

# National Security Reporting and the Plight of the Lapdog Press

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In 2011, after a string of information releases by WikiLeaks, this paper explored how American mainstream media had become institutionally ill-equipped to serve as a watchdog over government action in the national security and foreign affairs space. It discusses the history of the First Amendment's Press Clause and the rise of government secrecy and our professional press, and argues that current practices by government and the media have had the unintended consequence of making media susceptible to having coverage of foreign affairs and national security issues in general manipulated by outside actors, especially the government. Some combination of citizen-led new media could be the solution, or perhaps an effort to further professionalize the blogosphere.

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On January 25<sup>th</sup>, 2011, Raymond Davis was arrested in Pakistan on murder charges. Almost immediately, there was speculation in the Pakistani press that Davis was a CIA agent, and, indeed, American news outlets such as the Associated Press, *The Washington Post*, and the paper of record, *The New York Times* quickly confirmed this information. Then, at the request of the State Department, they sat on this knowledge until it was finally revealed by foreign news outlets on February 20<sup>th</sup>. After complying with an additional request for a delay, *The New York Times* finally reported the truth about Davis to American readers on February 22<sup>nd</sup>. Responding to an ensuing flurry of criticism, *The Times*' public editor Arthur Brisbane insisted that the delay was necessary to ensure Davis' safety even while admitting that this required the paper to present news "that, in the cold light of retrospect, seems very misleading."<sup>1</sup> At the same time, *The Times* admitted that the incident "inadvertently pulled back the curtain on a web of covert American operations inside Pakistan, part of a secret war run by the CIA" without any apparent recognition

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<sup>1</sup> Arthur S. Brisbane, *An American in Pakistan*, N.Y. TIMES, Feb. 26, 2011, at WK8 (New York ed.). For a thorough deconstruction of Brisbane's arguments, see Amy Davidson, *Keeping Quiet about Davis*, THE NEW YORKER, Feb. 28, 2011, at <http://www.newyorker.com/online/blogs/closeread/2011/02/keeping-quiet-about-davis.htm> ("[G]overnments are lazy, and politicians confuse risks to their careers with risks to their countries. If they can prevent the publication of embarrassing stories simply by repeating the word 'danger,' then they will misuse and overuse that tactic. The press can't let that happen. It's a matter of responsibility.").

that the paper's activities were helping to keep that curtain closed. *The Times* never explained how Davis' safety was at risk—in fact, Davis was freed in March and returned safely to the United States—and an argument can be made that the only danger publication presented was revealing an American foreign policy blunder. To protect against this, the American press abdicated its role as watchdogs over our government.

Yet this event has not been the first notable incident in recent memory where the press has played lapdog rather than watchdog. If *The Times'* publication of the Pentagon Papers in 1971 stands as the apex of the watchdog press in our country, the ensuing four decades have seen the national press, the so-called mainstream media composed of our few national newspapers and major news broadcasters, retreat from that position. Dramatic reporting lapses by the press are not, by themselves, a new phenomenon. Before 2001 media critics were lamenting that the watchdog function was then “atrophying like a muscle, shrinking from lack of exercise,”<sup>2</sup> and the tragic events of September 11<sup>th</sup> have made the situation even worse. As the failures of watchdog press became apparent as September 11<sup>th</sup> faded from view, mea culpas were made—both pillars of the mainstream press, *The New York Times* and *The Washington Post*,<sup>3</sup> admitted to flaws in their coverage of the lead-up to the Iraq War. In an infamous 2004 editorial, *Times* directly apologized for its role, noting that it should have “been more aggressive” and admitting its coverage “was not as rigorous as it should have been.”<sup>4</sup> *The Times* later blamed its certainty on

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<sup>2</sup> Murrey Marder, *Press Failure to Watchdog Can Have Devastating Consequences*, Nieman Reports 2001, at <http://www.nieman.harvard.edu/reports/article/101684/Press-Failure-to-Watchdog-Can-Have-Devastating-Consequences.aspx>.

<sup>3</sup> Howard Kurtz, *The Post on WMDS: An Inside Story*, WASH. POST, Aug. 12, 2004, at A1; *The Times and Iraq*, N.Y. TIMES, May 26, 2004, [http://www.nytimes.com/2004/05/26/international/middleeast/26FTE\\_NOTE.html?pagewanted=all](http://www.nytimes.com/2004/05/26/international/middleeast/26FTE_NOTE.html?pagewanted=all).

<sup>4</sup> *The Times and Iraq*, *supra* note 3.

its own brand of groupthink,<sup>5</sup> which has long served as the traditional scapegoat for foreign policy blunders.<sup>6</sup> Of course, it is *easy* for the Washington press corps to fault its failures on groupthink, as it is similarly easy to attribute failures in American journalism to corporate conspiracies or a superficial, disinterested public.<sup>7</sup>

The real culprit behind the evolution of our press from watchdog to lapdog is its systemic professionalization. From the perspective of Alexis de Tocqueville, the American press was once a screaming throng of differing viewpoints, in effect serving as an uncontrolled public forum. The rise of the mass media has changed this conception of the press. We now are served by a press that is at least nominally beholden to ethical codes of conduct and standards for proper reporting. While this type of professionalization is generally a positive development and was a key development in the evolution of our press, it makes our national press as currently constituted extremely susceptible to having its coverage of foreign affairs and national security issues manipulated by outside actors, particularly the government. This dynamic is the product of several behaviors which the professional press has developed, foremost among them being a devotion to objectivity and a reliance on government officials as sources of information. The result is a passive, if not skewed reporting on foreign affairs. Furthermore, this passivity helps to ensure that the government's preferred narrative dominates our public discourse. While this sort of passivity makes a mockery of the historical purpose of an autonomous press, more

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<sup>5</sup> *A Pause for Hindsight*, N.Y. TIMES, July 16, 2004, at <http://www.nytimes.com/2004/07/16/opinion/a-pause-for-hindsight.html>.

<sup>6</sup> See generally I.L. JANIS, *GROUPTHINK: A PSYCHOLOGICAL STUDY OF POLICY DECISIONS AND FIASCOES* 9 (1972) (defining "groupthink" as a mode of thinking that occurs when people "are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action.").

<sup>7</sup> LISA FINNEGAN, *NO QUESTIONS ASKED* xix (2007).

devastatingly, it leaves society with one less check upon government's already large discretion in dictating what is required for our national security.

There is no shortage of challenges facing American journalism today. Nationally, the institutional power of dominant newspapers and the network news divisions is transforming into a system where the gathering and distributing of news is more widely dispersed.<sup>8</sup> In some respects, this sort of disintegration of the institutions of the mass media would, in effect, be a return to the “wild, cacophonous, emphatically *decentralized* media culture” so lauded by Alexis de Tocqueville.<sup>9</sup> Traditionally, this might produce a perceived benefit of more speech and, thus, more points of view. However, a purely decentralized media would likely not translate into any added oversight of government's handling of our foreign affairs.<sup>10</sup> Critical coverage of national security and the foreign affairs of a government as large and unwieldy as modern-day America requires resources, financial and institutional, still largely located within a few leading press organizations. We are thus at a crossroads where neither old establishment journalism nor new media appear able to serve as our proverbial Fourth Estate. This is why the professional inclinations of our press have proven so ineffective at checking government abuse.

Put simply, watchdog journalism requires (1) independent scrutiny by the press of the activities of government and public institutions, with an aim toward (2) documenting,

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<sup>8</sup> Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV., Oct. 19, 2009, at [http://www.cjr.org/reconstruction/the\\_reconstruction\\_of\\_american.php?page=all](http://www.cjr.org/reconstruction/the_reconstruction_of_american.php?page=all).

<sup>9</sup> See William Powers, *The Massless Media*, THE ATLANTIC, Jan./Feb. 2005, at <http://www.theatlantic.com/magazine/archive/2005/01/the-massless-media/3668/>. Marveling at the variety of publications in the United States, De Tocqueville, of course, lamented how European governments concentrated the influence of the press by concentrating its power “in order doubtless to have more glory for overcoming them.” Alexis de Tocqueville, *Liberty of the Press in the United States*, ch. 11, DEMOCRACY IN AMERICA (1835).

<sup>10</sup> For example, the 2010 Pew Report on the State of the News Media laments that even as the promise of technology and innovative citizen journalism grows, the financial resources needed to do effective reporting is shrinking. See also Peter Osnos, *An Elegy for Journalism? The Colorful Past and Uncertain Future of Foreign Reporting*, FOREIGN AFFAIRS, Jan./Feb. 2010, at <http://www.foreignaffairs.com/articles/65729/peter-osnos/an-elegy-for-journalism?page=show>.

questioning, and investigating those activities, in order to (3) provide the public and public officials with timely information on important issues.<sup>11</sup> This paper explores how modern professional journalism has inhibited its own ability to fulfill its watchdog role. Part I explores the historical and institutional role of our press as a critical check on government, emphasizing the legal framework we have developed to support this mission. Part II demonstrates how government efforts at secrecy have worked to blunt the press' capacity to serve as a watchdog and, moreover, how the press has been captured within a system reliant upon secrecy, which Part III explores by looking at press behavior. Part IV provides an overview of the press' successful oversight of government, and the final part shows how this history and leveraging current circumstances might help both the press and the citizenry increase its critical oversight over government foreign policy.

## **I. The History of Press Freedom**

Immediately following *The Times'* victory in the Supreme Court over its publication of the Pentagon Papers, Justice Potter Stewart presented a powerful vision of the our press freedom as establishing a contest of sorts between the government and those who might cover it. He envisioned a society where government could use the press "to promote contemporary government policy or current notions of social justice."<sup>12</sup> He remarked that such a society could well thrive but that it was not the society our Founders had envisioned, rejecting the notion that the primary purpose of the press was to serve merely as "a neutral conduit of information

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<sup>11</sup> This definition is lifted from a chapter by W. Lance Bennett and William Serrin entitled *The Watchdog Role, in THE INSTITUTIONS OF AMERICAN DEMOCRACY: THE PRESS* (2005).

<sup>12</sup> Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 637 (1975).

between the people and their elected rulers.”<sup>13</sup> Instead, quoting admirably from Justice Brandeis, Justice Stewart believed that the struggle between press and government produced the sort of tension to “save the people from autocracy.”<sup>14</sup>

The historical rationale behind the Press Clause is muddled. One generally accepted thesis holds that the Press Clause guaranteed nothing more than the right of individuals to publish free of any prior restraint, that is censorship in advance of publication.<sup>15</sup> The early constitutional law scholar, Justice Joseph Story endorsed this view in his commentaries on the Constitution, arguing that the First Amendment could not rationally “secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility.”<sup>16</sup> He suggested that the Press Clause “imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, *without any prior restraint*, so always . . . that he does not thereby disturb the public peace, or attempt to subvert the government.”<sup>17</sup> In the wake of the Pentagon Papers, however, Justice Stewart advocated for a broader reading. He insisted that the Press Clause was a *structural* provision of the Constitution,<sup>18</sup> designed “to create a fourth institution outside the Government as an additional check on the three official branches.”<sup>19</sup>

While the actual freedom of the press at the time of Constitutional Convention was carefully circumscribed, particularly vis-à-vis private individuals and punishment for publication

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<sup>13</sup> *Id.* at 634.

<sup>14</sup> *Id.*

<sup>15</sup> This thesis was championed by Leonard Levy in his detailed history on press freedom in early American history. LEONARD LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

<sup>16</sup> JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* § 1874 (1833).

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> Stewart, *supra* note 12, at 633.

<sup>19</sup> *Id.* at 634.

*ex post*, the eighteenth-century press was widely perceived as having an institutional function, serving as a means of checking government action and decision-making.<sup>20</sup> David Anderson's recent exploration of the origin of the press clause endorses this view, embracing Justice Stewart's argument over Justice Story's thesis. Conceding that colonial America could be a profoundly repressive environment, Anderson argues that the Founders "may not have been sophisticated enough to realize that true freedom of expression must include freedom for even the most dangerous ideas, but they had seen the connection between press criticism and political change."<sup>21</sup> In a revolutionary environment amongst particularly political partisans, it is logical to assume that the Press Clause must have meant more than merely transplanting English sensibilities against prior restraints. As Massachusetts understood it, a vibrant and critical press was viewed as "essential to the security of freedom in a state" in the early republic.<sup>22</sup>

The fervor over the Sedition Act of 1798 is illustrative. The law, which criminalized "scandalous and malicious" writings against the government,<sup>23</sup> was clearly inconsistent with a theory that the Press Clause provided for the press to openly criticize government. Anderson suggests the episode was a lapse in constitutional judgment or a case of, as he puts it, "they meant for us to do as they said, not as they did."<sup>24</sup> Popular discomfort was immediate, and the law quickly deemed unconstitutional by the public despite any extensive First Amendment

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<sup>20</sup> See, e.g., David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 533-34 (1983); see also C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 118 (1994); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523, 562 (1977).

<sup>21</sup> *Id.* at 535. In his book *Necessary Secrets*, Gabriel Schoenfeld attempts to separate the "deep roots" of transparency and publicity held by the Founders with the practical necessity of secret keeping in highly sensitive affairs, among them the Constitutional Convention itself. GABRIEL SCHOENFELD, *NECESSARY SECRETS* 54-67 (2010).

<sup>22</sup> See THOMAS E. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (7<sup>th</sup> ed., 1903) (1868). Cooley provides citations to each states' press protection provisions in an extensive footnote. *Id.* at 596, n. 1.

<sup>23</sup> Act of July 14, 1798, 1 Stat. 596.

<sup>24</sup> Anderson, *supra* note 21, at 536.

jurisprudence at the time.<sup>25</sup> Even the Supreme Court subsequently noted that “[a]lthough the Seditious Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”<sup>26</sup>

Certainly, the historical impetus within the classical liberal doctrine to provide for the freedom of the press was to help protect individual liberty in general.<sup>27</sup> The Founders recognized that the press served as “the great bulwark of liberty.”<sup>28</sup> “Cato” wrote that absent the press—and absent critical discussion of government—that there could be “neither liberty, property, true religion, art, sciences, learning, or knowledge.”<sup>29</sup> Classical liberalism recognizes both the political value of a free press and its two primary aims in a free society. First, it can serve a *democratic* function by facilitating a marketplace of ideas amongst the citizenry, and secondly, the press may function as a *watchdog* against the government's tendency to accumulate power and restrain the liberty of its citizens.<sup>30</sup> While the democratic function has risen in esteem, the watchdog function was preeminent within the classical liberal tradition and was considered the essential purpose of the press regardless of the particular form of government, democratic or not.

The particular political history of the United States has made the notion of press autonomy vis-a-vis the government virtually sacrosanct.<sup>31</sup> However, the development of a more expansive right embracing criticism of public officials and government action was crafted not by

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<sup>25</sup> See, e.g., STORY, *supra* note 15, at § 1885-86. Even while Justice Story refrained from expressing his personal opinion of the law, he noted that appeals against the law were made “more successful with the people, and more consonant with the feelings of the times, than any other made upon that occasion. . . . It has continued, down to this very day, to be a theme of reproach with many of those, who have since succeeded to power.”

<sup>26</sup> *New York Times v. Sullivan*, 376 US 254, 276 (1964).

<sup>27</sup> David Kelley & Roger Donway, *Liberalism and Free Speech*, in *DEMOCRACY AND THE MASS MEDIA* 70 (1990).

<sup>28</sup> VA. CONST. art. 1, § 12.

<sup>29</sup> John Trenchard & Thomas Gordon, *Discourse upon Libels*, No. 100, *Cato's Letters*.

<sup>30</sup> Kelley & Donway, *supra* note 28, at 70.

<sup>31</sup> LEE BOLLINGER, *IMAGES OF A FREE PRESS* 153 (1990).

the courts but in the court of public opinion. Prior to the powerful dissents supporting free speech by Justices Brandeis and Holmes beginning with *Abrams v. United States* in the early twentieth century, legal doctrine was produced outside courts by the practices and enthusiasm of a robust and vigorous press, citizenry, and political community.<sup>32</sup> And once the Supreme Court became active in press cases, the general course of its jurisprudence has been designed to bolster and to strengthen the power of the press to serve as a watchdog.<sup>33</sup>

That said, much of the Court's expansion of press freedom arose out of an embrace of Justice Holmes "marketplace of ideas" metaphor, which advocated for a broader conception of speech freedom. Indeed, the Supreme Court has not been particularly forthcoming about what distinguishes the freedom of the press from a broader freedom of speech. During the height of the Supreme Court's press-based jurisprudence, Chief Justice Burger was unwilling to even entertain the notion that the Founder's contemplated a "special" place for the press.<sup>34</sup> Part of the problem is the inherent impracticability of defining the press—a broadly defined press approaches speech to such an extent that it would create a *structural* provision "with no distinct structure"<sup>35</sup>—but even if the freedom of the press has been inexorably intertwined with the

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<sup>32</sup> Michael Kent Curtis, *Teaching Free Speech from an Incomplete Fossil Record*, 34 AKON L. REV. 231, 234, 255-56 (2000). Curtis comments that "passive or negative role of the courts" in the defense of press freedoms "should not be too surprising. Courts are, in many ways, lagging indicators." *Id.* at 256.

<sup>32</sup> *Abrams* was a 7-2 decision, upholding the constitutionality of the Espionage Act against charges it violated the freedom of expression permitted by the First Amendment. The decision, subsequently overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), is most famous for the dissents of Justice Holmes and Brandeis which proposed a "clear and imminent danger" test for restricting speech. *See* 250 U.S. 616 (1919).

<sup>33</sup> Lee Bollinger describes *New York Times v. Sullivan*, 376 US 254 (1964), as a "fountainhead" in expanding our concept of the free press and free speech generally. BOLLINGER, *supra* note 32, at 8. Lucas Powe considers it "only a slight exaggeration to view 1964 as year zero for discussions of the constitutional issues that are currently central to the press's performance of its Fourth Estate functions." LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* ix (1991).

<sup>34</sup> *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 798 (1978) (Burger, C.J., concurring).

<sup>35</sup> David Lange, *The Speech and Debate Clauses*, 23 UCLA L. REV. 77, 106 (1975).

freedom of speech generally, the Supreme Court continues to reference an explicit freedom of the press and to proclaim its merits.<sup>36</sup>

Vincent Blasi argues that the press's watchdog function against government abuse, what he terms the *checking value*, is the underlying premise behind those press behaviors which the Court has endorsed in its jurisprudence.<sup>37</sup> Though he concedes that our incomplete understanding of the First Amendment clouds the Supreme Court's decisions in this field, he believes understanding press freedom from the vantage point of its checking value provides a helpful approach to addressing First Amendment questions. This checking function was given its clearest expression by Justice Black in his final opinion in *Pentagon Papers* where he urged the Court to adopt an absolute freedom of publication:

The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.<sup>38</sup>

Precisely because the government has the capacity to employ "legitimized violence," Blasi identifies oversight over government activity opposed to oversight of private activity or providing an issue forum as the preeminent role of the press.<sup>39</sup> Justice Black's rhetoric is consistent with this suggestion; his words clearly serve as encouragement to the public to investigate every nook and cranny of government activity. Blasi does not go this far. In limited contrast to Justice Black, he would permit some carefully circumscribed limitation upon the

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<sup>36</sup> Anderson, *supra* note 20, at 456-58. Anderson argues that absent a press clause, and a firm historical rejection of prior restraints, pivotal free speech cases could have gone the other way—impacting not only the press but the public at large.

<sup>37</sup> Blasi, *supra* note 21, at 526-27.

<sup>38</sup> *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971).

<sup>39</sup> *Id.* at 538.

press in matters of obvious national security. This theory is probably more consistent with the splintered rationale behind *Pentagon Papers*, but it is not without its own problems. As we will see, determining what sort of press reporting can compromise national security is fraught with challenges, and the government has become predisposed to suggesting more and more press coverage is problematic.

Ultimately, in the end, we are left with competing historical and legal visions of the press. The institution itself is undefined, but its mission, whether providing for an exchange of ideas or some democratizing function, seems to be founded on inhibiting government action—and misbehavior—through pointed oversight. In the contest between press and government envisioned by Justice Stewart, he could not have imagined a situation where the press would voluntarily commit to do the government’s bidding in promoting policy. Yet in the decades since the publication of the *Pentagon Papers*, pointed oversight is being challenged by the impulse to do the government’s bidding. As Murray Marder, creator of the Watchdog Journalism Project, put it, that “distinctive, essential function” of our press is “atrophying like a muscle, shrinking from lack of exercise.”<sup>40</sup> This is especially troubling when claims of national security prerogatives have created a national press that often simply parrots the government’s position in matters of foreign affairs and security.<sup>41</sup>

## **II. Secrecy and National Security**

### **A. Government's Protection of Its Secrets**

Despite the forcefulness of Justice Black's invocation of absolute press freedom in *Pentagon Papers*, his opinion was but one of nine separate opinions which emerged out of the

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<sup>40</sup> Marder, *supra* note 2.

<sup>41</sup> See, e.g., John Zaller & Dennis Chiu, *Government's Little Helper: U.S. Press Coverage of Foreign Policy Crises, 1945-1999*, in *DECISIONMAKING IN A GLASS HOUSE* (Brigitte L. Nacos et al., eds., 2000).

case. Even Justice Stewart, while voting against the government's position, suggested that the need for confidentiality and "absolute secrecy" in the realms of foreign affairs and national defense was "self-evident."<sup>42</sup> The dilemma confronting the press—and our society—today is twofold. On a theoretical level, the purviews of national security have grown increasingly larger in scope. Earlier notions of national security derived emphasized the threat of offensive military action, but the Obama Administration's latest National Security Strategy broadly defines American security interests as (1) the security of the United States, its citizens and allies; (2) a strong economy in an "open international economic system," (3) respect of universal values; and (4) an international order advanced by American leadership. As a result of this expansive definition, the government has a justification to keep vast amount of information, including decision-making processes and important policies, secret in order to ensure our national security.<sup>43</sup> While prior restraints on publishing information that could have a direct and immediate impact on the safety of soldiers in the field was always historically justifiable, the expanding umbrella of national security—and the concomitant espoused need for secrecy—is a more recent phenomenon that arose largely with the beginning of the Cold War and the formal establishment of the foreign intelligence system under the 1947 National Security Act.<sup>44</sup>

The history of the republic is replete with officially sanctioned efforts to silence press criticism of government.<sup>45</sup> However, the relationship between our government and the press has

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<sup>42</sup> *New York Times Co.*, 403 U.S. at 728. On the other hand, Justice Stewart cautioned against excessive secrecy "for when everything is classified, then nothing is classified," but deferred to the Executive Branch to determine the proper scope of an internal security system.

<sup>43</sup> See NATIONAL SECURITY STRATEGY 7 (2010).

<sup>44</sup> JAMES RUSSEL WIGGINS, FREEDOM OF SECRECY 92-118 (1964).

<sup>45</sup> See LOUIS EDWARD INGELHART, PRESS AND SPEECH FREEDOMS IN AMERICA, 1916-1995 (1997). See also *Alien & Sedition Acts*; *Sedition Act of 1918*; *Near v. Minnesota*, 283 U.S. 697 (1931) ("The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy . . .").

evolved dramatically over time. Prior to the *professionalization* of the press toward the end of the Nineteenth Century, the antagonism that characterized interactions between press and politicians was more partisan than institutional. The press was more hostile and the government more aggressive in silencing dissenting views, but without discounting the value of effective domestic oversight of government, the actual need for the press to provide a check on runaway government abuse was diminished in prior ages when the government was not as large and its reach significantly less. More importantly, the reporting inadequacies surrounding foreign affairs simply did not exist; the suggestion of silencing and intimidating the press in the name protecting the national security was impossible as the concept of national security as currently conceived did not exist. Whereas today our conception of national security has expanded and become either ill-defined or all encompassing, “national security” in prior eras did not exist beyond a battlefield.

For example, during the Civil War, government efforts both at maintaining battlefield secrecy and controlling press opinion and information varied wildly.<sup>46</sup> While the war allowed President Lincoln to considerably expand the scope of executive power, the president was remarkably conflicted when it came to the suppression of public criticism.<sup>47</sup> As a result of shifting political and practical concerns, his treatment of the press was somewhat inconsistent as a result. Fearing damage to the values embodied in the First Amendment, he routinely reversed efforts to suppress newspapers, notably instructing General Burnside to lift a closure order on *The Chicago Times* and directing his generals that suppression was warranted only “when [newspapers] may be working palpable injury to the military.” According to one historian, the

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<sup>46</sup> WIGGINS, *supra* note 45, at 95.

<sup>47</sup> See GEOFFREY STONE, *PERILOUS TIMES* 108-20 (2004) (arguing that Lincoln’s response to the Corning Letter suggested “unequivocally that, even in wartime, the government may not punish a speaker merely for criticizing its policies, programs, or actions.”)

government permitted an “astonishing” amount of criticism and press coverage of the war, even as *The New York Journal of Commerce* claimed the President’s government had denied habeas corpus to enough editors to fill eighteen columns.<sup>48</sup> As the administration of government grew increasingly complex after the Civil War, the government’s discipline regarding its secrets also increased.

At the start of World War II, the government was largely successful in enforcing government secrecy, working in partnership with the press. Compared with the sort of overt press manipulation that exists today, the Office of Censorship proved to be a considerably benevolent entity. For one, censorship during the period was part of a system of voluntary self-censorship under the guidance of Byron Price, a former executive news editor of the Associated Press. Civilian censors could suggest and argue points but were given no authority to punish beyond publicizing the names of violators, but an emphasis on mediation and compromise by Price helped to foster the belief among most of the press that the reasons for censorship were legitimate.<sup>49</sup> Further, Price pressured authorities from overclassifying information; the standard for not clearing publication of information was surprisingly high—censorship was never to be influenced by non-security policy considerations and, more importantly, was to be based only on real, articulable dangers to national security.<sup>50</sup> Certainly censorship in the field was a different matter, but the era of the “patriotic press” as President Roosevelt termed it saw the press given considerable leeway to report embarrassing information about the military. For example, Drew Pearson of *The Washington Post* was permitted to embarrass both Generals Patton and

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<sup>48</sup> INGELHART, *supra* note 46, at 87. See also Henry S. Commager, *To Secure the Blessings of Liberty*, N.Y. TIMES MAGAZINE, Apr. 9, 1939.

<sup>49</sup> For an excellent survey of World War II censorship, Michael S. Sweeney’s *Secrets of Victory* provides a history of Byron Price’s tenure as head of the Office of Censorship. See, e.g., *id.* at 54, 22

<sup>50</sup> WIGGINS, *supra* note 45, at 98; see also, Peter Duffy, *Keeping Secrets*, COLUM. JOURNALISM REV. 58, 58-59 (Sept./Oct. 2010).

Eisenhower by reporting that General Patton harassed a shell-shocked soldier.<sup>51</sup> Even during the height of journalistic patriotism, neither embarrassing government nor questionable assertions by the government that information might influence national security were considered grounds for censorship.

Though the Office of Censorship was terminated immediately after the war, the government's claimed need for secrecy did not vanish with the end of armed conflict. Subsequently, national security information has been largely determined by the discretion of the executive branch. President Truman's Executive Order 10-290, signed in September 1951, broadly expanded the classification of national security information.<sup>52</sup> President Eisenhower subsequently liberalized the system to a degree, establishing a three-tiered classification system of "Top Secret," "Secret," and "Confidential." The system was designed to allow information to become declassified over time, but the amount of information which became shielded from public or congressional oversight soon expanded out of control despite a variety of legislative efforts to limit government secrecy.

More worrisome, the increased secrecy often had little to do with protecting national security. Erwin Griswold, who argued on behalf of the government as Solicitor General in *Pentagon Papers*, eventually conceded that the government suffered from "massive overclassification" that is concerned "not with national security, but rather with governmental embarrassment."<sup>53</sup> The late Senator Patrick Moynihan, who chaired the 1997 Commission on Protecting and Reducing Secrecy, lamented "the enveloping culture of government secrecy [that]

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<sup>51</sup> Duffy, *supra* note 51, at 59.

<sup>52</sup> See, e.g., WIGGINS, *supra* note 45, at 101; N. CATHY MAUS, HISTORY OF CLASSIFICATION AND DECLASSIFICATION, FEDERATION OF AMERICAN SCIENTISTS, July 22, 1996, available at <http://www.fas.org/irp/doddir/doe/history.htm>.

<sup>53</sup> Edwin Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

just keeps growing.”<sup>54</sup> The report included an estimate that only 10% of classification decisions involved “legitimate protection of secrets.”<sup>55</sup> Writing before the events of September 11<sup>th</sup>, he warned that state secrecy ferments “fear of conspiracy” of which “our Muslim citizens are now especially vulnerable.”<sup>56</sup> Considering the Defense Department recognized that secrecy had reached “serious proportions” as early as 1956, analysis of the recent WikiLeaks’ release of State Department diplomatic cables suggests the situation is absurd—if not untenable.<sup>57</sup> Indeed, since September 11<sup>th</sup>, government secrecy has expanded even faster: even as Secretary of State Colin Powell expressed concern that over-classification had become even worse after the Cold War, Vice-President Dick Cheney created an extra-statutory classification stamp, “Treat As: SECRET,” used so routinely that it was applied to press guidance for his spokesman’s office.<sup>58</sup>

The problem is not limited to a particular administration or political ideology. The beginning of the Obama Administration promised a new era of “openness in government,” but this year’s Knight Open Government Survey noted that “at this rate, the president’s first term in office will be over by the time federal agencies do what he asked to them to do on his first day in office.”<sup>59</sup> More recently, the presidents of the Society of Professional Journalists and the

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<sup>54</sup> DANIEL PATRICK MOYNIHAN, DANIEL PATRICK MOYNIHAN: A PORTRAIT IN LETTERS OF AN AMERICAN VISIONARY (Steven Weisman, ed., 2010) 659.

<sup>55</sup> COMMISSION ON PROTECTING AND REDUCING SECURITY 36 (1997) [hereinafter MOYNIHAN COMMISSION].

<sup>56</sup> *Id.* at APPENDIX A (9. After the Fall).

<sup>57</sup> See, e.g., MOYNIHAN COMMISSION, APPENDIX G (Major Review of the US Secrecy System) (1997), available at <http://www.fas.org/sgp/library/moynihan/appg.html>; Julian Hattem, *WikiLeaks and the Classification Follies*, THE CENTER FOR PUBLIC INTEGRITY, Dec. 22, 2010, at <http://www.publicintegrity.org/articles/entry/2782>. Post 9/11, government secrecy seems to know no ideological bounds. Despite President Obama entering office committed to open government and transparency, an AP review suggests federal agencies have actually increased their use of legal exemptions to keep records secret. See Sharon Theimer, *Promises, Promises: Is government more open with Obama?*, AP, Mar. 16, 2010, available at <http://www.businessweek.com/ap/financialnews/D9EFOS100.htm>.

<sup>58</sup> Secretary Colin L. Powell, Written Remarks Before the Senate Governmental Affairs Committee, Sept. 13, 2004; Barton Gellman & Dan Eggen, *The Bush/Cheney Legacy Reexamined*, WASH. POST, Jan. 19, 2009, at <http://www.washingtonpost.com/wp-dyn/content/discussion/2009/01/09/DI2009010902913.html>.

<sup>59</sup> GLASS HALF FULL: THE KNIGHT OPEN GOVERNMENT SURVEY 2011 i (2011).

Association of Health Care Journalists denounced the administration's efforts to impose restrictions on press newsgathering, claiming they exceeded the constraints put in place during the Bush Administration. "Reporters' questions often go unanswered," the pair wrote. "When replies are given, they are frequently more scripted than meaningful."<sup>60</sup> No matter the rhetorical calls for transparency and openness in government, the federal bureaucracy proves remarkably resistant to sunshine. This bureaucratic tendency is hardly surprising—government likes to keep secrets.<sup>61</sup>

Furthermore, this tendency is amplified—and excused—by the proclaimed need for national security. The Freedom of Information Act was a laudable attempt by Congress to open up government, but the legislation has been largely useless as a means of breaking through the walls of secrecy surrounding foreign affairs as a result of the national security exemption.<sup>62</sup> As discussed above, this contents classified under the (b)(1) exemption is entirely governed by executive order, and any oversight provided by the courts is largely deferential, giving "substantial weight" to executive determinations of national security.<sup>63</sup> There is thus no

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<sup>60</sup> Charles Ornstein & Hagit Limor, *Where's the Transparency Obama Promised?*, WASH. POST, Mar. 31, 2011, at [http://www.washingtonpost.com/opinions/wheres-the-transparency-that-obama-promised/2011/03/31/AFipwHCC\\_story.html](http://www.washingtonpost.com/opinions/wheres-the-transparency-that-obama-promised/2011/03/31/AFipwHCC_story.html).

<sup>61</sup> Dana Priest and William M. Arkin have done extensive reporting on the labyrinthine structures put in place after 9/11 to protect national security, noting that "the result [is] an enterprise so massive that nobody in government has a full understanding of it." *Top Secret America*, WASH. POST, at <http://projects.washingtonpost.com/top-secret-america/articles/editors-note/>.

<sup>61</sup> Additionally, the government is behind in millions upon millions of documents scheduled to be declassified and the Pentagon Papers, subject to so much scrutiny almost forty years ago, remained classified as "Top Secret." See Dana Milbank, *Make Julian Assange Irrelevant*, WASH. POST, Dec. 18, 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/17/AR2010121704193.html>.

<sup>62</sup> ARTHUR SCHLESINGER, *THE IMPERIAL PRESIDENCY* 364-65 (1973).

<sup>63</sup> See, e.g., Christina E. Wells, *National Security Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1199 (2004); *Times Newspapers of Great Britain, Inc. v. CIA*, 539 F. Supp 678, 683 (S.D.N.Y. 1982).

In a concurrence in *United States v. Morrison*, Judge Wilkinson provided a rationale for judicial deterrence:

[T]he alternative would be grave. To reverse Morison's conviction on the general ground that it chills press access would be tantamount to a judicial declaration that the government may never use criminal penalties to secure the confidentiality of intelligence information. Rather than enhancing the operation of democracy,

institutional check within government to limit vast quantities of information from being kept secret from the public.

The historic irony is that the government appears to be a poor judge of what is, and is not, actually worth keeping secret, even in the realm of national security. Recent history is full of examples of absurd rationales provided by the government for withholding information with little apparent value. Sometimes the result is patently ridiculous: Air Force next-of-kin rules held up the release of the name of an airman who died in a routine car accident with his wife, forcing local newspapers to protest that they “could not report Mrs. Laramee was killed while riding in a car with an *unidentified* airman.”<sup>64</sup> A better example may be the refusal of the Office of the Director of National Intelligence, which has publicly disclosed the budget of the National Intelligence Program since 2007, to release its 2006 budget on national security grounds.<sup>65</sup> A similar demonstration of utterly inconsistent decision-making as to what must remain classified is an email from the Reagan Administration regarding Saddam Hussein. One version of the email produced as the result of an information request blacked out the middle of the message on national security grounds, while a second version, released a week later, censored the top and bottom of the letter without omitting the middle. The classification as a result evidently is that release of the contents of the entire message threatened national security; the practical result is the entire document could be read.<sup>66</sup>

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as Morison suggests, this course would install every government worker with access to classified information as a veritable satrap.

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<sup>64</sup> WIGGINS, *supra* note 45, at 107.

<sup>65</sup> Steven Aftergood, *Telling Secrets*, FOREIGN POLICY, Oct. 18, 2010, at [http://www.foreignpolicy.com/articles/2010/10/15/telling\\_secrets?page=0,1](http://www.foreignpolicy.com/articles/2010/10/15/telling_secrets?page=0,1).

<sup>66</sup> *Hearing on the Espionage Act and the Legal and Constitutional Implications of WikiLeaks Before the H. Comm. On the Judiciary* (2010) (statement of Thomas Blanton, Director, National Security Archive).

Writing about the rise of the imperial presidency, Arthur Schlesinger challenged anyone to name a case where a leak actually did serious damage to national security.<sup>67</sup> At least directly, the answer would appear to be none at all. During oral argument in *Pentagon Papers*, Solicitor General Griswold insisted that the continued publication of the documents would “materially affect the security of the United States. It will affect lives; it will affect the process of termination of the war; it will affect the process of recovering prisoners of war.”<sup>68</sup> In the same *Washington Post* op-ed wherein he denounced overclassification several decades later, Griswold also recanted his main argument in *Pentagon Papers*. He admitted that not only that he had never seen any trace of a threat to national security from the publication of the papers, but also that he had “never seen it even suggested that there was an actual threat.”<sup>69</sup> Indeed, the government's initial reaction to the “threat” was to move to discredit the leaker, Daniel Ellsberg; the Nixon Administration subsequently broke into Ellsberg's psychiatrist's office to search for files on the man's motivations, future intentions, and co-conspirators.<sup>70</sup>

The one example where the government was able to convince a court that a publication posed an actual threat to national security also ultimately turned out to be overblown. Eight years after the release of the *Pentagon Papers*, *The Progressive* commissioned an article on the construction and development of the hydrogen bomb. After *The Progressive* sent a copy of the article to the Department of Energy to verify the piece's technical accuracy, the government determined that much of the material within the article was “restricted data” under the Atomic Energy Act—though *The Progressive* claimed all of the information within the article had been

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<sup>67</sup> SCHLESINGER, *supra* note 63, at 362

<sup>68</sup> Transcript of Oral Argument at 26, *New York Times v. United States*, 03 U.S. 713 (1971) (No. 1873).

<sup>69</sup> Griswold, *supra* note 54.

<sup>70</sup> RICHARD NIXON, *THE MEMOIRS OF RICHARD NIXON* 514 (1978).

gathered from information already in the public domain. When the government brought suit to enjoin the piece's publication, the district court found itself between a proverbial rock and a hard place. The court recognized issuing a prior restraint against *The Progressive* would not only “seriously infringe cherished First Amendment rights” but would also constitute the first such case of a prior restraint involving government criticism in the country's history.<sup>71</sup> However, weighed against the threat of thermonuclear annihilation the right to publish was considered moot and the government's burden met.<sup>72</sup>

The national press—and the district court itself—worried about the case's implication on First Amendment rights and its potential to reverse the press's victory in *Pentagon Papers*. This soon proved unwarranted. Before the case could reach the Supreme Court, the information was released by others in the media and the government abandoned its case. It then became obvious once more that the government's concern about the need for secrecy was overblown and the potential damage to national security from the article overstated.<sup>73</sup>

### **B. The Game between Government and the Press**

One obvious tactic the press can use to combat government secrecy is to engage in investigative journalism. In a *Washington Post* eulogy to foreign reporting, a former *Boston Globe* foreign correspondent suggested the advantage of foreign correspondents was their ability to “burrow into a society, cultivate strangers' trust, follow meandering trails and *dig beneath layers of diplomatic spin and government propaganda*.”<sup>74</sup> Foreign bureaus, however, are

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<sup>71</sup> United States v. The Progressive, 467 F. Supp. 990 (1979).

<sup>72</sup> *Id.*

<sup>73</sup> BOLLINGER, *supra* note 32, at 51.

<sup>74</sup> Pamela Constable, *Demise of a Foreign Correspondent*, Wash. Post, Feb. 18, 2007, at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/16/AR2007021601713.html> (emphasis added).

expensive and have been an ample source for budget cuts at both the major news networks and national newspapers.<sup>75</sup>

As a result, the press has had to rely more and more on the government itself as a source of information, and, thus, government increasingly becomes a final arbiter of sorts of what news about which the public gets to learn. In day to day reporting, information provided by government officials becomes more valuable than documentation, critical analysis, or investigations—in other words, the watchdog becomes a lapdog. This failing was often on display in press responses to Iraq War coverage. For example, even while longtime *Nightline* managing editor Ted Koppel laments the declining quality and quantity of international news reporting, he has inadvertently assisted in enabling this state of affairs. In the lead-up to the Iraq War, he admitted the press's large reliance upon government sources:

Americans are likely to know less about this war than any other. You should expect to be more in the dark about what is really happening [in Iraq] than ever before. I say that in the hope that we'll be able to sit down *with our friends at the Pentagon* and reach an arrangement that will serve both our interests. . . . I'm afraid all we're going to get out of this one are briefings.<sup>76</sup>

Instead of stressing the press's independent ability to report on a war, Koppel implicitly emphasizes the control government has over press coverage. It is particularly striking that Koppel appears to suggest that the press's capacity to cover wars has actually regressed. While the press's mistakes on reporting in the lead-up to the Iraq War are well-documented, this same sort of deferential, limited reporting is arguably repeating itself with the Afghanistan War, not a

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<sup>75</sup> *Id.*; see also Lucinda Fleeson, *Bureau of Missing Bureaus*, AM. JOURNALISM. REV., Oct./Nov. 2003, at <http://www.ajr.org/article.asp?id=3409>; Ted Koppel, *Olbermann, O'Reilly and the Death of Real News*, Wash. Post, Nov. 14, 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/12/AR2010111202857.html> (“[F]or the most part, a 'bureau' now is just a local fixer who speaks English and can facilitate the work of a visiting producer or a correspondent in from London.”).

<sup>76</sup> FINNEGAN, *supra* note 7, at 41.

decade later.<sup>77</sup> According to the Project for Excellence in Journalism, absent significant emphasis and information provided directly by government, the Afghanistan War “remains a story that gets modest coverage.”<sup>78</sup>

This reliance on government for the story indirectly reduces the press's credibility. Since government briefings have become notoriously managed and “spun,” the perverse result is that government information is often only considered truthful if is uncovered anonymously and off-the-record.<sup>79</sup> The situation we now have is that, as Max Frankel, long time head of the *New York Times* Washington bureau, described it, a “game” has developed between government and media wherein the government “hides what it can, pleading necessity as long as it can” and the press pries at government to get stories.<sup>80</sup> The result is that our federal government exploits its secrets to manipulate the media.

Frankel described the dynamic at length to the Court during *Pentagon Papers*, calling the government the press’s “partner in the informal but customary traffic in secret information, without even the pretense of legal or formal ‘declassification.’”<sup>81</sup> He explained the government officials “declassify” this information with no regard to the national interest but rather to promote larger political, bureaucratic, or even personal and commercial interests. He accused the government’s classification regime as being largely a mechanism of political or bureaucratic convenience in order to hide mistakes and protect official reputations. “Almost everything . . . in the *foreign policy field*,” he added, is “classified as ‘secret’ and ‘sensitive’ beyond any rule or

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<sup>77</sup> See, e.g., Brian Stelter, *Afghan War Just a Slice of U.S. Coverage*, N.Y. TIMES, Dec. 19, 2010, at <http://www.nytimes.com/2010/12/20/business/media/20coverage.html>.

<sup>78</sup> *Id.*

<sup>79</sup> CRAIG CRAWFORD, *ATTACK THE MESSENGER: HOW POLITICIANS TURN YOU AGAINST THE MEDIA* 44 (2005). Crawford alleges that the press has become a “sucker” for using information derived from anonymous sources “because it makes their reports seem more exotic.”

<sup>80</sup> Affidavit of Max Frankel ¶ 19, *United States v. New York Times*.

<sup>81</sup> *Id.* at ¶ 17.

reason.”<sup>82</sup> As a result of the protective cloak of anonymity which the professional press routinely overuses,<sup>83</sup> the press ends up colluding with government rather than watching over it.

The most damning example of such behavior was a *New York Times* article by Michael Gordon and the now infamous Judith Miller completely sourced using anonymous government officials, claiming that Saddam Hussein was attempting to acquire materials necessary to build nuclear weapons.<sup>84</sup> Feigning irritation with the leak of information, Bush Administration officials—Dick Cheney, Colin Powell, Donald Rumsfeld, and Condoleezza Rice—quickly used the story as a foundation to build public support for military action against Iraq. Though the information was inaccurate, the imprimatur of *The New York Times* allowed the Bush Administration to pass off its own bad information as legitimate and manipulate public opinion.<sup>85</sup>

While, as a practical matter, it may be nigh impossible to eradicate the use of anonymous sources and anonymity does have its value, the frequency of anonymity and the particular use of anonymous sources in reporting on government has long been considered a prime source for the widespread erosion of the press's credibility.<sup>86</sup> More importantly, this sort of reliance on

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<sup>82</sup> *Id.* (emphasis added).

<sup>83</sup> See Dan Froomkin, *Washington Journalism on Trial*, WASH. POST, Feb. 8, 2007, at <http://www.washingtonpost.com/wp-dyn/content/blog/2007/02/08/BL2007020801013.html> (recounting former *Meet the Press* moderator Tim Russert's testimony at Scooter Libby's trial that “when any senior government official calls him, they are presumptively off the record”).

<sup>84</sup> Michael Gordon & Judith Miller, *Threats and Responses: The Iraqis; U.S. Says Hussein Intensifies Quest for A-Bomb Parts*, N.Y. TIMES, Sept. 8, 2002, at <http://www.nytimes.com/2002/09/08/world/threats-responses-iraqis-us-says-hussein-intensifies-quest-for-bomb-parts.html?pagewanted=all>.

<sup>85</sup> Michael Massing, *Now They Tell Us*, N.Y. REV. OF BOOKS, Jan. 29, 2004, at <http://www.nybooks.com/articles/archives/2004/feb/26/now-they-tell-us/?pagination=false>; Jay Rosen, *From Judith Miller to Julian Assange*, PRESS THINK, Dec. 9, 2010, at <http://pressthink.org/2010/12/from-judith-miller-to-julian-assange/>.

<sup>85</sup> Alarming, even after scandal caused by anonymous sourcing at the *New York Times*, a revamped policy of anonymity has proven inadequate according to the *Times* public editor. See Clark Hoyt, *Those Persistent Anonymous Sources*, N.Y. TIMES, Mar. 21, 2009, at <http://www.nytimes.com/2009/03/22/opinion/22pubed.html> (“[T]he paper failed to follow its own rules for explaining them nearly 80 percent of the time.”).

<sup>86</sup> See, e.g., Dan Froomkin, *How the Press Can Prevent Another Iraq*, NIEMAN WATCHDOG, Feb. 2, 2007, at <http://niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=00156> (arguing that the press

anonymous sources in reporting does not further the press's watchdog role. Information gleaned from government whistleblowers, such as the legendary Deep Throat, is categorically different from the statements of unattributable sources. When anonymity is used *by government* as a mechanism to release information rather than *by individuals* to release information about government, this is the antithesis of the watchdog model. Curiously, from a legal perspective, source anonymity has been the one chief press practice which the Supreme Court has refused to explicitly endorse.<sup>87</sup> One explanation for a rejection of the reporter's privilege in *Branzburg v. Hayes* was the slow recognition by the Supreme Court that the underlying watchdog press ideal it espoused in *New York Times v. Sullivan* simply had not been met in practice.<sup>88</sup>

### **C. Outside the Game: Leakers and Whistleblowers**

Distinguishing between, for lack of a better term, good and bad anonymity is possible. The press can reduce its reliance on anonymity without impairing its ability to offer protections to sources of information, leakers and whistleblowers in particular. *The New York Times'* confidentiality guidelines provide an ideal, noting that anonymity should never be automatic or assumed. The guidelines specifically address exceptions for "highly sensitive stories" when "a source may face legal jeopardy or loss of livelihood for speaking with us."<sup>89</sup> In such cases, the

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cannot be *too* skeptical of authority); Glenn Greenwald, *Why Do Journalists Expect to Have Credibility?*, Salon, Mar. 10, 2010, at [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/03/07/anonymity](http://www.salon.com/news/opinion/glenn_greenwald/2010/03/07/anonymity).

<sup>86</sup> Lamenting the government's spin on the Gulf of Tonkin incident to accelerate the Vietnam War, I.F. Stone poignantly noted that "the process of brain-washing the public begins with off-the-record briefings to newspapermen." MYRA MACPHERSON, "ALL GOVERNMENTS LIE" 396 (2006).

<sup>87</sup> See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>88</sup> See BOLLINGER, *supra* note 32, at 54 (Suggesting the Court "is endorsing the view that the overall performance of the press is alarmingly deficient" and language in *Branzburg* is "a far cry from the traditional Fourth Estate image of the press").

<sup>89</sup> N.Y. TIMES, CONFIDENTIAL NEWS SOURCE POLICY, *available at* [http://www.nytc.com/company/business\\_units/sources.html](http://www.nytc.com/company/business_units/sources.html) (last visited Mar. 31, 2011).

guidelines declare that additional reporting is “essential” to ensure that the press “has sought the whole story.”<sup>90</sup>

Information supplied by government to manipulate the narrative is easy to identify. In 2005, *The Washington Post*'s Mark Feldstein inadvertently elaborated upon the dynamic described by Max Frankel in the 1970s. Feldstein admitted that “most leaks consist of quick telephone conversations that take place when reporters and sources go through their Rolodexes making the rounds of their daily contacts. Note-taking is hurried and often sloppy.”<sup>91</sup> As an example of what sort of news copy this produces, an Associated Press' report on Libya demonstrates how these sorts of semi-official leaks retard the news reporting process:

A U.S. intelligence report on Monday, the day after coalition missiles attacked Gadhafi's Bab al-Aziziya compound in the capital, said that a senior Gadhafi aide was told to take bodies from a morgue and place them at the scene of the bomb damage, to be displayed for visiting journalists. A senior U.S. defense official revealed the contents of the intelligence report on condition of anonymity because it was classified secret.<sup>92</sup>

Not only would effective investigative journalism on the ground likely uncover this sort of information without the classified leak of information, but it is also arguable that the use of anonymity here does less to protect the individual from legal jeopardy or loss of her position and more to advance the Obama Administration's narrative justification for intervening in Libya.

Contrast that “leak” with the sorts of embarrassing information that the government legitimately wishes to hide, and it becomes apparent that anonymity is likely only warranted for information provided outside the context of the information game between press and government. The case of former NSA analyst Thomas Drake, accused of leaking confidential

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<sup>90</sup> *Id.*

<sup>91</sup> Mark Feldstein, *Leak Riddle: Who's Playing Whom?*, WASH. POST, July 24, 2005, at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/22/AR2005072202222.html>.

<sup>92</sup> *Targets Deep Within Libya Hit, Fewer US Jets Used*, ASSOCIATED PRESS, Mar. 24, 2011, at <http://abcnews.go.com/International/wireStory?id=13211506&page=2>.

information about costly and privacy-threatening information sifting programs to *The Baltimore Sun*, is illustrative. Not only was his behavior markedly different from the AP's unnamed defense official—Drake spent months communicating back and forth with a reporter using a program to hide his identity and *insisted* that he never be used a single source<sup>93</sup>—but also government officials, anonymous of course, subsequently admitted the resulting leak was “probably a public service” because absent the NSA’s embarrassment the failure would otherwise “because they’re classified, get swept under the rug.”<sup>94</sup>

Though the federal government ostensibly protects government whistleblowers, these protections have eroded in the wake of September 11<sup>th</sup> despite surveys within the intelligence community and the Defense Department revealing increasing concerns about bureaucratic competency.<sup>95</sup> At the same time, court rulings have weakened whistleblower protections, and executive agencies have routinely proven inhospitable to whistleblowers, especially within the national security apparatus.<sup>96</sup> For instance, the Inspector General of the Defense Department argued before Congress in 2006 that “despite its title, the ICWPA does *not* provide statutory protection from reprisal for whistleblowing for employees of the intelligence community. The name ‘Intelligence Community Whistleblower Protection Act’ is a misnomer.”<sup>97</sup>

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<sup>93</sup> Ellen Nakashima, *Former NSA executive Thomas A. Drake may pay high price for media leak*, WASH. POST, July 14, 2010, at [http://www.washingtonpost.com/wp-dyn/content/article/2010/07/13/AR2010071305992.html?wprss=rss\\_technology](http://www.washingtonpost.com/wp-dyn/content/article/2010/07/13/AR2010071305992.html?wprss=rss_technology).

<sup>94</sup> *Id.*

<sup>95</sup> Alexandra Marks, *National Security vs. Whistle-blowing*, CHRISTIAN SCIENCE MONITOR, Jan. 24, 2006, at <http://www.csmonitor.com/2006/0124/p02s01-uspo.html>.

<sup>96</sup> See PROJECT ON GOVERNMENT OVERSIGHT, HOMELAND AND NATIONAL SECURITY WHISTLEBLOWER PROTECTIONS: AN UNFINISHED AGENDA (arguing both courts and executive agencies have repeatedly carved out loopholes in clear defiance of congressional intent).

<sup>97</sup> Thomas F. Gimble, Acting Inspector General, Department of Defense, Statement before the Subcommittee on National Security, Emerging Threats and International Relations, House Committee on Government Reform, on National Security Whistleblower Protection (Feb. 14, 2006).

In 2006, former CIA Director Porter Goss stated that ICWPA provided “an appropriate and responsible way to bring questionable practices” to the attention of Congress and internal channels at federal agencies “to correct abuses without risk of retribution and while protecting information critical to our national defense.”<sup>98</sup> The problem is that ICWPA has proven to be toothless. For example, one public servant was prohibited by the NSA from testifying before Congress on potentially illegal eavesdropping activities because the membership of the House and Senate Intelligence Committees lacked the requisite security clearance to hear about the information. Further, using internal channels is fraught with its own challenges since the courts have ruled that federal employees are only protected from agency retaliation if they can prove irrefutable evidence of wrongdoing—a particularly onerous legal standard.<sup>99</sup> Hilary Bok argues that if we want whistleblowers to work within the system, we must ensure our abuse reporting practices actually work. “It is dangerous when people freelance,” she writes, adding:

But there’s one big exception to this rule: when the system itself has been corrupted. When you’re operating within a system in which whistle-blowers’ concerns are not addressed—where the likelihood that any complaint you make within the system will be addressed is near zero, while the likelihood that you will be targeted for reprisals is high—then no sane person who is motivated by a desire to have his or her concern addressed will work within that system.<sup>100</sup>

According to the Merit Systems Protection Board, the number one reason federal employees do not report wrongdoing is because they do not believe any corrective action will be taken.<sup>101</sup> The

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<sup>98</sup> Porter Goss, *Loose Lips Sink Ships*, N.Y. TIMES, Feb. 10, 2006, at [http://www.nytimes.com/2006/02/10/opinion/10goss.html?\\_r=1&ex=1297227600&en=3e6d549a42e100dc&ei=5090&partner=rssuserland&emc=rss](http://www.nytimes.com/2006/02/10/opinion/10goss.html?_r=1&ex=1297227600&en=3e6d549a42e100dc&ei=5090&partner=rssuserland&emc=rss). Goss was critical of press leaks, arguing that “those who choose to bypass the law and go straight to the press are not noble, honorable or patriotic. Nor are they whistleblowers. Instead they are committing a criminal act that potentially places American lives at risk. It is unconscionable to compromise national security information and then seek protection as a whistleblower to forestall punishment.”

<sup>99</sup> Marks, *supra* note 96.

<sup>100</sup> Hilary Bok, *Whistleblowers*, WASH. MONTHLY, Dec. 14, 2008, at [http://www.washingtonmonthly.com/archives/individual/2008\\_12/016053.php](http://www.washingtonmonthly.com/archives/individual/2008_12/016053.php).

<sup>101</sup> Testimony of Beth Daley, Senior Investigator, Project on Government Oversight, Before the House Subcommittee on National Security, Emerging Threats and International Relations (Feb. 14, 2006), *citing* U.S. MERIT SYSTEMS

reality is either there is a pervasive perception that the system does not work or it truly does not, whichever is worse.

Individual whistleblowers, such as Drake, face the problematic implications of our current system as a result. This took the form of official harassment and criticism during the Bush Administration and has increasingly turned to criminal prosecution under the Obama Administration.<sup>102</sup> According to an amicus brief by Government Accountability Project in *United States v. Thomas*, the Justice Department's prosecution "would not be possible were it not for Mr. Drake serving as a key cooperating witness to assist the government, specifically the [Defense Department Inspector General], with its investigation."<sup>103</sup>

His case illustrates the dilemma the expanding scope of national security poses. In indicting Drake, The Justice Department has explained that "our *national security* demands that . . . *violating the government's trust* . . . be prosecuted and prosecuted vigorously."<sup>104</sup> The first practical problem is that the Justice Department has been unable to show publicly how Drake's behavior, which it classifies as violating the government's trust, actually impacts national security. From a legal perspective, this sort of prosecution is also problematic because it warps the intentions of the Espionage Act to punish leakers rather than traditional spies and saboteurs. 18 U.S.C. § 793(d) prohibits individuals in Drake's positions from willfully disclosing

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PROTECTION BOARD REPORT, WHISTLEBLOWING IN THE FEDERAL GOVERNMENT: AN UPDATE (1993). Fear of retaliation is also a common concern.

<sup>102</sup> Initially, commentators believed the Obama Administration would be more friendly to Whistleblowers. President Obama himself equated whistleblowing to "acts of courage and patriotism" and suggested the federal government "need[s] to empower federal employees as watchdogs of wrongdoing and partners in performance. Ethics-Agenda, Change.gov, at [http://change.gov/agenda/ethics\\_agenda/](http://change.gov/agenda/ethics_agenda/) (last visited Mar. 31, 2011). Former Department of Justice whistleblower Jesselyn Radack has a good analysis of the situation at <http://www.whistleblower.org/blog/31-2010/573-transparency-obama-justice-department-now-jailing-whistleblowers->.

<sup>103</sup> Brief for Government Accountability Project as Amici Curiae Supporting Defendant at 9, *United States v. Thomas* (D.MD 2010) (No. RDB-10-CR-181).

<sup>104</sup> Scott Shane, *Former N.S.A. Official Is Charged in Leaks Case*, N.Y. TIMES, Apr. 15, 2010, at A18 (emphasis added).

information relating to national defense to those not authorized to receive it if they have reason to believe that the disclosure of such information could be used to injure the United States or aid some foreign power. Because the Espionage Act lacks a specific intent requirement, Stephen Vladeck observes that shoehorning the Act to fit non-espionage cases broadly expands the scope of the law, undermining whistleblower protections and creating “an increasingly less benign” state of indeterminacy about the rules of law governing defense secrets.<sup>105</sup> New legislation clarifying this area of the law and the reach of the Espionage Act is warranted, especially a legislative determination of what circumstances the government must show to demonstrate actual damage to national security, but in the current environment, the prospect of an intemperate congressional response threatens to produce more leaks, less accountability, and ultimately, diminished security.<sup>106</sup> In the meantime, an effective watchdog press could improve public awareness of this situation via more vigorous reporting of the sort of Catch-22 in which leakers like Drake find themselves.

In contrast to the traditional profile of government whistleblowers, the case of Pfc. Bradley Manning is *sui generis*. Manning stands accused of being the source of the stream of revelations, ranging from the mundane to the embarrassing and potential illegal, about American foreign policy goals and military objectives. As a matter of law, the Uniform Code of Military Justice applies to Manning’s conduct as a member of the U.S. Army, and after an additional charge of “aiding the enemy” under Article 104 of the U.C.M.J., Manning is now threatened with capital punishment if convicted.<sup>107</sup> Under Article 104, anyone who “gives intelligence to or

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<sup>105</sup> *Hearing on the Espionage Act and the Legal and Constitutional Implications of WikiLeaks Before the H. Comm. On the Judiciary* (2010) (statement of Stephen Vladeck, Professor of Law, American University).

<sup>106</sup> Blanton, *supra* note 67.

<sup>107</sup> See U.C.M.J. art. 104. According to the Army, it will not be seeking the death penalty against Pfc. Manning. See MDW Public Affairs, *Manning faces more charges for classified leaks*, Mar. 4, 2011, at <http://www.army.mil/news/2011/03/04/52773-manning-faces-more-charges-for-classified-leaks/>.

communicates or correspond with or holds any intercourse with the enemy, either directly or indirectly” may be found guilty of aiding the enemy.<sup>108</sup>

As yet, the military’s theory behind the prosecution is unclear. For one, exactly who the “enemy” was that Pfc. Manning is accused of aiding is unclear. While the Military Judges’ Benchbook, “enemy” may be broadly defined to include not only organized opposing forces in times of war but also “any other hostile body” such as mobs and bands of renegades, including citizens of belligerent power.<sup>109</sup> There is some speculation that the government is trying to include WikiLeaks founder Julian Assange within this definition,<sup>110</sup> but in the meantime, the more probable legal point of attack is that Manning’s information indirectly benefitted entities ranging from Islamic terrorists to the Iranian government using WikiLeaks as a conduit. In that case, according to Kevin Jon Heller, the military’s argument may not satisfy the notion of indirectly aiding the enemy envisioned by the Manual for Courts Martial.<sup>111</sup> While Manning’s intent is technically irrelevant, because the case rests on the supposition that any assistance was indirect, more proactive behavior on the part of the accused seems to be envisioned under both the offense of “giving intelligence to the enemy” and “communicating with the enemy.”

Ultimately, the military has two arguments under Article 104(2). The first is that Manning provided information to WikiLeaks indirectly with the intention that it would benefit some enemy. The problem with this theory is that Military Judges’ Benchbook seems to suggest that Article 104(2) does not apply to press leaks, specifically adding an intent element where

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<sup>108</sup> U.C.M.J. art 104(2).

<sup>109</sup> See Military Judges’ Benchbook 324-35 (2010).

<sup>110</sup> See *Assange Attorney: Secret grand jury meeting in Virginia on WikiLeaks*, CNN, Dec. 13, 2010, at [http://articles.cnn.com/2010-12-13/justice/WikiLeaks.investigation\\_1\\_julian-assange-WikiLeaks-case-grand-jury?\\_s=PM:CRIME](http://articles.cnn.com/2010-12-13/justice/WikiLeaks.investigation_1_julian-assange-WikiLeaks-case-grand-jury?_s=PM:CRIME).

<sup>111</sup> Kevin Jon Heller, *Did Bradley Manning “Aid the Enemy”? Did the New York Times?*, OPINO JURIS, Mar. 2, 2011, <http://opiniojuris.org/2011/03/02/did-bradley-manning-aid-the-enemy-did-the-new-york-times/>.

indirect communication with an enemy is done via an intermediary such as WikiLeaks or the professional press.<sup>112</sup> While Manning may have intended to release information, there is no evidence that he intended to direct that information to terrorists. The distinction is slight but essential. In fact, Manning appears to have envisioned himself as a classic whistleblower, arguing that the leaked information belonged in the public domain.<sup>113</sup> The second theory argues that the simple act of publishing information on the internet serves as either indirectly giving intelligence or indirectly communicating with the enemy. As Heller points out, the problem with this theory is that if Manning has aided the enemy in this way, so then has any press outlet that published the information that he stole.<sup>114</sup>

Predictably, the press is concerned about the suggestion that it has aided the enemy. Responding to calls that media outlets be prosecuted under the Espionage Act, Benjamin Wittes, who writes often on the use of “lawfare,” admitted this theory would cover news stories, his blogging, and make “felons of us all.”<sup>115</sup> The obvious response is that act of revealing this sort of information is constitutionally protected, which likely shields the press from legal prosecution.

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<sup>112</sup> Military Judges’ Benchbook 324 (2010). The model specification shows that the accused “indirectly by publishing” or via “a newspaper” communicates with the enemy when that “communication was intended to reach the enemy.” *Id.*

<sup>113</sup> In a series of purported conversations between computer hacker Adrian Lamo and Manning, he attempts to justify the leak as a “public good.” “i want people to see the truth . . . regardless of who they are . . . because without information, you cannot make informed decisions as a public,” he writes. Kevin Poulsen & Kim Zetter, *I Can’t Believe What I’m Confessing to You’: The WikiLeaks Chats*, WIRED, June 10, 2010, <http://www.wired.com/threatlevel/2010/06/WikiLeaks-chat/>. A number of former government officials conceded much of the information actually should have been or already was in the public domain.

<sup>114</sup> Heller, *supra* note 112.

<sup>115</sup> Michael Calderone, *If Assange is charged with espionage, what about news orgs?*, YAHOO! NEWS, Dec. 13, 2010, [http://news.yahoo.com/s/yblog\\_theoutline/20101213/ts\\_yblog\\_theoutline/if-assange-is-charged-with-espionage-what-about-news-orgs](http://news.yahoo.com/s/yblog_theoutline/20101213/ts_yblog_theoutline/if-assange-is-charged-with-espionage-what-about-news-orgs).

Manning is not in such a favorable legal position. While Daniel Ellsberg has argued passionately that Manning's actions were no different and no less laudable than his own,<sup>116</sup> there is one difference: Manning is a member of the U.S. Army. The Supreme Court has narrowed the scope of constitutional protection given to service members.<sup>117</sup> In *Parker v. Levy*, the Court held that the needs of the military required "a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it . . . Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."<sup>118</sup> It is likely the military would argue—and the Supreme Court would agree—that allowing the release of protected intelligence by a single twenty-one year-old could be both destructive to morale and corrosive to military discipline. For better or worse, military matters are accorded different treatment.

Politically, his situation is currently just as unfavorable. According to one legal analyst, the Army intends "to throw the book at Manning" to not only punish him but to serve as a deterrent for future leaks.<sup>119</sup> Even as Daniel Ellsberg compares himself to Manning, no less than the Commander-in-Chief has rejected this comparison.<sup>120</sup> Whatever the courts and military

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<sup>116</sup> Sharon Weinberger, *Pentagon Papers Leaker Decries Manning Prosecution in WikiLeaks Case*, AOL NEWS, Mar. 3, 2011, <http://www.aolnews.com/2011/03/03/pentagon-papers-leaker-daniel-ellsberg-calls-campaign-against-wh/>.

<sup>117</sup> Linda Sugin argues that only service members in combat during wartime should have fewer constitutional protections. "Most military personnel should be treated as a part of the civilian community," she writes, "equally protected by the Constitution under which the rest of American society functions." Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 857 (1987).

<sup>118</sup> *Parker v. Levy*, 417 U.S. 733, 758-59 (1974).

<sup>119</sup> *WikiLeaks: Bradley Manning faces 22 new charges*, CBS/AP, Mar. 2, 2011, <http://www.cbsnews.com/stories/2011/03/02/national/main20038464.shtml>.

<sup>120</sup> Responding to a series of questions about Manning, President Obama stated:

determine, the case of Bradley Manning would appear to rest in the court of public opinion. As a simple practical, Heller argues that “there is still something profoundly disturbing about the prospect of convicting Manning and sentencing him to life imprisonment for doing exactly what media organizations did.”<sup>121</sup> The legal and political plight of Manning has not gone unnoticed, and it noteworthy that rampant criticism of Manning’s subsequent treatment while in preventative detention by the press eventually compelled the Defense Department to transfer Manning out of Quantico to a medium-security facility.<sup>122</sup>

### **III. The Overly Objective Watchdog**

Anonymity, confidential sources, and information leaks go hand-in-hand with secrecy, but the particular blend of objectivity which defines the professional press may be more insidious to foreign affairs reporting. The evolution of an objective press largely runs parallel to the development of a professional press,<sup>123</sup> and the press clings to objectivity as the foundation for responsible reporting. This type of reporting disclaims bias in any form, but it has the

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If I were to release material I weren’t allowed to, I’d be breaking the law. We’re a nation of laws! We don’t let individuals make their own decisions about how the laws operate. [Manning] broke the law.

When pressed to distinguish between Manning and Ellsberg, the President stated that “Ellsberg’s material wasn’t classified in the same way.” Subsequently, his remarks on a pending criminal matter were heavily criticized as a breach of presidential protocol. See, e.g., Michael Whitney, *Obama on Manning: “He Broke the Law.” So Much for that Trial?*, FIREDOGLAKE, Apr. 22, 2011, <http://fdlaction.firedoglake.com/2011/04/22/obama-on-manning-he-broke-the-law-so-much-for-that-trial/>; MJ Lee & Abby Phillip, *Barack Obama on Bradley Manning: “He broke the law”*, POLITICO, Apr. 25, 2011, <http://www.politico.com/news/stories/0411/53601.html>.

<sup>121</sup> Heller, *supra* note 112.

<sup>122</sup> According to *The Washington Post*, negative publicity from sources as diverse as Amnesty International, the United Nations, and former State Department spokesmen P.J. Crowley compelled the Defense Department to reevaluate Manning’s situation. See, e.g., Ellen Nakashima, *WikiLeaks suspect Manning will be transferred from Quantico to Fort Leavenworth*, WASH. POST, Apr. 19, 2011, [http://www.washingtonpost.com/world/WikiLeaks-suspect-manning-will-be-transferred-from-quantico-to-fort-leavenworth/2011/04/19/AFFJp97D\\_story.html](http://www.washingtonpost.com/world/WikiLeaks-suspect-manning-will-be-transferred-from-quantico-to-fort-leavenworth/2011/04/19/AFFJp97D_story.html). After calling Manning’s treatment “ridiculous and counterproductive and stupid,” P.J. Crowley was forced to resign from the State Department.

<sup>123</sup> See generally DAVID MINDICH, *JUST THE FACTS: HOW “OBJECTIVITY” CAME TO DEFINE AMERICAN JOURNALISM* (1998).

fundamental feature of making the press a neutral rather than antagonist body vis-a-vis the government.

The initial problem presented is how to go about defining what *objectivity* is. In its modern form, objectivity demands that professional journalists take on a passive role in their reporting.<sup>124</sup> When it comes to foreign affairs, this passivity plays directly into the government's hands. Government has a tremendous capability to advance its causes without extensive public awareness as the thousands of pages of the Federal Register and the day-to-day actions of Congress can attest. However, the veneer of professional objectivity through which the mainstream media reports upon the government grants it a tremendous advantage in shaping public debate and advancing its preferred position. According to one hypothesis, the breakdown occurs when “independently obtained information differing from that offered by officials puts news organizations in the uncomfortable position of deciding whether and how strongly to challenge official claims.”<sup>125</sup> Though much of this problem is the result of entrenched rules in Washington press politics, modern objective journalism requires two sides for our neutral press to balance between. It refuses to make its own decisions that might appear to require a value judgment. For example, *The Washington Post* could not and would not refer to the Abu Ghraib scandal as torture without being handed additional outside sources.<sup>126</sup> Absent a strong voice with which to contrast the official line, the passivity demanded by modern objectivity weakens the confrontational capacity of the press.

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<sup>124</sup> *Id.* at 8-10 (1998). Mindich points out that “objectivity” is by its very nature slippery and illusive to define. “Since it is often defined in negatives—a lack of bias, a lack of party affiliations, a lack of sensationalism—one is left with the impression that ‘objective’ journalists do not do much of anything,” he writes. *Id.* at 6.

<sup>125</sup> W. LANCE BENNETT ET AL, *WHEN THE PRESS FAILS* 5 (2007).

<sup>126</sup> *Id.* at 148.

As *The Washington Post's* Paul Taylor described objective journalism, the inevitable result will be that the press cedes ground to authority:

Sometimes I worry that my squeamishness about making sharp judgments, pro or con, makes me unfit for the slam-bang world of daily journalism. Other times I conclude that it makes me ideally suited for newspapering—certainly for the rigors and conventions of modern ‘objective’ journalism. For I can dispose of my dilemmas by writing stories straight down the middle. I can search for the halfway point between the best and the worst that might be said about someone (or some policy or idea) and write my story in that fair-minded place. By aiming for the golden mean, I probably land near the best approximation of truth more often than if I were guided by any other set of compasses—partisan, ideological, psychological, whatever . . . . Yes, I am seeking truth. But I’m also seeking refuge. I’m taking a pass on the toughest calls I face.<sup>127</sup>

While this formulation of “golden mean” journalism is problematic on a number of levels, it is most dangerous when the government persuades the press that an issue is within the interest of national security. National security issues are often those most cloaked in secrecy, but they also present occasions for the government to generate bipartisan consensus that can serve as the foundation for promoting its agenda. These conditions allow the government “to define reality as they see fit,”<sup>128</sup> distorting and clouding the golden mean Taylor would pursue at the same time. Once a consensus develops in government, the objective press will never find an opposing view strong enough to achieve any sort of golden mean.

This produces an even larger problem. The defect of the national media is rooted in a behavioral constant that pervades its reporting: the professional press is disinclined to call a lie a lie or to label any entity, especially an individual within government, a liar. Shedding the self-prescribed, faux-politic reporting etiquette which is plaguing American journalism would likely generate the sort of “bias” defended by the press as unbecoming of objective journalism.<sup>129</sup> Alas, the press's challenge, as I.F. Stone's famous maxim states, is that “every government is run by

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<sup>127</sup> PAUL TAYLOR, *SEE HOW THEY RUN* 27 (1990).

<sup>128</sup> BENNETT, *supra* note 126, at 4.

<sup>129</sup> FINNEGAN, *supra* note 7, at xviii (2007).

liars and nothing they say should be believed,” but the mainstream press stubbornly resists taking on a more critical role. If anything, media figures are quick to brush aside suggestions that they should more accurately confront government officials.<sup>130</sup>

#### **IV. Lessons from the Past**

Much of the recent hyperbolic criticism has centered on September 11<sup>th</sup> as somehow a tipping point in the failure of the watchdog press. Press critic Jay Rosen points to precisely November 8<sup>th</sup>, 2002, as the day the watchdog press died.<sup>131</sup> But that may be going too far.

If we insist that the press be free from government control, it cannot be said that the press has been—or ever will be—free from government influence. Arguably, since the rise of journalism as a profession, the professional press has been repeatedly exploited by government. During the height of McCarthyism, the press would lament the “frozen patterns of journalism that inhibit us.”<sup>132</sup> As Douglass Cater described the situation in 1950, the objective lens in which

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<sup>130</sup> An exchange between ABC's Ted Koppel and the Daily Show's Jon Stewart during the 2004 Democratic National Convention is illustrative:

TED KOPPEL: (Off Camera) But it's not just a catharsis for you, it's a catharsis for your viewers. Those who watch say at least when I'm watching Jon, he can use humor to say, BS. You know, that's a crock . . . Okay, but I can't, I can't do that.

JON STEWART: No. But you can say that's BS. You don't need humor to do it, because you have, what I wish I had. Which is credibility, and gravitas, this is interesting stuff. And it's all part of the discussion, and I think it's a good discussion to have, but I also think that it's important to take a more critical look, you know? Don't you think?

TED KOPPEL: (Off Camera) No.

*Nightline with Ted Koppel*, Transcript, Democratic National Convention, July 28, 2004.

<sup>130</sup> Late last year, in response to Ted Koppel's lament that the cable news is the “death of real news,” Keith Olbermann similarly called out the mainstream media's ambivalence: “Insist long enough that the driving principle behind the great journalism of the television era was neutrality and objectivity and not subjective choices and often dangerous evaluations and even commentary and you will eventually leave the door open to pointless worship at the temple of a false god.” Keith Olbermann, *False promise of 'objectivity' proves 'truth' superior to 'fact,'* MSNBC, Nov. 15, 2010.

<sup>130</sup> Jay Rosen drew the ire of NBC's David Gregory, host of *Meet the Press*, when he suggested the program “fact-check” their guests. Gregory suggested “people can fact-check *Meet the Press* every week on their own terms.”

<sup>131</sup> Rosen, *supra* note 86.

<sup>132</sup> Douglass Cater, *The Captive Press*, Nieman Reports (1950), available at <http://www.nieman.harvard.edu/reports/article/100553/1950-The-Captive-Press.aspx>.

coverage of government was conducted was one such frozen pattern: “The “straight” reporter has become a sort of straitjacketed reporter. His initiative is hog-tied so that he cannot fulfill his first duty, which is to bring clearer understanding to his reader. It results in a distortion of reality.”<sup>133</sup> Unable or unwilling to delve into motives and tangential issues except as they become part of the public record, straight reporting could engender a sort of “professional callousness” that turns the press into as passive an observer as the average citizen. There is no better example of this than the press's behavior in August 1964. While criticism of the Vietnam War is often held up as the paradigm of the watchdog press, the press's initial reporting in of the Gulf of Tonkin affair was driven entirely by the government.<sup>134</sup> The press willingly presented false government claims as facts which directly led to the acceleration of American involvement in Vietnam.

The press's failings with regard to these types of issues are not new—they may in fact be systemic. The rise of the mass media in the 1940s produced the exact same sort of public scrutiny and concerns about the press's functionality which it faces today.<sup>135</sup> The Commission on Freedom of the Press, better known as the Hutchins Commission, issued a landmark report in 1947 on the threats and challenges facing the mid-century press. Composed of a number of distinguished scholars and legal academics, the report was denounced as the action of “totalitarian tinkers” by the press in its time even as its recommendations were considered to be largely “toothless” by the project's supporters.<sup>136</sup> Nevertheless, the problems afflicting

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<sup>133</sup> *Id.*

<sup>134</sup> NORMAN SOLOMON, *HABITS OF A HIGHLY DECEPTIVE MEDIA* 58-60 (1999). According to *Washington Post* reporter Murrey Marder, news coverage of the event was “all driven by the White House. . . . It was an operation—a deliberate manipulation of public opinion.” *Id.* Cf. POWE, JR., *supra* note 34, at 296 (discussing the limitations of the press, Powe cautions that “the Vietnam War was lost in Southeast Asia, not on American television—a point recognized today by the Army's official Center of Military History”).

<sup>135</sup> See Victor Pickard, *Whether the Giants Should Be Slain or Persuaded to Be Good: Revising the Hutchins Commission and the Role of Media in a Democratic Society*, 27 *Critical Studies in Media Communications* 4, 391-411 (2010).

<sup>136</sup> BENNETT, *supra* note 126, at 180-82.

reporting identified by the Commission speak to the same sorts of concerns regarding the press that exist to this day. For our purposes, the Commission even took notice of the particular problem presented by inadequate coverage of foreign affairs. It warned that “the greatest danger” in presenting a comprehensive and accurate account of the day's events was posed by international events, cautioning that in the realm of foreign policies “it is no longer enough to report *the fact* truthfully. It is now necessary to report *the truth about the fact*.”<sup>137</sup>

The difficulty is that the Commission could provide no real solutions to the problems facing the press that could be illustrative now. It was wary of recommending an extensive role for government in regulating press behavior,<sup>138</sup> but as a practical matter, government involvement is not just generally viewed with skepticism but would also be counterintuitive to a project aiming to increase critical coverage of foreign affairs and national security. Cass Sunstein has recently suggested that the government embrace cognitive infiltration, a term suggesting a full spectrum assault involving information campaigns, propaganda, and covert action, to combat the sorts of destructive societal conspiracy theories which can undermine democratic debate.<sup>139</sup> This proposal ignores that covert government action and secrecy in general, discussed supra, are the chief motivators of conspiracy formulation.<sup>140</sup> For whatever positive role the government may have in making the press service democratic ends, there is likely no role for it in improving the press's watchdog function. The Commission had little to say about how to improve the

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<sup>137</sup> Commission 21-22 (1947).

<sup>138</sup> *Id.* at 80-90.

<sup>139</sup> Cass R. Sunstein & Adrian Vermeule, *Conspiracy Theories* (January 15, 2008). Harvard Public Law Working Paper No. 08-03; U of Chicago, Public Law Working Paper No. 199; U of Chicago Law & Economics, Olin Working Paper No. 387. Available at SSRN: <http://ssrn.com/abstract=1084585>

<sup>140</sup> *See, e.g.*, JEFFREY A. SMITH, *WAR AND PRESS FREEDOM* 225 (1999) (citing Rick Marin & T. Trent Gegax, *Conspiracy Mania Feeds Our Growing National Paranoia*, *Newsweek*, Dec. 30, 1996-Jan. 6, 1997, 64-66, 71).

watchdog press, proscribing a mixture of market-based solutions and self-regulation by citizen press organizations.<sup>141</sup>

While the Federal Trade Commission has already engaged in discussions on how the government can support the “reinvention” of journalism,<sup>142</sup> as a practical matter, it seem incongruous to expect the government has any incentive to improve press oversight and criticism of it. Even from a legal perspective, self-improvement by elements of the press may be the most for which our society can hope.

Though the government likely has little incentive to improve the press's capacity to criticize it, legally, self-regulation by the press may be the most for which society can hope. While the Supreme Court has tentatively accepted the role of government in supporting democratic ends via regulation of the broadcast spectrum, it has emphatically validated the watchdog function of a critical press to the exclusion of access or fairness in print journalism.<sup>143</sup> In *Miami Herald v. Tornillo*, the Court struck down a state law guaranteeing a right of reply to political candidates attacked by a newspaper. The case arose after *The Miami Herald* refused to run a reply by Pat Tornillo to a vicious editorial during his 1970 run for the state legislature. However, the lesson from *Tornillo*, as Lucas A. Powe argues, is the simple truism that legality is not synonymous with right.<sup>144</sup> In the period surrounding *Tornillo*, newspapers, including *The Miami Herald*, did self-regulate by opening up their op-ed pages, allowing more space for letters

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<sup>141</sup> See BENNETT, *supra* note 126, at 181.

<sup>142</sup> See FEDERAL TRADE COMMISSION, POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM (Jun. 2010), *available at* <http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf>.

<sup>143</sup> Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (holding that the First Amendment permits federal agencies to formulate fairness rules for editorial speech by broadcast stations) with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (granting more constitutional protection to the print medium than broadcast mediums).

<sup>144</sup> POWE, JR., *supra* note 34, at 285.

to the editor, and establishing ombudsman.<sup>145</sup> According to *The New York Times*, the goal in creating the “opposite-editorial” was “to afford greater opportunity for exploration of issues and presentation of new insights and new ideas by writers and thinkers who have no institutional connection with the *Times* and whose views will very frequently be completely divergent from our own.”<sup>146</sup>

These are all positive developments in fulfilling the press's potential democratic function, but merely opening up op-ed pages has not proven to enhance the press's capacity to act as a watchdog. Ombudsmen are ignored. The press's reliance upon objectivity and anonymity in the face of government spin shut out opposing views. Thus, the challenge is to orient the press back toward an adversarial position vis-a-vis government and away from the professional notion of serving as neutral arbiter.

## **V. Improving the Watchdog Function**

Oddly, the Hutchins Commission's casual recommendation that the market and efforts by citizens could improve the press's watchdog ability may be more feasible now than six decades ago. While the rise of the mass media threatened to consolidation of the press into fewer and fewer hands, the rise of new media has fundamentally shattered the old economic model of news gathering. According to the Project for Excellence in Journalism, the existential problem facing American journalism is not a lack of credibility or a captive audience but rather a dwindling pool of revenue.<sup>147</sup> Since 2000, the newspaper industry has lost roughly 30% of its reporting and editing capacity and the network news divisions and leading news magazines are fairing no

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<sup>145</sup> *Id.*

<sup>146</sup> *Editorial Statement*, Op-ed Page, N.Y. TIMES, Sept. 21, 1970, at 42.

<sup>147</sup> State of the News Media 2010, Introduction, Project for Excellence in Journalism, at [http://www.stateofthemediamedia.org/2009/narrative\\_overview\\_intro.php?media=1&cat=0](http://www.stateofthemediamedia.org/2009/narrative_overview_intro.php?media=1&cat=0).

better.<sup>148</sup> The market has spoken, and the free flow of information on the internet has dealt a devastating blow to traditional reporting. The result:

Reporting is becoming more participatory and collaborative. The ranks of news gatherers now include not only newsroom staffers, but freelancers, university faculty members, students, and citizens. . . . There is increased competition among the different kinds of news gatherers, but there also is more cooperation, a willingness to share resources and reporting with former competitors.<sup>149</sup>

This has produced regional news cooperatives and local investigative organizations, some such as *Voice of San Diego* are projects begun by philanthropists while others like *New England Center for Investigative Reporting* are based out of universities. In some form, these various individual and collective citizen efforts may represent the future of watchdog journalism. An ironic 2007 op-ed by Cass Sunstein continues this line of thinking. Endorsing both Friedrich von Hayek and WikiLeaks, Sunstein marveled at the potential of collaborative open-source initiatives to allow people to pool knowledge and aggregate the production of information.<sup>150</sup>

Alan Rusbridger, editor of the British daily, *The Guardian*, described his vision for the future of journalism as being “of the web” and not merely on the web:

This, journalistically, is immensely challenging and rich. Journalists have never before been able to tell stories so effectively, bouncing off each other, linking to each other (as the most generous and open-minded do), linking out, citing sources, allowing response – harnessing the best qualities of text, print, data, sound and visual media. If ever there was a route to building audience, trust and relevance, it is by embracing all the capabilities of this new world, not walling yourself away from them.

Two further points about this fluid, constantly-iterative world of linked reporting and response: first, many readers like this ability to follow conversations, compare multiple

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<sup>148</sup> *Id.*

<sup>149</sup> Downie & Schudson, *supra* note 8.

<sup>150</sup> Cass R. Sunstein, *A Brave New Wikiworld*, WASH. POST, Feb. 24, 2007, at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/23/AR2007022301596.html>. On Hayek, Sunstein writes that he “insisted that the knowledge of individuals, taken as a whole, is far greater than that of any commission or board, however diligent and expert.” Sunstein later notes that WikiLeaks is a dissident organization, planning “to post secret government documents and to protect them from censorship with coded software.”

sources and links. Secondly, the result is journalistically better – a collaborative-as-well-as-competitive approach which is usually likely to get to the truth of things, faster.<sup>151</sup>

What he is describing is professionalizing the blogosphere. Stephen Cooper argues that the blogosphere already may serve as the “watchdog's leash” because of its growing power to point out the press's errors, second-guess or argue for different interpretations of facts and reporting, and draw attention to insufficiently covered stories.<sup>152</sup> The challenge, however, is to encourage our national press to embrace this type of collaborative oversight.

Thus far, while citizen reporting has grown in prominence due to the expansion of the internet, it is still often looked down upon. William Keller, executive editor at the *New York Times*, has lamented how blogs “just throw opinions out there” while CNN anchors have railed against “the dark side” of the internet in the form of “anonymous bloggers” who are “bunch of cowards” that spread conspiracies, lunacies, and extremism.<sup>153</sup> The irony is that these sorts of recriminations are precisely what our national press engages in when it fails to effectively function as a watchdog. This disdain for the blogosphere is by no means a new phenomenon. David Mindich argues that the professional press defines itself by defining others as biased or illegitimate because, returning to our theme, it is easier than talking about the passive performance of our press.<sup>154</sup>

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<sup>151</sup> Alan Rusbridger, *The Hugh Cudlipp Lecture: Does Journalism Exist?* (Jan. 25, 2010), in *Guardian*, Jan. 25, 2010, at <http://www.guardian.co.uk/media/2010/jan/25/cudlipp-lecture-alan-rusbridger>.

<sup>152</sup> STEPHEN D. COOPER, *WATCHING THE WATCHDOG* 15 (2006).

<sup>153</sup> See Sammy Rose Salzman, *New York Times Editor Defends Press Credibility*, *THE JOHN HOPKINS NEWSLETTER*, Apr. 28, 2005, at <http://media.www.jhunewsletter.com/media/storage/paper932/news/2005/04/28/News/New-York.Times.Editor.Defends.Press.Credibility-2243464.shtml>; Glenn Greenwald, *CNN anchors attack the scourge of anonymity*, *SALON*, July 24, 2010, at [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/07/24/anonymity](http://www.salon.com/news/opinion/glenn_greenwald/2010/07/24/anonymity). Cooper argues against the negative characterizations of the blogosphere as “salivating morons” or as “parasites too stupid to realize they are killing off their hosts.” Cooper, *supra* note 91, at 291.

<sup>154</sup> MINDICH, *supra* note 124, at 141.

Standing against the prevailing mindset in America is, again, Rusbridger at the *The Guardian* who views combining the press's capacity with the expertise and agendas of citizens who wish to be active rather than passive participants in newsgathering as the “most interesting experiments” in journalism.<sup>155</sup> One illustration both as an experiment in journalism and as an example of Mindich's argument is *The New York Times* acquisition of the political polling blog, *FiveThirtyEight*. While the blog's founder, Nate Silver, has an espoused political ideology, he describes his work critiquing poll results “as a type of journalism” and *The New York Times* evidently agreed, featuring his content in the politics section of its website.<sup>156</sup> Immediately, the newspaper received criticism that its move would hurt the paper's objectivity even as it was acknowledged that *FiveThirtyEight* had improved the discourse on political polling during the 2008 election campaign.<sup>157</sup> The response seems more an industry defense mechanism than anything else: Nate Silver, a single partisan, had undermined the hegemony of the professional press to deliver the news, yet he was somehow *not* a journalist in the traditional sense. However, while our major news outlets continue to peddle their reputation as responsible journalists, but, as Mindich argues, reputation is not a tangible product but rather a byproduct of watchdog journalism, and in an age where information can be widely distributed at a moment's notice, functioning as a “passive mirror is less and less relevant.”<sup>158</sup>

Professional journalism has repeatedly failed to serve as a public watchdog when it comes to most of the major armed conflicts our country has engaged in over the past century.

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<sup>155</sup> Rusbridger, *supra* note 152.

<sup>156</sup> Nate Silver, *FiveThirtyEight to Partner with New York Times*, June 3, 2010, at <http://www.fivethirtyeight.com/2010/06/fivethirtyeight-to-partner-with-new.html>.

<sup>157</sup> Ben Smith, *Times Picks Up 538 and Avoids Mention of Ideology*, POLITICO, June 3, 2010, at [http://www.politico.com/blogs/bensmith/0610/Times\\_picks\\_up\\_538\\_and\\_avoids\\_mention\\_of\\_ideology.html](http://www.politico.com/blogs/bensmith/0610/Times_picks_up_538_and_avoids_mention_of_ideology.html). Smith criticized Silver as being “one of a new group of journalists who aim to replace the studied neutrality old [mainstream media] types like me practice. . . .” (emphasis added).

<sup>158</sup> MINDICH, *supra* note 124, at 141.

Media scholar Robert McChesney argues that the yellow journalism which drove the Spanish-American War is not much different from the professional reporting leading up to the Iraq War.<sup>159</sup> He believes this is because reporters “who question agreed-upon assumptions by the political elite stigmatize themselves as unprofessional and political.” This dilemma is not faced by the average citizen: after President Bush was viciously criticized during a town hall meeting by a private citizen, *The Washington Post* reported, without irony, that “no one had really gotten in Bush's face. No one had really confronted him so directly on the issues of war and liberty that are at the heart of both his presidency and his political troubles. And no one had given him the opportunity to look unbothered by dissent.”<sup>160</sup> What our professional press possesses is clearly not so much reputation as it is capacity or in agenda-setting,<sup>161</sup> and this is what has been effectively ceded to government. While technology has made it possible for average citizens to influence a story's total impact, the blogosphere relies heavily on the national newspapers and broadcast networks for their information.<sup>162</sup> Utilizing the talents of individuals and citizen

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<sup>159</sup> ROBERT MCCHESENEY, *THE PROBLEM OF THE MEDIA: U.S. COMMUNICATIONS POLITICS IN THE 21<sup>ST</sup> CENTURY* 74 (2004).

<sup>160</sup> Peter Baker, *Bush Faces Rare Audience Challenge in N.C.*, WASH. POST., Apr. 7, 2006, at <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/06/AR2006040601828.html>. Robert Talyor had told President Bush the following:

You never stop talking about freedom, and I appreciate that. But while I listen to you talk about freedom, I see you assert your right to tap my telephone, to arrest me and hold me without charges, to try to preclude me from breathing clean air and drinking clean water and eating safe food. . . .What I want to say to you is that I, in my lifetime, I have never felt more ashamed of, nor more frightened by, my leadership in Washington.

<sup>161</sup> POWE, JR., *supra* note 35, at 296. Powe argues that the press “is far better at its Fourth Estate function of checking than it is with the right-to-know duty of initiating. Its power, at its peak, is that of agenda setting; it does not, and cannot, force action. . . . And it was not the *Post* or the *Times* that gave the House impeachment inquiry its momentum; it was the instant gut reaction of the American people to Nixon's sacking of Archibald Cox, Elliot Richardson, and William Ruckelshaus in the Saturday Night Massacre.”

<sup>162</sup> According to the Project for Excellence in Journalism, 99% of all stories linked to in blogs originate from newspapers or news networks and, astoundingly, 80% of those links are derived from the BBC, CNN, the *Washington Post*, and the *New York Times*. *New Media, Old Media*, Pew Project for Excellence in Journalism, May 23, 2010, at [http://www.journalism.org/analysis\\_report/new\\_media\\_old\\_media](http://www.journalism.org/analysis_report/new_media_old_media).

groups, however, the press's ability to shape the agenda can be augmented, and, in the case of national security reporting, perhaps be legitimized by the concerns of the public.

The example of the moment is obviously the stateless news organization known as WikiLeaks. Behind the imposing figure of Julian Assange lies this new model of journalism: a collaborative effort by non-professional, non-journalist citizens working in tandem with the professional press to set an agenda. WikiLeaks is not objective; while its information is delivered from anonymous sources, it presents physical evidence as its facts. WikiLeaks specifically aims to counteract the sort of anonymity and objectivity criticized supra. According to Assange, the organization practices the ideal of “scientific journalism” based on presenting primary sources to support every bit of information it makes available. Assange further insists upon differentiating between “journalistic balance” and accuracy and fairness. “The truth is not revealed by balancing the lies of competing powergroups,” he argues.<sup>163</sup> WikiLeaks aims to report around government secrecy and deception in order to reveal precisely how our government pursues our foreign policies.

The government's response has been predictably self-serving: while lauding that “even in authoritarian countries, information networks are helping people discover new facts and making governments more accountable,” Secretary of State Clinton has turned around and insisted, absent any evidence, that the work of WikiLeaks “puts people’s lives in danger, threatens our national security and undermines our efforts to work with other countries to solve shared problem.”<sup>164</sup> Julian Assange has subsequently been hounded by law enforcement agencies and

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<sup>163</sup> Jesselyn Radack, *Jon Stewart Agrees on Drake Case; Wikileaks May Be the Only Option Left for Whistleblowers*, GOVERNMENT ACCOUNTABILITY PROJECT, June 16, 2010, <http://www.whistleblower.org/blog/31-2010/610-wikileaks-may-be-the-only-option-left-for-whistleblowers-hotlist>.

<sup>164</sup> *Compare* Hilary Clinton, Sec'y of State, Remarks on Internet Freedom, Jan. 21, 2010, at <http://www.state.gov/secretary/rm/2010/01/135519.htm> with Nicole Gaouette, *WikiLeaks Release of Cables Puts*

our government has intervened to cut off his financial resources, a script similarly suffered by Daniel Ellsberg after he released the Pentagon Papers. In a new study, Yochai Benkler has argued that the U.S. government has exercised “extralegal” efforts to censor Wikileaks and has enlisted a complicit press to assist it.<sup>165</sup>

Indeed, it is remarkable to witness our so-called watchdog press take such a critical stance against WikiLeaks:

The freedom of the press committee of the Overseas Press Club of America in New York City declared him "not one of us." The Associated Press, which once filed legal briefs on Assange's behalf, refuses to comment about him. And the National Press Club in Washington, the venue less than a year ago for an Assange news conference, has decided not to speak out about the possibility that he'll be charged with a crime.<sup>166</sup>

The press itself has insisted that WikiLeaks function is only “superficially similar” to Daniel Ellsberg's release of the Pentagon Papers to *The New York Times*.<sup>167</sup> *The New York Times* counsel in *Pentagon Papers*, Floyd Abrams, has similarly denounced WikiLeaks in a prominent piece in *The Wall Street Journal*:

WikiLeaks is different. It revels in the revelation of "secrets" simply because they are secret. It assaults the very notion of diplomacy that is not presented live on C-Span. It has sometimes served the public by its revelations but it also offers, at considerable potential

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“*People's Lives in Danger,*” *Clinton Says*, BLOOMBERG, Nov. 29, 2010, at <http://www.bloomberg.com/news/2010-11-29/WikiLeaks-release-of-cables-puts-people-s-lives-in-danger-clinton-says.html>.

<sup>165</sup> See Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the soul of the Networked Fourth Estate* (forthcoming 2011).

<sup>166</sup> Nancy A. Youssef, *In WikiLeaks Fight, U.S. Journalists Takes a Pass*, MCCLATCHY, Jan. 9, 2011, at <http://www.mcclatchydc.com/2011/01/09/106445/in-WikiLeaks-fight-us-journalists.html>.

<sup>167</sup> See, e.g., David Martin, *WikiLeaks vs. the Pentagon Papers*, CBSNEWS, July 26, 2010, at [http://www.cbsnews.com/8301-503544\\_162-20011710-503544.html](http://www.cbsnews.com/8301-503544_162-20011710-503544.html) (“More fundamentally, the WikiLeaks documents *do not radically alter our understanding of the war*. They document what we've known for years - not enough troops, too many civilian casualties, a corrupt and inefficient Afghan government and an uncertain ally in Pakistan. The Pentagon Papers revealed that much of what the public had been told about the war in Vietnam was flat wrong and in many cases deliberately so.”) (emphasis added); David Corn, *Ground Truth from Afghanistan*, MOTHER JONES, July 26, 2010, at [http://motherjones.com/mojo/2010/07/ground-truth-afghanistan?utm\\_source=twitterfeed&utm\\_medium=twitter&utm\\_campaign=Feed:+Motherjones/mojoblog+\(MotherJones.com+|+MoJoBlog\)](http://motherjones.com/mojo/2010/07/ground-truth-afghanistan?utm_source=twitterfeed&utm_medium=twitter&utm_campaign=Feed:+Motherjones/mojoblog+(MotherJones.com+|+MoJoBlog)) (quoting *Foreign Policy's* Tom Ricks: A huge leak of U.S. reports and this is all they get? I know of more stuff leaked at one good dinner on *background*.).

price, a vast amount of material that discloses no abuses of power at all. . . . *The recent release of a torrent of State Department documents is typical.*<sup>168</sup>

Abrams not only reversed his prior, supportive position on leaks, but he has drastically narrowed the scope of the watchdog press. If one accepts Abrams' argument, so long as the government is not abusing its power, the press has a duty to keep its secrets. Such a description suits Vincent Norris' description of our press as the “watchdog that nips at the heels while carefully avoiding the jugular.”<sup>169</sup>

In the end, this returns us to the essential problem that appears when the press allows the government's preferred narrative to control public debate on foreign policy and national security. In a ponderous essay and critique of WikiLeaks, William Keller insists that there should be no doubt where *The New York Times*' sympathies “lie in this clash of values” against “murderous extremism,”<sup>170</sup> reflecting a sort of war footing plainly missing from most of its day-to-day reporting. Where this paper generally calls for *more* coverage of government secrecy, Gabriel Schoenfeld has taken the opposite tack, calling for the prosecution of *The Times* under the Espionage Act in order to set in motion the sort of “chilling effect” on expression by a press that he believes is placing us all at risk.<sup>171</sup> From his perspective, the trend to take away from the last have century has been greater transparency and openness in government, but “secrecy . . . is one of the most critical tools of national defense” for the war thrust upon us on September 11<sup>th</sup>.<sup>172</sup>

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<sup>168</sup> Floyd Abrams, *Why WikiLeaks Is Unlike the Pentagon Papers*, Wall Street J., Dec. 29, 2010, at <http://online.wsj.com/article/SB10001424052970204527804576044020396601528.html> (emphasis added).

<sup>169</sup> Vincent Norris is cited in David Allen's book, *DEMOCRACY, INC.*, 175 (2005).

<sup>170</sup> William Keller, *Dealing with Assange and the WikiLeaks Secrets*, N.Y. TIMES, Jan. 30, 2011, at MM32.

<sup>171</sup> Gabriel Schoenfeld, *Has the “New York Times” Violated the Espionage Act?*, COMMENTARY, Mar. 2006. See also GABRIEL SCHOENFELD, *NECESSARY SECRETS* 265-68 (2010).

<sup>172</sup> See SCHOENFELD, *supra* note 171, at 20-22. It is worth noting that while Schoenfeld claims he is not an “absolutist” on intelligence leaks, his categories of leaks—(1) inconsequential, (2) seriously damaging, and (3) gray areas where reasonable people can disagree—do not seem to admit any sort of classified intelligence revelation that would be in the public interest. See Interview by Alex Kingsbury with Gabriel Schoenfeld (June 11, 2010) ,

The difficulty with the global war on terror is that, as Schoenfeld concedes, it may have no end. Even as he would have us return to the era of the “patriotic press,” which carried on well into the early stage of Cold War, the faith the press had in Bryon Price’s Office of Censorship evaporated in the face of repeated lies by the government. According to a critique by Eric Posner, a simple sociological problem appears that when government persecutes journalists, the public assumes it is an effort to silence critics. Though Schoenfeld would scale back the voluntary discretion of the press and replace it with the force of statutes and the Department of Justice. However, government’s only response to such a state of affairs would be simply: “trust us.”<sup>173</sup>

History and practice generally suggests the public should not. Certainly no one institution, not the executive branch nor the professional press, should be the sole proper judge of what is an abuse of power. The great benefit of watchdog journalism is its potential to shine a light on all segments of government for the benefit of the public. At the close of 2010, CBS News revealed a list of national security stories uncovered by WikiLeaks, which included the following:

- The Obama Administration worked with Republicans to protect Bush Administration officials facing criminal investigation overseas for their involvement in torture policies;
- Middle Eastern rulers have urged the United States to attack Iran to destroy its nuclear program to stop the country from developing nuclear weapons;
- Despite public denials by government officials, the United States military had been conducting offensive operations inside Pakistan;

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available at <http://www.usnews.com/opinion/articles/2010/06/11/why-classified-secrets-should-be-kept-from-the-public>.

<sup>173</sup> See Eric A. Posner, *The Prudent and Imprudent*, THE NEW REPUBLIC, May 18, 2010, at <http://www.tnr.com/book/review/the-prudent-and-the-imprudent>.

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- Government officials failed to investigate hundreds of report of abuse, torture, rape, and murder by Iraqi police and soldiers.<sup>174</sup>

If as Justice Black declared in *Pentagon Papers*, the press was protected in order to “bare the secrets of government and inform the people,” are these stories unworthy of the attention of our watchdog press?

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<sup>174</sup> Joshua Newman, *How WikiLeaks Enlightened Us in 2010*, CBS NEWS, Dec. 31, 2010, at [http://www.cbsnews.com/8301-503543\\_162-20026591-503543.html](http://www.cbsnews.com/8301-503543_162-20026591-503543.html).