 1469–70.

¹⁷⁷ Stone, *supra* note 157, at 4.

It is widely presumed that some sort of clear-and-present-danger standard would apply if a publisher were to be charged under the Espionage Act, or another related statute, for publication of classified information.¹⁷⁸ But few on the publishers' side relish the idea of risking review of this issue by the Supreme Court — a process that would be politically charged, legally risky for the publisher-defendant, and ultimately uncertain. And while publishers might not object were Congress to make that standard explicit as a matter of statutory law, it seems fanciful to think that Congress in the current political environment could find the will to make that change or otherwise clarify the more confounding terms of the Espionage Act.

On balance, it is better to live with the Act's uncertainties and the abstract belief that First Amendment principles would provide a defense for publishers in most instances. But that position may be cold comfort for publishers, at least with respect to one aspect of the Act: those sections that appear to apply to acts of newsgathering rather than disclosure. Professor Stephen Vladeck has provided a useful account of the various provisions in the Act that facially criminalize receipt or retention of information.¹⁷⁹ Those provisions would seem to apply to anyone who receives or retains secret information, even if the person happens to be a journalist. That is significant, as Vladeck points out, because the First Amendment has rarely been invoked successfully to protect the gathering of information as opposed to the publication of information.¹⁸⁰ Good arguments can be made that the right to publish necessarily entails the right to receive and retain information, but those arguments have infrequently carried the day in other First Amendment litigation.¹⁸¹

Further, the elephant in the room is the difficult question of who constitutes a publisher, and what that should mean for First Amendment purposes. *The Pentagon Papers* and subsequent Espionage Act caselaw assumed a world in which there was a sharp dichotomy: on one side, publishers imbued with robust First Amendment rights and on the other, government employees who enjoyed little free speech protection.¹⁸² It is fair to think that the Supreme Court's willingness to embrace certain free speech arguments in *The Pentagon Papers* was driven in part by the fact that the defendant was *The Times* and not a rogue publisher.¹⁸³

WikiLeaks and its kindred websites may not look or act like traditional publishers, but how could the law distinguish them from traditional publish-

¹⁷⁸ *Id.* at 6. Were charges premised on some intrusion by journalists — hacking into government systems, for instance — the First Amendment protections would largely collapse under the obvious precedents. See *Bartnicki v. Volper*, 532 U.S. 514, 532 n.19 (2001).

¹⁷⁹ Vladeck, *supra* note 32, at 231–32.

¹⁸⁰ See *id.* at 232–34.

¹⁸¹ *Id.*

¹⁸² *United States v. Rosen*, 445 F. Supp. 2d 602, 635 (E.D. Va. 2006); see generally Stone, *supra* note 37, at 186–97.

¹⁸³ See Bellia, *supra* note 116, at 1471–72.

ers in a principled way? Should legal distinctions be drawn because WikiLeaks's publications involve disclosure of raw documents rather than the synthesis of information into news stories? Because WikiLeaks has a political point of view? Because its employees are not subject to binding codes of ethics or professional licensure? If those characteristics disqualified a publisher from full protection under the First Amendment, *The Times* and every other U.S. publisher and broadcaster would lack constitutional protection. There is no binding code of ethics or licensure for U.S. journalists, increasingly publishers post full government documents on their websites, and mainstream media outlets routinely publish editorials, columns, and articles having a point of view.

In short, attempts to set a lower level of free speech protection for the new, nontraditional publishers pose a clear risk that the freedom enjoyed by traditional journalists will be chipped away in the same stroke. That is not to say that it is impossible to make a legal distinction between the two, or that the possibility of such a distinction is not a subject deserving of serious thought in a world where irresponsible disclosures could do actual harm. There is, for instance, a case to be made that intent should matter — those who publish with knowing intent to harm can be distinguished from those who publish with a good-faith belief that they are advancing public knowledge and debate. In the end, though, to give proper breathing space under the First Amendment, even a standard based on intent would likely protect much of the work of new publishers as well as traditional publishers.

D. *Prior Restraint*

It has been something of an article of faith after *The Pentagon Papers* that a prior restraint will not be sustained in the national security context except in extraordinary and hard-to-imagine circumstances.¹⁸⁴ It is worth remembering, however, that, despite American law's historic disfavor of prior restraints, courts have at times barred publication of information by the mainstream press, most notably in the context of high-profile criminal tri-

¹⁸⁴ The courts' hostility to prior restraints dates back to the seminal case *Near v. Minnesota*, 283 U.S. 697, 716–19 (1931) (presuming prior restraint to be unconstitutional, though “[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops”). In the sole national security case in which a district court granted a restraint after *The Pentagon Papers*, *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wisc. 1979), the judge noted that “few things, save grave national security concerns, are sufficient to override First Amendment interests” and justify a prior restraint. *Id.* at 992. The judge found that the publication at issue there — purportedly the secret to making nuclear weapons — was the rare exception. *Id.* at 999–1000. But, even then, the article was ultimately published with no adverse consequences. Sarah Wyatt, *The Progressive Stirred Pot with H-Bomb Article 20 Years Later, No One Has Built One*, Wis. ST. J., Mar. 8, 1999, at 4A. See Bellia, *supra* note 116, at 1458–61, for a discussion of the high standard for prior restraints found in the opinions in *The Pentagon Papers*.

als.¹⁸⁵ An executive branch intent on keeping secrets related to national security could undoubtedly weave together a credible case for prior restraint based on the indefinite holding in *The Pentagon Papers* and the use of prior restraint in rare but seemingly less consequential matters. And judges, who have been reluctant to second-guess the government on national security issues in FOIA cases, may be equally deferential with regard to prior restraint. As framed by the judge in *United States v. Progressive, Inc.*¹⁸⁶ — a decision that stands alone as the only prior restraint granted on national security grounds after *The Pentagon Papers* — a court faced with the choice between a potentially incorrect ruling that harms an abstract principle like freedom of the press and a potentially incorrect ruling that harms national security will understandably be sympathetic to the government's position.¹⁸⁷

As both *The Pentagon Papers* and *Progressive* showed, however, the realities of modern publishing will routinely render prior restraints ineffective, especially in the era of the Internet. In both cases, while prior restraints were being litigated against one set of publishers, the documents at issue were published elsewhere.¹⁸⁸ The other practical reality is that the physical location of WikiLeaks-style publishers may not be known, and, even if it is, the publisher may exist beyond the reach of an American court's jurisdiction. Nonetheless, the government may still find both symbolic and legal value in obtaining a prior restraint, even if its effectiveness is dubious. It might serve as a serious, public pronouncement of the government's bona fide belief that national security is at risk and that those who publish are enemies of the public interest. More than that, if the restraint is ignored, it sets up the legal case for contempt proceedings in which even well-founded First Amendment arguments would have limited applicability.¹⁸⁹

To open the door to greater use of prior restraints in response to non-traditional publishers would be to erode basic protections of free speech without obtaining a benefit worthy of such cost. Because mainstream media organizations would likely abide by judicially imposed prior restraints, irrespective of what nontraditional publishers might do, relaxing the standard

¹⁸⁵ See *United States v. Noriega*, 865 F. Supp. 1549, 1564 (S.D. Fla. 1994) (holding broadcaster in contempt for disregarding order not to broadcast tape of defendant's discussion with counsel); *People v. Bryant*, 94 P.3d 624, 638 (Colo. 2004) (restraining press from disclosing transcript of closed hearing in rape prosecution).

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

¹⁸⁷ *Id.* at 995–96.

¹⁸⁸ William R. Glendon, *The Pentagon Papers — Victory for a Free Press*, 19 CARDOZO L. REV. 1295, 1296 (1998) (discussing publication of the papers by the *Washington Post* days after *The Times* was enjoined); Peter Masley & J.P. Smith, *Order Forbids Publication of Another H-Bomb Story*, WASH. POST, Sept. 16, 1979 (reporting that college newspaper publishes secret to hydrogen bomb after injunction against *Progressive*).

¹⁸⁹ See, e.g., *In re Providence Journal*, 820 F.2d 1354, 2355 (1st Cir. 1987) (explaining that publisher must obey unconstitutional order barring publication, even if it deems the order "transparently unconstitutional," where timely appeal is possible); *United States v. Dickinson*, 465 F.2d 496, 511 (5th Cir. 1972) (stating that even unconstitutional orders must be obeyed except in narrow circumstances).

for obtaining prior restraints would allow the government to suppress disclosure in the media most likely to have the greatest impact, reach, and credibility. This would compound the root problem with all prior restraints: they permit government control of information without the safeguard of public monitoring. Prior restraints stand in stark contrast to post-publication penalties where the public is able to assess the public value of the information at issue, the effects of disclosure, and whether any punishment is proportional to the wrong.¹⁹⁰

None of this addresses an alternative possibility: that, in a society bound by the rule of law, there should be an independent third-party adjudicator of the conflict between a press that wants to publish and a government that wants to keep secrets.¹⁹¹ That idea flows from the notion that it is too risky to leave the determination of national security in the hands of private publishers, yet acceding all authority to make the decision to the government carries the potential for abuse of power. While conceptually that argument may be appealing, a voluntary system embodying the concept of a neutral decider has been tried in the United Kingdom and has been met with widespread press skepticism and little apparent success in striking the right balance.¹⁹² A singular problem with the third-party model, whether it is a court or some newly constituted body, is the imbalance of information power between the government on the one side and the publisher on the other. Would the government be willing to disclose to a third party a true assessment of a leak's potential harm? Would the third party feel capable and empowered to challenge the government's showing of harm? In the absence of public oversight of the process and reasonable transparency in the government's case, how would the third party have legitimacy in the eyes of the publishers and the public? It is hard to envision a system that could render the sort of prompt and respected decisions that would make the system workable and worthy.

E. The Reporter's Privilege

In the wake of the jailing of Judith Miller, some reporters and editors pressed Congress to pass a federal shield law to give journalists a right to

¹⁹⁰ For an exceptional discussion of why prior restraints pose an evil exceeding post-publication punishment, see *Near v. Minnesota*, 283 U.S. 697, 713–20 (1931). Of course, the possibility of post-publication penalties can still exercise control over publishers through threatened prosecution.

¹⁹¹ In the United Kingdom, for instance, the so-called “DA Notice” system provides for a committee to advise publishers and broadcasters on the risks of publishing defense information. See *How the System Works*, DA-NOTICE SYSTEM (Oct. 13, 2012), http://www.dnotice.org.uk/the_system.htm.

¹⁹² See, e.g., Roy Greenslade, *Does the DA Notice System Inhibit Press Freedom?*, GUARDIAN (Aug. 22, 2011, 12:56 PM), <http://www.guardian.co.uk/media/greenslade/2011/aug/22/ministry-of-defence-newspapers>; Naomi Grimley, *D for Discretion: Can the Modern Media Keep a Secret?*, BBC NEWS (Aug. 21, 2011, 10:01 PM), <http://www.bbc.co.uk/news/uk-politics-14572768>.

maintain the confidentiality of anonymous sources.¹⁹³ For more than thirty years prior to *In re Grand Jury Subpoena, Judith Miller*,¹⁹⁴ courts had found that a qualified privilege existed under the First Amendment to protect the identity of a journalist's source.¹⁹⁵ These decisions relied on interpretations of the Supreme Court's decision in *Branzburg v. Hayes*, in which three reporters had been unsuccessful in asserting a right to resist subpoenas seeking the identities of confidential sources.¹⁹⁶ In various formulations, courts after *Branzburg* held that those seeking journalists' records had to show that forcing a reporter to reveal a source was necessary to the investigation or case, and that the identity of the source could not be learned elsewhere.¹⁹⁷ The *Miller* decision, in a significant reappraisal of *Branzburg*, appeared to signal the end of that First Amendment-based privilege, at least for federal criminal investigations.

The decision to lobby for a federal statutory shield law that would provide a qualified privilege had not come easily to publishers and journalists. They have long been concerned that a privilege given to them by Congress could be taken away by a future Congress.¹⁹⁸ Moreover, journalists widely believe in an absolute right to protect confidential sources — a protection found in state shield laws in New York, New Jersey, California, and elsewhere.¹⁹⁹ However constructed, a qualified privilege is little comfort to most sources offering confidential information — they want to know that they will not be named, and not simply that there would be a decent legal case for arguing that disclosure should not be forced. Nonetheless, with the judicially created privilege in doubt after *Miller*, political expediency encouraged publishers to support federal legislation providing a qualified privilege.²⁰⁰

The balancing test contained in the proposed federal shield law, largely crafted from the post-*Branzburg* judicial decisions, would have required prosecutors to show that identification of a source was necessary to the prosecution, that the testimony was unavailable through another witness, and that nondisclosure of the information would be contrary to the public interest.²⁰¹

¹⁹³ Tory Newmyer, *Shield Law Makes Lobbyists of Reporters*, ROLL CALL INFLUENCE (Oct. 17, 2007), http://www.rollcall.com/issues/53_44/20508-1.html.

¹⁹⁴ 438 F.3d 1141 (D.C. Cir. 2007).

¹⁹⁵ See, e.g., *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000); *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 30 (2d Cir. 1999); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981).

¹⁹⁶ 408 U.S. 665, 667 (1972).

¹⁹⁷ See *Ashcraft*, 218 F.3d at 287; *Gonzales*, 194 F.3d at 36; *Zerilli*, 656 F.2d at 713.

¹⁹⁸ See Walter Pincus, *Walter Pincus Sees Shield Law as 'A Bad Misstep'*, NIEMAN WATCHDOG (Dec. 3, 2007), http://www.niemanwatchdog.org/index.cfm?fuseaction=back_ground.view&backgroundid=218.

¹⁹⁹ See, e.g., CAL. EVID. CODE § 1070 (West 2012); N.J. STAT. ANN. § 2A:84A-21 (West 2013); N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney 2012).

²⁰⁰ Post-*Miller*, in civil cases, the courts have continued to recognize the qualified privilege. See, e.g., *Lee v. Dep't of Justice*, 413 F.3d 53, 59–60 (D.C. Cir. 2005).

²⁰¹ See S. REP. NO. 111-448, at 2–3 (2009), available at http://federaledge.com/pdf/Legisl/2009/FFIA/S448_07_Introduced.pdf.

Special provisions applied specifically to prosecutions involving national security.²⁰² But after initially attracting bipartisan support in Congress, the effort derailed, in part due to the controversy that raged around the WikiLeaks disclosure.²⁰³

As the government has pursued prosecution of leakers, the wisdom of accepting a legislatively enacted qualified privilege has grown less appealing. If broader prosecutions of leakers are going to chill disclosure, and if the reporters who rely on those leaks are not going to have appropriate legal protection when pressed to disclose sources, the risk of unnecessary and damaging governmental secrecy increases. Journalists may choose to go to jail or endure other court sanctions rather than violate a promise of confidentiality to a source, and that act of civil disobedience may serve to reassure potential leakers that they will have some protection. But acts of civil disobedience are intended to move the law to a more just position, not to be a permanent de facto solution to an ongoing problem in public policy.

With no federal shield law in the offing, the law governing the right to protect sources is particularly unsettled, as vividly shown in the jurisprudential sparring in the three opinions filed in the D.C. Circuit decision in *Miller* — as well as the fight between the majority and the dissent in the Second Circuit decision in *New York Times v. Gonzales*, a second high-profile privilege case involving national security.²⁰⁴ While no judge on either panel accepted the notion that there should be an absolute privilege, in both cases judges implicitly acknowledged a qualified common law privilege that would effectively replace, and largely be identical to, the now uncertain First Amendment-based privilege.²⁰⁵ Like the First Amendment-based privilege, the common law privilege would require that prosecutors show that disclosure of a source was necessary to a prosecution and that no other witness or document could provide the identity.²⁰⁶ However, the judges advocating for a common law solution also urged that an additional prong be added to the test in leak cases: that the government needed to show that the public interest would be advanced by forcing disclosure of the source's identity.²⁰⁷ As set out by Judge Tatel in the *Miller* case, that would require a court to balance

²⁰² See, e.g., *id.* at 5 (“Section 2 shall not apply to any protected information that a Federal court has found by a preponderance of the evidence would assist in preventing — (1) an act of terrorism; or (2) other significant and articulable harm to national security that would outweigh the public interest in newsgathering and maintaining a free flow of information to citizens.”).

²⁰³ See, e.g., *The Lack of a Federal Shield Law*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/node/98959/> (last visited Mar. 15, 2013).

²⁰⁴ *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006). In *Gonzales*, prosecutors sought the newspaper's phone records in an attempt to find a leaker who provided information about a crackdown on charities with ties to terrorist organizations after 9/11. *Id.* at 162.

²⁰⁵ See *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 991–95 (D.C. Cir. 2006) (Tatel, J., concurring); *Gonzales*, 459 F.3d at 179–81 (Sack, J., dissenting).

²⁰⁶ See *Miller*, 397 F.3d at 997–98 (Tatel, J., concurring); *Gonzales*, 459 F.3d at 186–87 (Sack, J., dissenting).

²⁰⁷ *Miller*, 397 F.3d at 997–98 (Tatel, J., concurring); *Gonzales*, 459 F.3d at 186–87 (Sack, J., dissenting).

“the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information’s value.”²⁰⁸

Even as these judges tried to breathe life into a common law privilege, other courts, after *Miller* and *Gonzales*, have shown an openness to cabinning *Miller* and resisting government attacks on the reporter’s privilege, limiting or disregarding the D.C. Circuit’s opinion. For instance, a district court has quashed subpoenas in the ongoing prosecution of former CIA employee Jeffrey Sterling, where the prosecutors have long sought the testimony of writer James Risen to make the case that Sterling leaked information.²⁰⁹ In so ruling, the court relied both on technical grounds and, at the trial stage, on First Amendment–based qualified privilege, which it found still existed in the Fourth Circuit in criminal trials.²¹⁰

In light of the forces now challenging the model of mutual restraint, the need for the courts to clarify and strengthen the reporter’s privilege has become apparent. More than that, this is a time when publishers should be advocating vigorously for core values like the protection of sources, raising public awareness of the threat to democracy posed by overclassification, and making the case for greater transparency through protection of the press. Contrary to the belief of some, that is best done in judicial fora, rather than through legislative channels where political compromise is always required — not to mention Congress’s demonstrated unwillingness to confront the executive on any issues related to secrecy. There is a straightforward proposition to be advanced: that the great problem in governance has not been too much disclosure, but too much secrecy. While it is unlikely that the courts will embrace an absolute privilege, the possibility of a qualified privilege strong enough to withstand most leak subpoenas remains in reach and would be a significant step toward maintaining a proper balance between transparency and secrecy.

CONCLUSION

Bickel wrote that the disorderly situation “threatens to break down when the adversaries turn into enemies, when they break diplomatic relations with each other, gird for and wage war.”²¹¹ Such breakdowns, he said, “threaten graver breakdowns yet, eroding the popular trust and confidence in

²⁰⁸ *Miller*, 397 F.3d at 998 (Tatel, J., concurring).

²⁰⁹ See *United States v. Sterling*, 818 F. Supp. 2d 945, 947 (E.D. Va. 2011); *In re Grand Jury Subpoena to James Risen*, Nos. 1:10CR485, 1:08dm61, 2010 U.S. Dist. LEXIS 143340 (E.D. Va. 2011).

²¹⁰ *Sterling*, 818 F. Supp. 2d at 959–60. The government appealed the lower court’s decision, and the Fourth Circuit heard oral argument on the matter last year. See Charlie Savage, *Appeals Panel Weighs Question on Press Rights*, N.Y. TIMES (May 18, 2012), https://www.nytimes.com/2012/05/19/us/politics/appeals-panel-weighs-press-rights-in-case-involving-reporter-james-risen.html?_r=0.

²¹¹ BICKEL, *supra* note 2, at 87.

both government and press on which effective exercise of the function of both depends.”²¹² It would be an exaggeration to say that we have arrived at such a Hobbesian state of affairs or even to suggest that the disruptions discussed here constitute acts of war and the end of functioning relationships between the press and the government. Bickel’s fundamental point remains true: a degree of indeterminacy provides the best hope for a functional system balancing legitimate secrecy and democratic transparency. But experience is proving that too much indeterminacy without mutual restraint is no longer just disorderly — it is unworkable. When that restraint is called into question, can adjustments in the law serve as an acceptable substitute and restore balance where it is lost? In the end, it may well be, paradoxically, that greater order is needed to preserve the ultimate benefits of the disorder.

²¹² *Id.*

