Does the First Amendment's Freedom of the Press Clause Place the Institutional Media Above the Law of Classified Secrets?

Testimony of

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Hearing Addressing Obligations of the Media
With Respect to Publication of Classified Information

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By John C. Eastman[1]

Good morning, Chairman Hoekstra and members of the Committee. I am delighted to be with you today as you explore the extremely important constitutional issues surrounding recent disclosures of highly-classified intelligence-gathering programs that the President has authorized as critical to the war on terrorism and to our national security. I am the Henry Salvatori Professor of Law & Community Service at Chapman University School of Law in Orange, California, specializing in American constitutional law and legal history. I also direct the Center for Constitutional Jurisprudence, the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. One of those principles concerns the scope of the freedom of the press recognized by the First Amendment, and particularly how that freedom operates in a system of government designed to protect the inalienable rights of citizens, including the right of collective self-defense.

Over the past six months, we have witnessed the publication of several pieces of classified information that appear to be extraordinarily sensitive, and extremely important tactical components of our ongoing effort to protect American citizens and property from additional terrorist attacks: The New York Times revelation last December of the NSA program conducting surveillance on Al Queda communications into or out of the United

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States, which the *Times* itself characterized as our "most closely guarded secret";[2] the USA Today disclosure earlier this month that several telephone companies were turning over databases of information about numbers called—so-called pen registers;[3] and the Washington Post's story that some terrorists captured by U.S. forces were being held by the CIA in undisclosed locations in allied countries.[4]

No one contests that in each instance, classified information was illegally provided to these media outlets and then subsequently published by them. And to my knowledge, no one seriously contends that the individuals who leaked the information are not subject to prosecution for violating the Espionage Act[5] (or even subject to prosecution for treason if it could be proved that their intent in leaking the classified information was to undermine our war effort and thereby give aid and comfort to the enemy).[6] Even those who would seek to bestow on the leaker the protected status of "whistle-blower" surely will acknowledge that the whistle-blower statute requires that the allegedly illegal activities be reported internally, through a certain specified administrative route, rather than shouted to the world from the front pages of our nation's major newspapers.[7] Otherwise, the whistle-blower statute would permit every government employee to be a classified information law unto himself, determining what

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[2] James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," New York Times (Dec. 16, 2005).

[3] Leslie Cauley, "NSA Has Massive Database of American's Phone Calls," USA Today, A1 (May 11, 2006)..

[4] Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," Wash. Post A1 (Nov. 2, 2005).

[5] 18 U.S.C. §972 et seq.; *see also, e.g., United States v. Morison*, 604 F. Supp. 655 (D.C. Md.), *appeal dismissed*, 774 F.2d 1156 (4th Cir. 1985).

[6] U.S. Const. Art. III, § 3, cl. 1; *Tomoya Kawakita v. United States*, 343 U.S. 717 (1952); *Cramer v. United States*, 325 U.S. 1 (1945).

[7] See The Intelligence Community Whistleblower Protect Act of 1998, 50 U.S.C. § 403q.

should or should not be secret. The devastating consequences to our national security, and also to individual privacy, of such a flawed interpretation should be manifest.

The question you are considering today is not the potential criminal liability of the leaker, of course, but of those in the institutional media who publish the classified information provided by the leaker. That poses interesting constitutional questions if we assume, as I shall do, that classified information was leaked and subsequently published, and that the leaker himself, should his identity become known, is subject to criminal prosecution under the Espionage Act, among other things, for that illegal disclosure.

Earlier this month, Bill Keller, Executive Editor of the New York Times, published an important letter to the editors of the Wall Street Journal challenging the notion "that when presidents declare that secrecy is in the national interest, reporters should take that at face value." Implicit in his rejection of that proposition is the view that reporters generally, and perhaps the editors of the New York Times in particular, are free to ignore the laws regarding publication of classified information when, *in their view*, the benefit to the public from gaining access to the information would outweigh any harm that might flow from its disclosure. Keller elaborated:

> [P]residents are entitled to a respectful and attentive hearing, particularly when they make claims based on the safety of the country. In the case of the eavesdropping story, President Bush and other figures in his administration were given abundant opportunities to explain why they felt our information should not be published. We considered the evidence presented to us, agonized over it, delayed publication because of it. In the end, their case did not stand up to the evidence our reporters amassed, and we judged that the responsible course was to publish what we knew and let readers assess it themselves.

This is truly an extraordinary claim, that somehow the New York Times is entitled to weigh evidence and determine for itself whether to publish classified information—in

other words, that the New York Times is above the law and can publish whatever classified information it sees fit, with impunity.

Section 798 of the Espionage Act makes no such exception, of course. Its text is unambiguous. "Whoever knowingly and willfully . . . publishes . . . any classified information— . . . (2) concerning the . . . use . . . of any device . . . used . . . by the United States . . . for . . . communication intelligence purposes; or (3) concerning the communication activities of the United States . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both." Subsection (b) of the Act defines "communication intelligence" as "all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipient." In the cloak and dagger world of intelligence gathering, this statutory prohibition is a model of clarity—it is illegal to publish classified information about our intelligence-gathering efforts and capabilities.

Keller and other defenders of his claimed exemption from this legal mandate point to the Pentagon Papers case, *New York Times Co. v. United States*,[8] as support for the proposition that the media's publication of classified intelligence communications information is protected by the First Amendment. There are two fundamental flaws with that contention.[9] First, the Pentagon Papers case dealt only with a request for an injunction, or prior restraint, on publication—the quintessential restriction on the freedom

[8] 403 U.S. 713 (1971).

[9] There is also a third, more minor flaw, in reliance on the Pentagon Papers case. The information that the government sought to enjoin the New York Times and Washington Post from publishing was governed by Section 793(e) of the Espionage Act, 18 U.S.C. § 793(e), not Section 798, which applies to the intelligence communications information at issue here. As Justice Douglas noted in his concurring opinion, Section 793(e) barred only the "communication" of classified information relating to the national defense, unlike Section 798, which bars both the publication and communication of signals communication information, demonstrating (at least for Justice Douglas" "that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act."

of the press in mind of those who drafted and ratified the Bill of Rights. But five Justices in that case (Chief Justice Burger and Justices White, Stewart, Harlan, and Blackmun), recognized what our nation's founders also understood—a prohibition on prior restraints does not eliminate liability for post-publication prosecution for abuses of the freedom. Justice White, for example, joined by Justice Stewart, specifically noted in his concurring opinion that "a responsible press may choose never to publish the more sensitive materials" "because of the hazards of criminal sanctions."[10] Justice Harlan, joined by Chief Justice Burger and Justice Blackmun, would have required full briefing and consideration of whether an injunction was proper in light of the "doctrine against enjoining conduct in violation of criminal statutes."[11] James Wilson made this same point during the Pennsylvania ratifying convention in December 1787:

> I presume it was not in the view of the honorable gentleman to say there is no such thing as a libel, or that the writers of such ought not to be punished. The idea of the liberty of the press is not carried so far as this in any country. What is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual.[12]

The second fundamental flaw in relying on the Pentagon Papers case is that the Court's *per curiam* opinion described a prior restraint on speech as "bearing a heavy presumption against its constitutional validity," but it was not an irrebuttable presumption for a majority of the Court. The classified information at issue in the case did not involve ongoing tactical intelligence-gathering operations such as those recently disclosed by the New York Times, the Washington Post, and USA Today, and all but the most absolutist

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[10] 403 U.S., at 733.

[11] *Id.* at 755.

[12] Elliot's Debates, vol. 2, p. 449, *reprinted in* Neil H. Cogan, ed., The Complete Bill of rights: The Drafts, Debates, Sources, and Origins 99 (Oxford 1997).

of First Amendment justices[13] and scholars have recognized, quite rightly, that the freedom of the press does not extend to publication of such things as troop movements. Justice White, for example, joined by Justice Stewart, expressly noted that he was not contending "that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations," only that the government had not met "the very heavy burden that it must meet to warrant an injunction against publication."[14] Chief Justice Burger noted in his dissenting opinion that there are exceptions to the First Amendment, and that "[c]onceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures."[15] Justice Harlan, joined by the Chief Justice and Justice Blackmun, specifically wished to consider whether an injunction was appropriate in light of the "presumption" and "strong First Amendment policy" against prior restraints, thereby rejecting the absolutist view that would make his requested inquiry irrelevant.[16] And Justice Blackmun noted in his dissenting opinion that "even the newspapers concede that there are situations where restraint is in order and is constitutional."[17] In support of his position that the government has the right to prevent the publication of some sensitive information, albeit a "very narrow right," he cited no less a Justice than Oliver Wendell Holmes, whose own opinions on the First Amendment have chartered the course of

[13] I refer here in particular to the concurring opinions of Justices Black, Douglas, and Brennan in *New York Times*, 403 U.S., at 714, 720, and 724.

[14] *Id.*, at 731.

[15] *Id.*, at 749.

[16] *Id.*, at 753, 754.

[17] *Id.*, at 761.

Supreme Court jurisprudence in the field for the better part of the past century. "It is a question of proximity and degree," noted Holmes in *Schenck v. United States*.[18] "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[19]

In other words, the Pentagon Papers case comes with a very big caveat—one that is fully in line with prior precedent permitting prior restraints when the information at issue is highly sensitive classified information of ongoing military intelligence operations. In *Near v. Minnesota*, for example, the Supreme Court noted that "the protection even as to previous restraint is not unlimited," even though "the limitation has been recognized only in exceptional cases." Among the litany of exceptional cases mentioned by the Court was 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."[20] Similarly, in *United States v. Reynolds*, the Court upheld the government's claim of privilege that investigation reports of an Air Force accident involving a plane that was testing classified electronics equipment need not be produced during discovery. Chief Justice Vinson, for the Court, offered this highly relevant explanation in support of the holding:

> In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense. Experience in the past was has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. *It is equally apparent that these electronic devices must be kept secret if their full*

[18] 249 U.S. 47, 52 (1919).

[19] *Id.*

[20] 283 U.S. 697, 716 (1931).

> *military advantage is to be exploited in the national interests.* On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.[21]

I think it pretty clear that the recent disclosures fit within the "exceptional case" caveat recognized by a majority of the Court in both the Pentagon Papers case and in *Near*, and although the Supreme Court has never expressly held that such a caveat exists, neither has it held that the First Amendment bars the government from preventing the publication of classified information about ongoing, highly-sensitive military operations in the same way that it can prevent the dissemination of classified information by other citizens.

The second extraordinary claim made by Mr. Keller that needs to be addressed is the notion that the First Amendment's Freedom of the Press creates a special preserve for the institutionalized press, as opposed to ordinary citizens. Although this is a common understanding among reporters and newspaper editors, it is wrong. The Freedom of the Press was designed to protect the published word of all citizens, not just an institutionalized fourth estate. As one of the anti-federalist opponents of ratification of a constitution that did not include a bill of rights noted, the liberty of the press insures that "the *people* have the right of expressing and publishing their sentiments upon every public measure . . . ."[22] James Madison's initial proposal for the First Amendment clearly expressed this common understanding, guaranteeing the right of the people "to speak, to write, or to publish their sentiments."[23] Roger Sherman's own proposal a

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[21] 345 U.S. 1, 10 (1953) (emphasis added).

[22] Centinel, No. 2 (Oct. 24, 1787), reprinted in Cogan, The Complete Bill of Rights, at 103 (emphasis added).

[23] Annals of Congress, June 8, 1789, reprinted in Philip B. Kurland and Ralph Lerner, eds., 5 The Founders' Constitution 128 (1987).

month later mirrored Madison's: "The people have certain natural rights which are retained by them when they enter into society, Such are the rights . . . of Speaking, writing and publishing their Sentiments with decency and freedom . . . . Of these rights therefore they Shall not be deprived by the government of the united States."[24] These formulations were drawn from the amendments proposed by several of the state ratifying conventions,[25] and lest their be any doubt that "freedom of the press" was synonymous with the right of the people generally to speak, write, and publish their sentiments, the Pennsylvania proponents of a Bill of Rights made that amply clear: "That the people have a right to the freedom of speech, of writing, and of publishing their sentiments, *therefore*, the freedom of the press shall not be restrained by any law of the United States."[26] As my Claremont Institute colleague Thomas West has noted, what is protected is not just the right to use a printing press or to go into the newspaper business, but the right of every citizen to publish, to make and distribute copies of words and/or pictures communicating his or her sentiments to the public. The founders would never have accepted the view that the freedom of the press is limited to members of a particular industry called "the press" or "the media."[27]

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[24] Cogan, *supra* n. 12, at 83.

[2525] See, e.g., proposal of the North Carolina ratifying convention (Aug. 1, 1788) ("That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of Liberty, and ought not to be violated); proposal of the Rhode Island ratifying convention (May 29, 1790) ("That the people have a right to freedom of speech and of writing and publishing their sentiments, that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated); proposal of the Virginia ratifying convention (June 27, 1788) ("That the people have a right to freedom of speech, and of writing and publishing their Sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated), all reprinted in Cogan, *surpa*, at 93.

[26] Pennsylvania Packet (Dec. 18, 1787), reprinted in Cogan, *supra*, at 93 (emphasis added).

[27] *See generally,* Thomas G. West, "Free Speech in the American Founding and in Modern Liberalism," in Ellen Frankel Paul, et al., eds., Freedom of Speech 310-384 (Cambridge University Press 2004).

The consequence of this original understanding, of course, is that the First Amendment does not afford any greater protection to "the press" than it does to ordinary citizens, nor exempt "the press" from "the basic and simple duties of every citizen" to report information regarding discovery or possession of stolen property or secret government documents—a duty which Chief Justice Burger correctly noted rests equally "on taxi drivers, Justices, and the New York Times."[28]

Indeed, in analogous areas of media law involving matters with much lower stakes than national security, the Court has repeatedly emphasized that the media has no special exemption from generally applicable laws. The Court's holding in *Associated Press v. United States*, for example, devastates any claim that the "press" has "a peculiar constitutional sanctuary" from the law:

> [W]e are not unmindful of the argument that newspaper publishers charged with combining cooperatively to violate the Sherman Act are entitled to have a different and more favorable kind of trial procedure than all other persons covered by the Act. No language in the Sherman Act or the summary judgment statute lends support to the suggestion. There is no single element in our traditional insistence upon an equally fair trial for every person from which any such discriminatory trial practice could stem. For equal-not unequal-justice under law is the goal of our society. Our legal system has not established different measures of proof for the trial of cases in which equally intelligent and responsible defendants are charged with violating the same statutes. Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. . . . All are alike covered by the Sherman Act. The fact that the publisher handles news while others handle food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.[29]

Justice Harlan made the same point for the Court plurality in *Curtis Publishing Co. v. Butts*: "The publisher of a newspaper has no special immunity from the application of

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[28] *New York Times*, 403 U.S., at 751.

[29] 326 U.S. 1, 7 (1945) (internal citation omitted).

general laws."[30] And in the post-Pentagon Papers case of *Branzburg v. Hayes*, the Supreme Court refused to recognize a report/informant privilege that would exempt reporters from the obligation shared by other citizens to testify before grand jury, explicitly noting that "otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed."[31]

So where does that leave us with respect to the New York Times' contentions? Once it is clear that the "Freedom of the Press" acknowledged in the First Amendment does not create a special preserve for the institutional media, the full import of Bill Keller's claims come into view, and it is the old saw, long since disproved, that democratic governments are not permitted secrets, even in time of war. Our Constitution expressly recognizes the common-sense necessity of government secrets, for example, in the Article I requirement that each House of Congress shall publish a journal of its proceedings, "excepting such Parts as in their Judgment may require Secrecy."[32] The need for secrecy is even more urgent in the executive branch, and as Alexander Hamilton noted in Federalist 71, it is one of the key reasons the Constitution provides for unity in the executive office, establishing an "energetic" executive who can operate with "secrecy" and "despatch" when necessary to protect "the community against foreign attacks."[33] This need for secrecy in the conduct of certain executive functions such as those under consideration today has repeatedly been recognized and approved by the

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[30] 388 U.S. 130, 150 (1967). *See also, e.g., Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937) (no press exemption from labor laws).

[31] 408 U.S. 665, 682 (1972).

[32] U.S. Const. Art. I, § 5, cl. 3.

[33] The Federalist, No. 70, at 424 (Clinton Rossiter, ed., 1961).

courts as well. Writing for the Court in *United States v. Curtiss-Wright Export Corp.*, for example, Justice Sutherland explained why the President's authority over foreign affairs was so great, noting that he "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."[34] A similar view was expressed by Justice Jackson in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*: "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and *ought not to be published to the world.*"[35]

The constitutionality of protecting intelligence gathering and other operational military secrets in time of war is therefore beyond dispute, and the institutional press is no more permitted to ignore the legal restrictions imposed by the Espionage Act on the publication and other dissemination of such classified information than are ordinary citizens. Neither is it exempt from prosecution for willful violations of that Act.

Justice Goldberg famously noted in *Kennedy v. Mendoza-Martinez* that our Constitution "is not a suicide pact,"[36] and the sentiment is particularly apropos for the issues under consideration today. The simple fact is that the asymmetric nature of the current war against international terrorist organizations makes intelligence gathering the central and most critical front in the war. Not only must the executive branch aggressively pursue every legal means of gathering intelligence at its disposal, it must be equally aggressive in protecting the classified methods that it is using in that effort if it is

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[34] 299 U.S. 304, 320 (1936).

[35] 333 U.S. 103, 111 (1948) (emphasis added).

[36] 372 U.S. 144, 160 (1963).

to succeed in preventing future attacks on our homeland and fellow citizens such as those we witnessed on that fateful day in September nearly five years ago. Every citizen, including—particularly including—those employed with major media organs have a responsibility to prevent ongoing operational secrets from falling into the hands of our enemies by complying with the law regarding classified information. It is one of those "basic and simple duties" of citizenship that rests equally "on taxi drivers, Justices, and the New York Times."[37] We may never know how great the damage to our national security the recent disclosures of classified, highly-sensitive intelligence-gathering information have caused, but with the seriousness of the threat to our lives and liberty posed by terrorist organizations such as Al Qaida, it is certainly the right, and may well be the duty, of the executive to prosecute those responsible for them.

[37] *New York Times*, 403 U.S., at 751.