

2008

A Legion of Worries: National Security Reporting in the Age of the War on Terror

Katherine L. Johnson

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

 Part of the [Military, War, and Peace Commons](#), and the [National Security Law Commons](#)

Recommended Citation

Johnson, Katherine L. (2008) "A Legion of Worries: National Security Reporting in the Age of the War on Terror," *William Mitchell Law Review*: Vol. 34: Iss. 5, Article 5.

Available at: <http://open.mitchellhamline.edu/wmlr/vol34/iss5/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

A LEGION OF WORRIES: NATIONAL SECURITY REPORTING IN THE AGE OF THE WAR ON TERROR

Katherine L. Johansen[†]

Inspired by the William Mitchell College of Law's National Security Forum panel: "Right to Know vs. Wrong to Tell: The Collision Between the First Amendment and Executive Powers."

On June 7, 1942, the headline hit: "Navy had Word of Jap Plan to Strike at Sea."¹ Under it ran the *Chicago Tribune's* story suggesting that the United States had cracked Japanese naval codes.² President Roosevelt, then leading the nation through World War II, was furious.³ Until his advisors convinced him otherwise, the President's plan was to deploy marines to commandeer the *Tribune's* offices.⁴ Instead, federal prosecutors impaneled a grand jury to indict the paper.⁵ However, the government dropped the charges after realizing it would have to disclose additional classified information to secure an indictment.⁶ It was the closest the United States has ever come to prosecuting journalists for publishing classified information.⁷

Now the country wages a new war but struggles with the same issues regarding government and the press in wartime. Since 9/11, national security reporters have been charged with covering the War on Terror in ways that both inform and protect the public to the greatest extents possible. Weighing these competing interests

[†] Kate Johansen is a J.D. candidate at William Mitchell College of Law. She is the incoming Editor-in-Chief of the *William Mitchell Law Review* and a 2003 Truman Scholar.

1. *Navy had Word of Jap Plan to Strike at Sea*, CHI. TRIB., June 7, 1942, at 1.

2. *See id.*

3. Geoffrey R. Stone, Roy R. Ray Lecture: Freedom of the Press in Time of War (Apr. 4, 2006), in 59 SMU L. REV. 1663, 1668 (2006) [hereinafter Stone Lecture].

4. *Developments in the Law—The Law of Media*, 120 HARV. L. REV. 1007, 1009 n.12 (2007).

5. Stone Lecture, *supra* note 3.

6. *Id.*

7. *Id.*

is not an easy task, as debate over recent national security stories has shown. From revealing legally dubious wiretapping programs to unveiling how the Treasury Department tracks terrorist finances to uncovering the CIA's secret overseas prisons, these stories are controversial not only for their subject matter but also for whether the public should know about them at all.

This controversy brings consequences. Even in cases less dramatic than exposed code-cracking, national security reporters run an inescapable risk of incurring legal penalties in the course of their daily work. As Jane Mayer, who covers national security issues for the *New Yorker* puts it, “[l]egal worries are legion in this kind of reporting.”⁸

Consequently, inside each national security story there exists a second story, a shadow story, a story of how the press navigates the legal obstacles inherent in national security coverage. These stories are animated, explains Mayer, by the theme of tension between security and liberty. “Any story that illustrates this tremendously difficult balancing act is going to be of national interest,” she states. That is why it is important to examine this tension not only in the substance but also in the practices of American news. That is why this is a process story.

I. NOT YOUR TYPICAL BEAT

What turns a Washington whisper into a national headline? How do national security reporters wrest from a taciturn Potomac scoops that may elicit shouts of protest? In a field characterized by concealment, how do national security journalists even find stories? Mary Louise Kelly, who covers the topic for National Public Radio, states that cold calling is not an option.⁹ “You must be out there,” she asserts. The best methods, according to Kelly, are to attend conferences, network at social events, and befriend scholars. The goal is simple, she states: obtain any information possible.

Mark Mazzetti, a national security reporter for the *New York Times*, offers similar insight; the answer is simply to talk to people.¹⁰

8. E-mail from Jane Mayer, Journalist, *The New Yorker*, (Dec. 17, 2007) (on file with author). All Mayer commentary emanates from this source.

9. Mary Louise Kelly, Correspondent, National Public Radio, Remarks at the William Mitchell College of Law National Security Forum: Right to Know vs. Wrong to Tell (TPT television broadcast Oct. 25, 2006). All Kelly commentary emanates from this source.

10. Telephone Interview with Mark Mazzetti, Reporter, *New York Times* (Dec.

Beyond obtaining information, it is important for a reporter to establish himself in the field, a feat that, according to Mazzetti, takes at least a year. Casual conversations with scholars at universities and security world think tanks are the most helpful; these scholars often have government experience but are freer to talk than current government officials, he explains. The process seems relaxed; according to Mazzetti, formal interviews are rare. This informality seems well-suited to national security reporting though. There are no daily briefings, so national security news has a more unpredictable rhythm than other areas. Instead, Mazzetti explains, “enterprise reporting,” where journalists identify and develop stories as they find them, is the norm.

What developments catch an enterprising reporter’s eye? Mayer shares, “I look for stories that interest me, principally, and assume they will probably interest others as well.” She says the best stories deal with serious issues but offer colorful personalities and narrative touches, propelling the reader in a way that fiction might—with momentum and suspense. While it is hard to obtain sufficient detail to write that type of story in this “forbidden and secret area of reporting,” says Mayer, it is not impossible.

Of course, a story has no more value than fiction without adequate sourcing, and sourcing national security stories is uniquely challenging. Mayer has found that many people will talk if a reporter networks well, is persistent, and shows her competence. Still, she admits, national security information is harder to get. The most difficult aspect, she continues, is that national security sources often face greater legal repercussions than other sources. In fact, many face criminal charges if they even speak with reporters. Potential prosecution for publishing a story further magnifies the difficulty of getting sources to confide, Mayer adds. Mazzetti, who covered politics for *U.S. News & World Report* before starting at the *New York Times*, illustrates the difference between national security and other news sources as follows: “If you’re covering the Hill, most people want to see their names in the paper. If you’re covering national security, most people get in trouble if they see their names in the paper.”

Because national security sources face serious consequences for providing information, many require anonymity. While journalists should never abuse anonymous sources, says Mazzetti,

12, 2007). All Mazzetti commentary emanates from this source.

they are essential to reporting on national security. An exchange between Dana Priest, a *Washington Post* reporter who won a Pulitzer Prize for uncovering the CIA's secret overseas prisons, and a Minneapolis reporter demonstrates how protective these journalists are of their sources.¹¹ When asked how she verified the prisons' existence, Priest replied, "You know, it's a tough one to answer because there are people who are alleging that they're going to try to find my sources. So, I'm reluctant to talk about how I go about doing it . . ." Following up, the interviewer asked Priest if she was concerned about facing legal consequences similar to those being faced at the time by fellow reporter Judith Miller.¹² Priest responded, "I wouldn't normally talk about my sourcing and the way I go about it anyway because the people that talk to me do it because they know I won't reveal anything that would lead people to understand who they are because so much for them is at stake . . ." Mazzetti expands on the same sentiment: "If [sources] can't trust you, that's it."

While reporters must strive to be trustworthy, their sources are not similarly obligated. Sources may speak at great personal risk, but their reasons are not always altruistic or even benign. Priest reasons that "[p]eople always have their own motives for opening up to reporters. The most common are that they want to tell 'their side' of a story, or to shape the public's understanding of events, or plant their place in history."¹³ Mayer explains that a reporter also runs a greater risk of being manipulated on national security stories because so many of the sources are master secret keepers. The manipulation risk is enhanced, she continues, because many sources speak only anonymously, and there are no documents to verify information. As a result, a reporter needs multiple sources to confirm stories and must run them by official channels, like the CIA spokesperson, if only to know every possible version of a story before running it.

11. Sid Pranke, *Interview: Dana Priest on Secret Gulags, CIA, and War*, PULSE OF THE TWIN CITIES, Dec. 1, 2005, <http://www.pulsetc.com/article.php?sid=2182>. Unless otherwise noted, all Priest commentary emanates from this source.

12. Judith Miller, of course, is the *New York Times* reporter imprisoned for eighty-five days in 2005 for refusing to reveal two Bush administration officials who leaked the identity of CIA agent Valerie Plame.

13. Q & A with Post Reporter Dana Priest, <http://discuss.washingtonpost.com/wp-srv/zforum/99/nat092199.htm> (last visited Mar. 30, 2008).

II. TO PUBLISH OR NOT TO PUBLISH?

Even after a reporter has identified, developed, and sourced a story, every aspect must be vetted for publication. While legal issues arise at every stage of the journalistic process, they are perhaps most prominent at this stage. Bill Keller, executive editor of the *New York Times*, declares: "I always start with the premise that the question is, why should we *not* publish? Publishing information is our job. What you really need is a reason to withhold information."¹⁴

This baseline presumption is less clear in operation than in theory; what qualifies as a reason to withhold? The *New York Times* waited a year to break the story of the NSA's wiretapping program, imparts Scott Shane, the reporter who wrote the story.¹⁵ The press suffered immense scrutiny for unveiling the government's almost certainly legal banking program to track terrorist finances. When the *Washington Post* ran its secret prisons story, Priest notes, the paper received as much hate mail as mail applauding her investigation. So what factors, ranging from professional duty to timing considerations to program legality to public reaction to, of course, national security concerns, should dominate the decision to publish controversial information?

Priest submits that reporters must make many judgment calls about what material to use to tell a story.¹⁶ That decision-making process inevitably involves collaboration. After all, while stories may start with a tip, quips Shane, they do not end there. Journalists agree that once they have a lead, their obligation is to talk to their editor and seek other sources. Once corroborated, a number of criteria could influence the publication decision. Naturally, safety is a primary concern; if publishing the details of an operation jeopardizes human safety or vital national security programs, it weighs strongly against publication. "It is not in anybody's interest, including the press's, to get anybody killed," maintains Mazzetti. Conversely, journalists have a duty to inform the public and report

14. Howard Kurtz, *Piling on the New York Times with a Scoop: Story on Secret Program Further Rouses Critics*, WASH. POST, June 28, 2006, at C01.

15. Scott Shane, Reporter, *New York Times*, Remarks at the William Mitchell College of Law National Security Forum: Right to Know vs. Wrong to Tell (TPT television broadcast Oct. 25, 2006). All Shane commentary emanates from this source.

16. Q & A with Post Reporter Dana Priest, <http://discuss.washingtonpost.com/wp-srv/zforum/99/nat092199.htm> (last visited Mar. 30, 2008).

government wrongdoing. Mayer posits that journalism should hold people accountable. “We don’t have faceless bureaucrats,” she argues. The desire to avoid delay during which a competitor may break the story is another consideration. One factor that journalists agree does not weigh in the publication decision is a story’s political effect. “Reporters want to write a story whether it helps or hurts [a particular political view],” says Mayer.

Still, national security reporters often consult with the government before running their stories. Mayer explains that it would be rare to run a story without talking to the CIA to fact check first. Beyond simple verification, a spirit of cooperation between government and the press animates the publication process. “It’s not an all or nothing situation,” imparts Mazzetti. “People think the press has a ‘stand firm’ attitude, but that’s not how it works. The press lets the government make its case.” According to Mazzetti, reporters usually present their information to pertinent government officials, identify potentially controversial portions, and, perhaps, eliminate non-critical details. “It’s usually a negotiation,” he concludes.

This exchange between government officials and the press promotes a beneficial dialectic. Quoting Max Weber, Shane emphasizes that “bureaucracy is addicted to secrets.” Thus, he contends, it is right that journalists should push to publish, and government should push to keep information secret. “Our society thrives on contests of interests,” he asserts. But does this tug of war maintain an effective balance? And what happens when one side pulls too hard, forcing the other to cross legal lines?

III. JUSTICE FOR JOURNALISTS

In June 2006, *Washington Post* media critic Howard Kurtz wrote an article cataloguing responses to the *New York Times*’ decisions to out the Bush administration’s wiretapping and banking programs.¹⁷ In it, Kurtz cites William Bennett, a conservative pundit, who notes that the “cumulative impact” of the two *Times* stories, along with the *Post*’s disclosure of secret CIA prisons, had brought tension between conservatives and the press to a “critical mass.”¹⁸ Kurtz further quotes Bennett as asking: “Gosh, is there a secret operation

17. See Kurtz, *supra* note 14.

18. *Id.*

we're running that *won't* be disclosed by the press?"¹⁹ While Bennett favors leak investigation to prosecution when the press reveals national security programs, the former Reagan official does not rule out legal action.²⁰ "Some of us have been saying for a long time that the press is not above the law. Sooner or later you have to prove that," declares Bennett.²¹ But how would one prove it? What legal issues do sources, the government, and reporters face when it comes to covering national security stories?

A. *Going Right to the Source*

Many national security stories start with a leak, where government employees provide sensitive information to those not authorized to receive it. In 2006, the Department of Justice began investigating journalists who published classified information; Senator Arlen Specter, chairman of the Senate Judiciary Committee, held a hearing on the investigation.²² At the hearing, he emphasized the dual nature of leaks; they can be harmful or useful.²³ Either way, national security reporting thrives on leaks.

Any benefit aside, leakers are criminally liable. The government may bring charges against employees who disclose information to which they had access solely through employment.²⁴ Still, most consider discharge, internal investigations, and leak regulation vastly preferable to prosecution. Some agencies augment statutory restrictions with more stringent rules. The CIA, for instance, prohibits unreported contact with reporters, regardless of what information is passed.²⁵ These limits may seem harsh, but public employees routinely agree to them. Because these employees know sensitive information only through

19. *Id.*

20. *Id.*

21. *Id.*

22. *The Department of Justice's Investigation of Journalists Who Publish Classified Information: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (opening remarks by Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) [hereinafter *Hearing*].

23. *Id.* at 1 ("Leaks are made for a variety of reasons, and while they have a very important social purpose, they also have the potential for harmful, deleterious effects on national security.").

24. See Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 946–47 (2006).

25. See R. Jeffrey Smith & Dafna Linzer, *Dismissed CIA Officer Denies Leak Role: Official Says Agency Is Not Asserting She Told of Secret Prisons*, WASH. POST, Apr. 25, 2006, at A01.

employment, legally binding discretion is perhaps not entirely inappropriate.

The intelligence community's classification system also influences the relationship between government and national security reporters. Classification guidelines are often vague; to avoid blame for under classification, employees over classify.²⁶ The government may also use classification to conceal errors.²⁷ Additionally, government employees maintain a First Amendment right to disclose even classified information in limited circumstances.²⁸ Unfortunately, classification appears to be a broken system; every blue ribbon panel that has studied U.S. defense and intelligence performance since 9/11 has emphasized the need for less secrecy and more transparency in this area.²⁹ Finally, expansions in classification usually accompany expansions of executive power, a threat that the press is traditionally expected to counteract. These flaws, Shane notes, make it difficult to use "classified" as the cut-off for publication.

B. *Prior Restraints and Patchwork Prosecutions*

National security journalists also face legal issues at every stage of reporting, including newsgathering. The acquisition of sensitive government documents is a longstanding journalistic custom. Still, reporters are not immune from criminal prosecution for illegal acts performed in pursuit of a story. Prosecuting journalists for illegal

26. Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185, 192–93 (2007) [hereinafter Stone, *Government Secrecy*].

27. See MATTHEW M. AID, DECLASSIFICATION IN REVERSE: THE U.S. INTELLIGENCE COMMUNITY'S SECRET HISTORICAL DOCUMENT RECLASSIFICATION PROGRAM (2006), available at www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB179.

28. Stone, *Government Secrecy*, *supra* note 26, at 193–94. Stone explains that the government may not punish an employee who releases classified information unless it meets two conditions. First, it must prove the disclosure is potentially damaging to the United States (a condition, Stone notes, that may be met implicitly by the fact that the information was classified). *Id.* Second, the government must prove the information was closely held and not available to the general public before the employee disclosed it. *Id.* Stone further argues that government employees must maintain a right to disclose classified information regarding unlawful government conduct because the government has no legitimate interest in concealing its own illegality while the public has a strong interest in learning of the government's actions. *Id.* at 195–96. This example in particular underscores why classification cannot be used as a hard cut-off for publication decisions.

29. AID, *supra* note 27 (introductory comments).

newsgathering is rare but not unprecedented.³⁰ Threats of prosecution seem more common and even equally effective.³¹

Attempts to prevent publication through enjoinder are another legal factor. The *Pentagon Papers* provides the most famous example.³² In that case, federal courts temporarily stayed publication of classified government studies detailing the origins of the Vietnam War.³³ (The Court ultimately determined the studies posed no national security threat and ruled for the press.) Later cases clarified that the First Amendment required courts to avoid prior restraints on publication, although the Supreme Court may recognize a narrow exception for national security.³⁴ Thus, national security reporters must avoid sourcing their stories in ways that may invite enjoinder actions.

Journalists must also be aware of the specific statutes that their newsgathering may violate. For example, some argue that recent national security reporting warrants prosecution under the Espionage Act.³⁵ The Act criminalizes communication and transmission of classified information and applies to anyone from leakers to, presumably, journalists.³⁶ A media-based prosecution, though, would hinge on whether publication qualifies as “communicat[ing]” or “transmit[ing]” information.³⁷ Justice Department official Matthew Friedrich noted that while the department has never prosecuted a press member under the Act, prosecution is possible.³⁸

Generally, other federal espionage statutes do not bar leaking classified information. Rather, separate statutes prohibit disclosing certain types of information. For example, the Judith Miller affair

30. See Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441 (2002).

31. See Mark Feldstein, *The Jailing of a Journalist: Prosecuting the Press for Receiving Stolen Documents*, 10 COMM. L. & POL'Y 137, 173–77 (2005) (detailing the significant impact of potential charges against journalist Les Whitten during the Nixon era).

32. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

33. The Court ultimately determined the studies posed no national security threat and ruled for the press. See *id.* at 714–15.

34. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

35. Adam Liptak, *Gonzales Says Prosecutions of Journalists Are Possible*, N.Y. TIMES, May 22, 2006, at A14.

36. Espionage (Barbour Espionage) Act of 1917, ch. 30, 40 Stat. 217, 217–230 (codified in scattered sections of 18 U.S.C., 22 U.S.C., and 50 U.S.C. (2000)).

37. See *id.*

38. *Hearing, supra* note 22, at 4.

revealed that disclosing the identity of a covert agent is illegal under the Intelligence Identities Protection Act.³⁹ Similarly, the Atomic Energy Act prohibited Progressive, Inc. from disseminating information on how to build hydrogen bombs.⁴⁰ This patchwork of statutory consequences demonstrates that national security reporters must be attuned to a variety of specific laws governing their stories' subject matter.

IV. A REPORTER'S PRIVILEGE?

The reporter's privilege may alleviate some of the problems inherent in prosecuting journalists. The privilege exempts press members from having to reveal confidential sources, even when otherwise compelled by law. It emanates from the idea that journalistic sources are a special kind of evidence because of their unique First Amendment value.⁴¹

The Supreme Court's sole examination of the reporter's privilege came in the 1972 decision *Branzburg v. Hayes*.⁴² In a 5-4 split, the Court effectively held that there was no privilege. However, Justice Powell's concurrence, critical to establishing a majority, held that compelled disclosure was only appropriate in certain instances; a balancing test, he argued, would offer the best resolution.

Subsequent treatment of *Branzburg* has been inconsistent. Initially, commentators thought *Branzburg* rejected the privilege; others read it as favoring a qualified privilege due to Powell's concurrence.⁴³ According to Ninth Circuit Judge Stephen Trott, most federal district courts do not recognize a privilege, although the privilege is more popular in the circuit courts.⁴⁴

39. See Eunice Eun, *Journalists Caught in the Crossfire: Robert Novak, The First Amendment, and Journalist's Duty of Confidentiality*, 42 AM. CRIM. L. REV. 1073, 1078 (2005).

40. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979). For an article written by the editor of the controversial story, entitled "The H-Bomb Secret," see Erwin Knoll, *The H-Bomb and the First Amendment*, 3 WM. & MARY BILL RTS. J. 705 (1994).

41. Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL RTS. J. 1063, 1072-74 (2006).

42. 408 U.S. 665 (1972).

43. Kraig L. Baker, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege*, 69 WASH. L. REV. 739, 747 (1994).

44. Honorable Stephen Trott, Ninth Circuit Court of Appeals, Remarks at the William Mitchell College of Law National Security Forum: Right to Know vs.

Beyond divided courts, much has changed since *Branzburg's* narrow ruling. Reporters face an increasing rate of subpoenas, especially in criminal cases.⁴⁵ There is also an entirely new Supreme Court, although the trend since *Branzburg* has been to halt or reverse expansion of rights for criminal defendants, including journalists.⁴⁶

The privilege offers benefits; it protects the source-reporter relationship, maintains a source pool, protects against distracting harassment suits, prevents “fishing expeditions” disguised as subpoenas, and facilitates the investigation of government wrongdoing.⁴⁷ The privilege also guards against chilled investigative journalism.⁴⁸ Finally, enacting a privilege may force the government to regulate its leaks more effectively.⁴⁹

Understandably, many reporters favor the privilege. “Yes, emphatically, we need this very badly,” urges Mayer. “It has become harder and harder to get vitally important information out where the public can see it because sources are so afraid of being prosecuted for leaking,” she continued. “Without the ability to protect sources, extremely important stories about the activities of our democracy will never receive the public scrutiny they deserve.”

What then are the harms of a reporter’s privilege? First, it may invite abuse or reckless journalism.⁵⁰ The privilege may also weigh too heavily against judicial administration and contravene the Supreme Court’s ruling.⁵¹ Some add that the media already has sufficient protection and that an absolute privilege invites agenda pushing and over-reliance on confidential sources.⁵² Most importantly, the government remains legally accountable, so why shouldn’t the press? If the free press is free of accountability, who

Wrong to Tell (Oct. 25, 2006). The first federal case to uphold a qualified privilege was *Farr v. Pritchess*, 522 F.2d 464, 467 (9th Cir. 1975). Since this case, the First, Second, Third, Fourth, Fifth, Ninth, Eleventh and D.C. Circuits have found that a qualified privilege exists.

45. Schmid, *supra* note 30, at 1443–44.

46. *See id.* at 1445–46.

47. *Id.* at 1460–65.

48. David Joseph Onorato, Note, *A Press Privilege for the Worst of Times*, 75 GEO. L.J. 361, 386–87 (1986).

49. *See Eun, supra* note 39, at 1090–91.

50. Louis Capocasale, *Using the Shield as a Sword: An Analysis of How the Current Congressional Proposals for a Reporter’s Shield Law Wound the Fifth Amendment*, 20 ST. JOHN’S J. LEGAL COMMENT. 339, 348, 372–74 (2006).

51. *See id.* at 347, 363.

52. *Id.* at 367, 373.

will watch the watchdogs?⁵³

Clearly, each benefit and detriment catalogued is refutable. Disparate judicial treatment of these policy pros and cons has already engendered confusion among both the judiciary and the press; thus, many feel the privilege debate is best resolved legislatively. Shield laws have long been a popular option. More than thirty states have adopted shield laws, starting with Maryland in 1896.⁵⁴ Most states enacted their shields in the 1960s, reacting to the federal courts' rejection of common law privileges.⁵⁵ Still, because state actions span six decades, state shield laws lack uniformity; they also bestow narrow privileges.⁵⁶

Congress has entertained, but not passed, a federal shield law. Senator Chris Dodd sponsored the Free Speech Protection Act, which proposed an absolute privilege against compelled disclosure.⁵⁷ Senator Dick Lugar and Congressmen Mike Pence and Rich Boucher carried related bills prohibiting the compelled disclosure of confidential sources.⁵⁸ Senator Lugar's shield also contained an exception for "genuine" national security issues.⁵⁹ While none of these bills prevailed, reporter's privilege legislation remains a perennial issue.

V. THE POLITICS FACTOR

Threats to prosecute journalists are usually defended as necessary to uphold the law. However, they are often politically motivated; indeed, the prevailing political climate and culture may affect prosecution threats more than an act's actual legality.

Several political factors influence these threats and prosecutions. First, more secretive administrations are more likely to threaten or undertake prosecutions. Wartime administrations are the most secretive because of the importance of the information they conceal and because the public grants them greater reign to be secretive. Journalists agree that the current administration is the most secretive they have encountered. Some, such as Priest, link this secrecy to the nature of the War on Terror,

53. *Id.* at 370–71.

54. Fargo, *supra* note 41, at 1069.

55. Baker, *supra* note 43, at 743.

56. *Id.*

57. See Capocasale, *supra* note 50, at 359–60.

58. *Id.* at 360–61.

59. See *id.* at 362.

the operation of which is dominated by the military and the CIA. These institutions, controlled by adept secret-keepers, are less likely to offer information and more likely to urge consequences.

Second, the nature of the information revealed affects political reaction. Stephen Spruiell of *National Review* explained a recent example: “The divisive nature of [the eavesdropping] program tempered some of the criticism [surrounding publication]. Because the [banking program] is so defensible, [there was] a much more vocal response.”⁶⁰

Third, news organizations’ actions may invite politicking. For instance, the *New York Times* ran its banking story while several other organizations delayed publication until they could consult the Treasury Department. The *Times* also published its wiretapping story while the *L.A. Times* hesitated to run the same piece. Clearly, while some stories carry a slim chance of prosecution, they carry a huge chance of being scooped. Which is worse to a journalist? More importantly, because the same organization proceeded with controversial stories while others waited, some believe that the *Times*’ agenda included more than fulfilling its journalistic duties.

Additionally, the eagerness of some critics to scapegoat the *Times* suggests an alternate agenda, one that employs red herrings to divert public attention from failing policies. This type of demonization is not uncommon. Priest recalls that after the *Post* published her secret prisons story, Congressional representatives wanted to investigate not into the sites but into the fact that government employees revealed them. Kurtz argues that conservatives have used the *Times*’ controversial publications to demonize the paper.⁶¹ He cites Heather MacDonald, a writer for the *Weekly Standard*, who called the *Times* “a national security threat,” alleging that the paper’s staff is drunk on their own power.⁶²

Congress, in its own flaccid display of outrage, passed a Sense of Congress resolution condemning the media after the press revealed the banking program.⁶³ The resolution, passed by a 227-183 vote, stated that Congress expects cooperation in keeping

60. Kurtz, *supra* note 14, at C01 (quoting Stephen Spruiell).

61. *See id.*

62. *Id.*

63. Rick Klein, *House Votes to Condemn Media Over Terror Story*, BOSTON GLOBE, June 30, 2006, at A1.

classified programs secret in the future.⁶⁴ In floor debate, most Republicans focused on the dangers of exposing the program. “[L]oose lips kill American people,” pronounced then Speaker Dennis Hastert.⁶⁵ Representative Peter King urged prosecution under the Espionage Act, adding that the *Times* could have blood on its hands if another terrorist attack occurred.⁶⁶ Senator Spencer Bacchus decreed that the publication did irreparable harm to a vital terrorist tracking tool.⁶⁷ “If you are Al Qaeda, the appropriate response to this publication is, ‘thank you’ . . . [I]f you’re an American citizen . . . the appropriate response is anger and outrage,” he stated.⁶⁸ Representative Michael Oxley chimed in: “Now we have it spread all over the news media about how this program works. What’s the average terrorist going to think? He’s going to find a different way to move his money around.”⁶⁹

Many Democrats responded with equal vitriol. “We are here today because there hasn’t been enough red meat thrown at the Republican base,” leveled Representative James P. McGovern.⁷⁰ The congressman further charged that the resolution was designed to punish journalists. According to Representative Edward Markey, the resolution amounted to nothing more than shooting the messenger.⁷¹ Representative Maurice Hinchey attacked the measure’s motives, stating that it “attempts to intimidate the press and strengthen [a] despotic administration.”⁷²

In public response, many Americans, torn between free press and national security values, seem paralyzed into neutrality. Opinionated citizens are evenly divided; both the *New York Times* and the *Washington Post* report received equal amounts of laudatory and critical mail after their most controversial stories.

Ironically, national security reporters will play a significant political role in 2008. As Mazzetti explains, national security will be *the* big issue in the election, and candidates often jump on news stories for talking points, even when they disapprove of the information being public. “Everything national security reporters

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

write will become campaign fodder,” says Mazzetti. Reporters do not write stories so that candidates can talk about them, he adds, but it seems unavoidable. After all, even when politicians dislike what reporters write, they are still accountable for understanding it.

VII. CONCLUSION

In the end, national security reporting during the War on Terror is difficult for both government and journalists. Government officials are charged with keeping the public safe, which may require them to conceal information. The press is charged with monitoring government actions to keep the public free. Currently, a cautious citizenry seems more disposed to favor the former. “It’s clear that the environment of fear and war make the public more inclined to look to the government for protection and less inclined to appreciate it when the press undermines or criticizes national security programs that the government claims are essential to save lives,” says Mayer. “It is a tough political environment in which for journalists to write.”

Journalists are hardly retreating though. In fact, Mayer encourages reporters to become even more aggressive in demystifying the CIA, the NSA and other secretive government agencies. “The public really needs to be reminded that the CIA works for it and that these programs are set up in the name of American citizens,” she contends. “Americans are entitled and have a duty to understand what their own government is doing.” And there is much to be discovered. As Mazzetti points out, the legal framework generated by the early post 9/11 era will inevitably be a story for a long time. But how much will we—or should we—ultimately know?
