

Government Secrecy vs. Freedom of the Press

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A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.¹

Since September 11, 2001, the United States has investigated, threatened to prosecute, and prosecuted public employees, journalists, and the press for the dissemination of classified information relating to national security. The government's response to the *New York Times's* revelation of President George W. Bush's secret electronic surveillance directive illustrates the tension between the government and the press.

Senator Jim Bunning and Representative Peter King accused the *Times* of "treason,"² and 210 Republicans in the House of Representatives supported a resolution condemning the *Times* for potentially "plac[ing] the lives of Americans in danger."³ Attorney General Alberto Gonzales went so far as to suggest that the *Times* might be prosecuted for violating a provision of federal law making it a crime to disclose "information relating to the national defense" with "reason to believe" that the information "could be used to the injury of the United States."⁴ In the entire history of the United

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¹ Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

² David Remnick, *Nattering Nabobs*, NEW YORKER, July 10, 2006, at 33, 34.

³ Rick Klein, *House Votes to Condemn Media Over Terror Story*, BOSTON GLOBE, June 30, 2006, at A1.

⁴ 18 U.S.C. § 793(e) (2000); see also 18 U.S.C. § 798 (2000). After the *Times* disclosed the NSA spy program, Senator Pat Roberts of Kansas suggested that he might propose legislation expressly making it unlawful for non-government employees to communicate classified information. See Walter Pincus, *Senator May Seek Tougher Law on Leaks*, WASH. POST, Feb. 17, 2006, at A4. The government also threatened to prosecute individuals as a result of the *Washington Post's* disclosure of the government's secret detention camps for enemy combatants in Eastern Europe. See Michael Barone, *Blowback on the Press*, U.S. NEWS & WORLD REPORT, May 8, 2006; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1. For a defense of the Bush administration's position, see Gabriel Schoenfeld, *Has the New York Times Violated the Espionage Act?*, COMMENT., Mar. 2006, at 23. The *New York Times* and the *Washington Post* both won the Pulit-

States, the federal government has *never* prosecuted the press for publishing confidential government information.

It is difficult to assess the precise cause of the current tension between the government and the media. Perhaps the media are pressing more aggressively than ever before to pierce the government's shield of secrecy. Perhaps the government is pressing more aggressively than ever before to expand its shield of secrecy. Perhaps both factors are at work. In this Essay, I explore not why this tension exists, but whether the measures taken and suggested by the executive branch to prevent and punish the public disclosure of classified information are consistent with the First Amendment.⁵

I address three questions: (1) In what circumstances may the government discharge and/or criminally punish a public employee for *disclosing* classified information relating to the national security to a journalist for the purpose of publication?⁶ (2) In what circumstances may the government criminally punish the press for *publishing* such information? (3) In what circumstances may the government criminally punish a journalist for *receiving or soliciting* such information from a government employee for the purpose of publication? The issues are as difficult as they are important, and the governing law is unformed and often obscure. I shall try to bring some clarity to these questions,⁷ which in turn pose fundamental questions about the conflict between the government's authority to keep secrets, the press's responsibility to inform the public, and the government's accountability to its citizens.

I. GOVERNMENT EMPLOYEES

I begin with individuals who are *not* government employees. In what circumstances may such persons be held legally accountable for revealing

zer Prize for journalism for publishing these stories.

⁵ For purposes of this Essay, I attempt to work within the principles and doctrines of existing Supreme Court decisions. This is therefore more of a "lawyerly" than "academic" analysis, although it inevitably reflects elements of both perspectives.

⁶ Although I refer throughout the Essay to "classified" information, the basic principles I discuss would apply to information that is confidential but not classified as well. The fact of classification should be relevant to the analysis, but not dispositive of it. In other words, some confidential but not classified information might be so central to national security that the government has a sufficient reason to protect it from public disclosure. There is also a problem when a journalist learns information orally, without receiving a copy of the source document. In that situation, the journalist will not see the classification on the document, which might lead to factual questions about the journalist's knowledge at the time he received the information.

⁷ I am not considering in this Essay a fourth issue related to this general set of questions: whether and to what extent the First Amendment protects a journalist's privilege. On this question, see *Branzburg v. Hayes*, 408 U.S. 665 (1972); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2005); *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 31 (D.D.C. 2004); Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39 (2005).

information to journalists for the purpose of publication? The answer to this question will enable us to establish a baseline definition of First Amendment rights. I will then inquire whether the rights of government employees are any different.⁸

A

In general, an individual who is not a government employee has a broad First Amendment right to reveal information to a journalist for the purpose of publication. There are a few limitations, however.

First, the Supreme Court has long recognized that there are “certain well-defined and narrowly limited classes of speech,” such as false statements of fact, obscenity, and threats, that “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁹ Because such categories of speech have “low” First Amendment value, they may be restricted without satisfying the usual demands of the First Amendment.¹⁰

For example, if *X* makes a knowingly false and defamatory statement about *Y* to a journalist, with the understanding that the journalist will publish that information, *X* might be liable to *Y* for the tort of defamation. Or, if *X* reveals to a reporter that *Y* was raped, *X* might be liable to *Y* for invasion of privacy. The public disclosure of *Y*'s identity, unlike the fact of the rape, might be thought to be of such slight value to public debate that it can be prohibited in order to protect *Y*'s privacy.¹¹

⁸ Although this Part focuses on government employees, a similar analysis would apply to government contractors who are granted access to national security information. *See* *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996) (holding that private contractors have the same First Amendment rights as public employees); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (same).

⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

¹⁰ *See* *Virginia v. Black*, 538 U.S. 343 (2003) (threats); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (commercial advertising); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (false statements of fact); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity).

¹¹ This is a more speculative example than defamation because the Supreme Court has never upheld either a criminal prosecution or civil liability for invasion of privacy by publication. *See* *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (reversing the judgment that found a newspaper civilly liable for publishing a rape victim's name that was publicly available); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (holding that a newspaper cannot be punished for publishing the name and photograph of a juvenile offender where the newspaper had learned the suspect's name from several witnesses to the shooting and from the police and prosecutors at the scene); *Okla. Publ'g Co. v. District Court*, 430 U.S. 308 (1977) (holding that a reporter cannot be prohibited from disclosing the name of a juvenile offender where the name was obtained at court proceedings that were open to the public); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (ruling that a broadcaster cannot be held liable in damages for publishing a rape victim's name where the name was lawfully obtained by examining a copy of the indictment).

Second, private individuals may sometimes voluntarily contract with other private individuals to limit their speech. Violation of such a private agreement is actionable as a breach of contract. For example, if *X* takes a job as a salesman and agrees as a condition of employment not to disclose his employer's customer list to competitors, he would be liable for breach of contract if he revealed the list to a reporter for a trade journal with the expectation that the journal would publish the list. Or, if *Y* accepts employment as a chemist and agrees not to disclose her company's trade secrets, she would be liable if she revealed the information to a journalist. In these circumstances, the individual has voluntarily agreed to limit a First Amendment right. Such privately negotiated waivers of constitutional rights are usually enforceable.¹²

Third, there might be situations, however rare, in which an individual discloses previously non-public information to a journalist in circumstances when publication of the information would be so dangerous to society that the individual might be punished for such disclosure. For example, suppose a scientist discovers how to grow the ebola virus using ordinary household materials. The harm caused by the public dissemination of that information might be so clear, present, and grave that the scientist could be punished for facilitating its publication.¹³

B

To what extent is a *government employee* in a similar position? When we ask about the First Amendment rights of public employees, it is the second of the three limitations examined above—the waiver of rights issue—that is critical.

At first blush, it might seem that, whatever might be the case with private employers, the government cannot insist that individuals surrender their First Amendment rights as a condition of public employment. Surely, it would be unconstitutional, for example, for the government to require individuals to agree as a condition of employment never to criticize the President, practice Islam, or assert their Fourth Amendment rights. It would be irrelevant that the individuals had voluntarily agreed not to criticize the President, practice their faith, or assert their Fourth Amendment rights, because the government cannot condition employment on the waiver of constitutional rights. As the Supreme Court has long held, the government cannot legitimately use its leverage over jobs, welfare benefits,

¹² See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (holding that a confidential source can sue a reporter for promissory estoppel for disclosing his identity in violation of the reporter's promise not to do so).

¹³ A somewhat analogous situation was arguably presented in *United States v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), in which the court granted an injunction against publication of an article allegedly providing information about how to make a nuclear bomb.

drivers' licenses, tax deductions, zoning waivers, and the like to extract waivers of constitutional rights.¹⁴

One could argue that because *private* employers can constitutionally extract concessions from their employees as a condition of employment, including waivers of constitutional rights, the government should be able to do the same. There are three answers to this argument. First, the Constitution binds only the government, not private employers. Second, the government's scale and power are so vast that it can have a much more pervasive impact on individual freedom than private employers can. Third, because the government is not profit driven, it is much more likely than private employers to sacrifice economic efficiency in order to achieve other, especially political, goals. The government, for example, is much more likely to refuse to hire people who do not support the party in power, thus leveraging government power for political advantage.¹⁵

This does not mean, however, that the government may *never* require individuals to waive their constitutional rights as a condition of public employment. There are at least two circumstances in which the government may restrict the First Amendment rights of its employees. First, as the Supreme Court noted in *Pickering v. Board of Education*, the government:

has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees¹⁶

¹⁴ See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[E]ven though a person has no ‘right’ to a valuable government benefit and even though the government may deny him the benefit for any number of reasons,” it may not do so “on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”).

¹⁵ Professor Sunstein has put the point well:

Citizens may often find it in their interest to give up rights of free speech in exchange for benefits from government. . . . But if government is permitted to obtain enforceable waivers, the aggregate effect may be considerable, and the deliberative processes of the public will be skewed. . . . Waivers of first amendment rights thus affect people other than government employees, and effects on third parties are a classic reason to proscribe waivers. The analogy . . . is to government purchases of voting rights, which are impermissible even if voters willingly assent.

Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 915 (1986).

¹⁶ 391 U.S. 563, 568 (1968).

The government has a legitimate interest in operating efficiently, and some restrictions of employee speech might be reasonably necessary to achieve that efficiency. The Hatch Act, for instance, prohibits public employees from taking an active part in political campaigns.¹⁷ Its goal is to insulate public employees from undue political pressure and improper influence. Thus, to enable public employees to perform their jobs properly, the government may require them to waive the First Amendment right to participate in partisan political activities.¹⁸

Another illustration might involve a police officer who uses racist language in a street encounter. The police department might reasonably conclude that the officer can no longer perform her job effectively or that her continued employment would seriously undermine the department's credibility with the community. As *Pickering* observed, it may be appropriate in such circumstances to "balance" the competing interests.¹⁹

Similarly, a government employee's disclosure of confidential information to a journalist for the purpose of publication might jeopardize the government's ability to function effectively. For example, if an IRS employee gives a reporter someone's confidential tax records, this disclosure might seriously impair the public's confidence in the tax system.

A second reason why the government may sometimes restrict what otherwise would be the First Amendment rights of public employees is that the employee learns the information *only* by virtue of his government employment. Arguably, it is one thing for the government to prohibit its employees from speaking in ways in which other citizens can speak, but something else entirely for it to prohibit them from speaking in ways other citizens *cannot* speak. If a public employee gains access to confidential information *only because* of his public employment, then prohibiting him from disclosing that information to anyone outside the government might be said not to restrict his First Amendment rights at all because he had no right to *know* the information in the first place.²⁰ The presence of this factor would seem to add weight to the government's side of the *Pickering* balancing.

There is little clear law on this question. In *Snepp v. United States*,²¹ however, the Supreme Court held that a former employee of the CIA could constitutionally be held to his agreement not to publish "any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment, [without]

¹⁷ 5 U.S.C.A. § 7324 (2001).

¹⁸ See, e.g., *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947).

¹⁹ 391 U.S. at 568.

²⁰ See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (upholding a protective order prohibiting a newspaper from publishing confidential information it obtained only "by virtue of the trial court's discovery processes"); see also Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169.

²¹ 444 U.S. 507 (1980).

specific prior approval by the Agency.”²² The Court did not suggest that *every* government employee can be required to abide by such a rule. Rather, it emphasized that a “former intelligence agent’s publication of . . . material relating to intelligence activities can be detrimental to vital national interests.”²³

In light of *Pickering* and *Snepp*, it seems reasonable to assume that a public employee who discloses classified information relating to the national security to a journalist for the purpose of publication has violated his position of trust and ordinarily may be discharged and/or criminally punished without violating the First Amendment.

It is important to note that this conclusion is specific to public employees and does not govern those who are *not* public employees. Unlike public employees, who have agreed to abide by constitutionally permissible restrictions of their speech, journalists and publishers have *not* agreed to waive their rights. This situation is analogous to one where the private employee agrees not to disclose his employer’s customer lists, but does so. Although the employee might be liable for breach of contract, the journalist to whom he discloses the list and the trade journal that publishes it are not liable to the employer.²⁴

Moreover, as the Court recognized in *Pickering*, the government has a greater (though not unlimited) need for, and interest in, restricting the speech of its employees than restricting the speech of individuals generally. The government cannot constitutionally punish individuals for making racist comments, but it can discipline a police officer who makes such comments on the job.

Information the government wants to keep secret may be of great value to the public. The public disclosure of an individual’s tax return may undermine the public’s confidence in the tax system, but it may *also* reveal important information about a political candidate’s finances. The conclusion that the government has a legitimate reason to prohibit its employees from disclosing such information does not reflect a judgment that the government’s interest in confidentiality *outweighs* the public’s interest in disclosure. Indeed, information about a political candidate’s finances

²² *Id.* at 508.

²³ *Id.* at 511–12; *see also* *Haig v. Agee*, 453 U.S. 280 (1981) (upholding the Secretary of State’s revocation of a former CIA employee’s passport for exposing the identities of covert CIA agents).

²⁴ *See, e.g.,* *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829 (1978) (holding that the government may not punish the press for publishing confidential information, even though it may prohibit public employees from disclosing that information); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (holding that the government may not restrain the press from publishing information about a criminal defendant, even though it may prohibit public employees from disclosing such information to the press); *see also* *Gentile v. State Bar*, 501 U.S. 1030, 1074 (1991) (ruling that the extrajudicial “speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press,” because lawyers are voluntary participants in the legal system).

might be of fundamental significance to public debate. It would plainly be unconstitutional for the government to prohibit the dissemination of such information if it did *not* come from the government's own files.

In theory, of course, it would be possible for the courts to decide in each instance whether an unauthorized disclosure of confidential information by a public employee is protected by the First Amendment because the value of the information to the public outweighs the government's need for secrecy. But such an approach would put the courts in an extremely awkward position and effectively would convert the First Amendment into a constitutional Freedom of Information Act. The Supreme Court has sensibly eschewed that approach and granted the government considerable deference in deciding whether and when public employees may disclose confidential government information.²⁵

C

Such disclosures are not always punishable, however. In applying *Pickering* and *Snepp*, courts do not give the government carte blanche to insist on secrecy. The government's restrictions must be reasonable.

Returning to the problem of confidential information relating to the national security, I begin with *classified* information. The existing classification system authorizes public employees to classify any information the unauthorized disclosure of which could reasonably be expected to harm national security. Access to such information is restricted to individuals with an appropriate security clearance. It is unlawful for a government employee to disclose such information to any person who is not authorized to know it.²⁶

The classification system is a highly imperfect guide to the *need* for confidentiality. The concept of "reasonable expectation of harm to national security" is inherently vague and amorphous. It is impossible to know from this standard how likely, imminent, or grave the potential harm must actually be. Moreover, the classification process is poorly designed and sloppily implemented. Predictably, the government tends to *over*-classify information. An employee charged with the task of classifying

²⁵ For an excellent critique of this conclusion, see Adam M. Samaha, *Government State Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 U.C.L.A. L. REV. 909, 948–76 (2006), which suggests that the Freedom of Information Act can provide a useful "platform" for recognizing and enforcing a broader *constitutional* right of access to government secrets.

²⁶ See Executive Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003), *amending* Executive Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995). There are three designations. "Top Secret" refers to information the unauthorized disclosure of which could reasonably be expected to cause exceptionally grave damage to national security. "Secret" refers to information the unauthorized disclosure of which could reasonably be expected to cause serious damage to national security. "Confidential" applies to information the unauthorized disclosure of which could reasonably be expected to cause damage to national security. See *id.* at 15,326.

information inevitably will err on the side of over-classification because no employee wants to be responsible for *under*-classification. In addition, we know from experience that public officials have often abused the classification system to hide from public scrutiny their own misjudgments, incompetence, or venality.²⁷

Despite these very real concerns with the classification system, there is good reason to have clear, simple, and easily administered rules to guide public employees. Hence, a government employee ordinarily can be disciplined, discharged, or prosecuted for knowingly disclosing classified information to a journalist for the purpose of publication.²⁸

D

Are there *any* circumstances in which a public employee has a First Amendment right to disclose *classified* information to a journalist for the purpose of publication? Courts have recognized that a public employee has such a right if the government fails to satisfy two conditions. In order to punish the public employee, the government first must prove that the disclosure would be “potentially damaging to the United States.”²⁹ Although this judgment is implicit in the very fact of classification, that alone is not conclusive. Because the classification process is imperfect, the courts require independent proof of at least potential harm to the national security.

Second, the government must prove that the information was “closely held” and “not available to the general public” prior to the employee’s

²⁷ See, e.g., *United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring) (“There exists a tendency, even in a constitutional democracy, for government to withhold reports of disquieting developments and to manage news in a fashion most favorable to itself.”); *Halperin v. Kissinger*, 606 F.2d 1192, 1204 n.77 (D.C. Cir. 1979) (noting “the well-documented practice of classifying as confidential much relatively innocuous or noncritical information”); see also Harold Edgar & Benno Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 354 (1986) (“[The E]xecutive is inherently self-interested in expanding the scope of matters deemed ‘secret’; the more that is secret, the more that falls under executive control.”). By the mid-1990s, 1,336 government employees were authorized to classify information “Top Secret,” and more than two million public employees and one million government contractors had “derivative classification” authority. See REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY xxxix, Sen. Doc. 105-2, 103d Cong. (1997) (Chairman’s Foreword).

²⁸ What if a public employee discloses information relating to national security that is *not* classified? One approach would be to hold that non-classification is dispositive. But this would not work when the disclosed information is not in a tangible form and therefore cannot be marked as “classified.” An alternative approach is to allow the government to punish the disclosure if the employee knew both that the government regarded the information as confidential and that the unauthorized disclosure of the information could be expected to cause damage to national security. See *United States v. Rosen*, No. 1:05CR225, 2006 WL 2345914 (E.D. Va., Aug. 9, 2006).

²⁹ See, e.g., *Morison*, 844 F.2d at 1071–72; *Rosen*, 2006 WL 2345914.

disclosure.³⁰ As Judge Learned Hand noted more than sixty years ago, “it is obviously lawful” for a public employee to reveal information that the government has not withheld from the public.³¹

Thus, to punish a public employee for disclosing classified information to a reporter for the purpose of publication, the government must prove that the information was not already in the public domain and that the disclosure is potentially damaging to the national security.

This is a far cry from requiring the government to prove that the employee knew the disclosure would create a clear and present danger of grave harm to the nation. The gap between these two standards represents the difference between the rights of ordinary individuals and the rights of public employees. It is what the public employee surrenders as a condition of his employment; it is the effect of *Pickering* balancing; and it is a measure of the deference we grant the government in the management of its “internal” affairs.³²

Under this approach, erroneous classification of a particular document is not a sufficient justification for a public employee’s breach of his contract with the government. A public employee does not have a First Amendment right to second-guess the classification system. As long as the conditions of potential harm and secrecy are satisfied, the employee has no constitutional right to disclose classified information and then assert in his defense that the information was insufficiently dangerous or too valuable to public debate to justify secrecy. A central goal of the classification system is to avoid these ad hoc judgments, and courts generally should not be in the business of second-guessing the classifiers.³³

This approach is fundamentally problematic. As we have seen, the disclosure of confidential information may be *both* potentially harmful to the national security *and* quite valuable to public debate. Consider, for example, information relating to (a) secret understandings with other nations, (b) evaluations of new weapons systems, (c) plans for shooting down hijacked airplanes, and (d) evaluations of the adequacy of private industry’s protection of nuclear power plants. One might reasonably conclude that some or all of this information should be available to the public to

³⁰ *Morison*, 844 F.2d at 1071–72; *Rosen*, 2006 WL 2345914 at *23–*24; see also *United States v. Truong Din Hung*, 629 F.2d 908, 918 n.9 (4th Cir. 1980); *United States v. Allen*, 31 M.J. 572, 627–28 (N.M.C.M.R. 1990).

³¹ *United States v. Heine*, 151 F.2d 813, 816 (2d Cir. 1945). Cf. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

³² For examples of cases dealing with public employees in the context of classified information, see *Morison*, 844 F.2d 1057; *United States v. Zettl*, 835 F.2d 1059 (4th Cir. 1987); *United States v. Kampiles*, 609 F.2d 1233 (7th Cir. 1980); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972).

³³ This is similar to the tax return situation. An IRS employee does not have a constitutional right to leak an otherwise confidential tax return because the confidentiality of that return is not sufficiently “important” to warrant confidentiality.

enable informed deliberation. But the approach to public employees outlined above empowers the government to forbid its disclosure.

In this sense, granting a high level of deference to the government to determine what information to withhold from the public significantly overprotects government secrecy at the expense of official accountability and informed public debate. There is no reason to believe that government officers will reach the “right” result in striking the balance between national security and the public’s right to know. Not only do they have powerful incentives to over-classify, but the classification standard itself considers only one side of the balance—whether disclosure might harm the national security. It does not even take into account the other side of the balance—whether disclosure might enhance democratic governance.

The law as it stands accepts this approach largely for the sake of simplicity, but we should be under no illusions about the impact. This standard gives inordinate weight to secrecy at the expense of informed public opinion.

E

There is at least one situation, however, in which a government employee must have a First Amendment right to disclose classified information, even if the disclosure might harm the national security. This arises when the disclosure reveals *unlawful* government conduct.

Applying the *Pickering* standard, the government has no legitimate interest in keeping secret its own illegality, and the public has a compelling interest in the disclosure of such information. Even if the government ordinarily can punish a public employee for disclosing classified information, that presumption disappears when the disclosure reveals the government’s own wrongdoing. The government is, after all, accountable to the public. In a self-governing society, citizens need to know when their representatives violate the law.³⁴

Even in this situation, however, the government might argue that public employees should *never* disclose classified information. After all, even a well-intentioned “whistleblower” might be *wrong* in his assessment of a program’s legality, and by disclosing the information he might seriously damage the national security. The government might maintain that, at least in dealing with classified information, government employees must err on the side of protecting the national security and that such leakers must be punished even if the program is unlawful. Only in this way, the government might argue, can it effectively deter future leakers from taking chances with the national security.

³⁴ Indeed, federal law forbids classification for the purpose of concealing “violations of law, inefficiency, or administrative error.” Executive Order No. 13,292, § 1.7(a)(1), 68 Fed. Reg. 15,318 (Mar. 25, 2003).

From a constitutional perspective, this is unexplored terrain. In my judgment, the government employee must prevail on this issue. In terms of deterrence, it should suffice for the government to punish those who disclose classified programs that are *not* unlawful. When the program is in fact unlawful, the public's need to know outweighs the government's interest in secrecy. As we have seen, public employees cannot be punished for disclosing classified information that is already public or whose disclosure does not pose a threat to the national security. Public employees who disclose government *illegality* should have similar protection.³⁵

An intermediate position would allow the government to punish public employees who disclose unlawful programs if (a) the employee knew that the government regarded the program's secrecy as critical to the national security, *and* (b) there were reasonable procedures in place through which the employee could have questioned the legality of the program, without going to the press, and he failed to use those procedures.³⁶ If such procedures exist and the government employee complies with them, he should not be punished for then disclosing an unlawful program.

A related question is whether a public employee can be punished for disclosing a classified program she reasonably but *wrongly* believed to be unlawful. A familiar analogy resolves this problem. If an individual reasonably believes that a criminal law restricting speech violates the First Amendment, she may violate the law and raise the constitutional issue as a defense. If she was right in believing the law unconstitutional, she cannot be punished. But if she was wrong, she can be convicted, because the First Amendment does not recognize as a defense the defendant's reasonable belief that the law was invalid. This same principle should apply to public employees who disclose classified information.

To summarize, a public employee who knowingly discloses classified information to a journalist for the purpose of publication may be disciplined, discharged, and/or criminally punished if the information was not already in the public domain and its disclosure has the potential to harm the national security, *unless* the disclosure reveals *unlawful* government

³⁵ In some instances, the legality of the government's conduct will be unclear. It will need to be resolved in the course of the criminal prosecution or the civil action arising out of the employee's discharge. A more difficult question than illegality is whether the employee has a First Amendment right to expose waste, incompetence, or deceit, as where a public official lies to the public. I am inclined to privilege such disclosures, as well as those involving illegality.

³⁶ The Intelligence Community Whistleblower Protection Act of 1998 sets forth a limited mechanism to enable whistleblowers dealing with classified information to raise their concerns with agency officials or members of congressional oversight committees. The Act covers whistleblowers who want to report (1) a serious abuse or violation of law; (2) a false statement to, or willful withholding of information from, Congress; or (3) a reprisal in response to an employee's reporting of an urgent matter. Pub. L. No. 105-272, § 702, 112 Stat. 2413, 2415 (1998).

action and the employee has complied with reasonable whistleblower procedures governing the disclosure of such information.³⁷

II. THE PRESS

In what circumstances may the government criminally punish the press for *publishing* classified information? In the entire history of the United States, the government has never prosecuted the press for such action. Of course, this does not mean such a prosecution is impossible. It may be that the press has exercised great restraint and has never before published confidential information in circumstances in which a prosecution would be constitutionally permissible. Or, it may be that the government has exercised great restraint and has never prosecuted the press even though that would have been constitutionally permissible. We cannot know the answer until we define the circumstances in which such a prosecution would be consistent with the First Amendment.³⁸

A

Because there has never been such a prosecution, the Supreme Court has never had an occasion to rule on such a case. The closest it has come was in *New York Times v. United States*,³⁹ the “Pentagon Papers” case.

In 1967, Secretary of Defense Robert McNamara commissioned a top secret study of the Vietnam War. The study, which filled forty-seven volumes, reviewed in great detail the formulation of U.S. policy toward Indochina, including military operations and secret diplomatic negotiations. In the spring of 1970, Daniel Ellsberg, a former Defense Department official, gave a copy of the Pentagon Papers to the *New York Times*. On June 13, the *Times* began publishing excerpts from the Papers. The next

³⁷ On August 2, 2006, Senator Christopher “Kit” Bond introduced legislation to clarify the circumstances in which public employees or others who are officially entrusted with access to classified information may be criminally prosecuted for unauthorized disclosure of such information. The proposed legislation would make it unlawful for such persons knowingly to disclose classified information to any person who is not authorized to receive it. The proposal defines “classified information” as information or material that has been “properly classified.” This law would clearly apply to disclosures to members of the press. Whether this law would be constitutional depends on the interpretation of “properly classified.” The proposal would, in my view, be constitutional if “properly classified” is construed as excluding the classification of information already in the public domain, information whose disclosure does not have the potential to harm national security, and information that reveals unlawful government action. Congress enacted similar legislation in 2000, but President Bill Clinton vetoed it as unconstitutional under the First Amendment. See Bond Legislation Targets Intelligence Leaks (Aug. 2, 2006), available at <http://www.fas.org/sgp/news/2006/08/bond080206.html>.

³⁸ Perhaps the closest the government ever came to a prosecution of the press involved a disclosure by the *Chicago Tribune* in 1942 that might have alerted the Japanese to the fact that the United States had broken their secret codes. See GEORGE LENDT, CHICAGO TRIBUNE: THE RISE OF A GREAT AMERICAN NEWSPAPER 627–36 (1979).

³⁹ 403 U.S. 713 (1971).

day, Attorney General John Mitchell sent a telegram to the *Times* stating that the publication of this material was “prohibited” by federal law and that further publication would “cause irreparable injury to the defense interests of the United States.”⁴⁰ He therefore requested that the *Times* “publish no further information of this character and advise” him that it had “made arrangements for the return of these documents to the Department of Defense.”⁴¹

Two hours later, the *Times* transmitted a response, which it released publicly: “The *Times* must respectfully decline the request of the Attorney General, believing that it is in the interest of the people of this country to be informed of the material contained in this series of articles.”⁴² The *Times* added that, if the government sought to enjoin any further publication of the material, it would contest the government’s position, but would “abide by the final decision of the court.”⁴³

Events escalated quickly. On June 15, the United States filed a complaint for injunction against the *Times*. The federal district court promptly granted the government’s request for a temporary restraining order on the ground that “any temporary harm that may result from not publishing during the pendency of the application for a preliminary injunction is far outweighed by the irreparable harm that could be done to the interests of the United States Government if it should ultimately prevail” in the case.⁴⁴ This was the first time in U.S. history that a federal judge had restrained a newspaper from publishing information relevant to public debate.

Over the next few days, the matter rapidly worked its way up to the Supreme Court. On June 30, the Court announced its decision. Reflecting the unprecedented nature of the case, each Justice wrote an opinion. Six Justices held that the government had not met its “heavy burden of showing justification” for a prior restraint on the press.⁴⁵ The Court therefore ruled that the *Times* was free to resume publication of the Pentagon Papers.

Justice Potter Stewart’s opinion best captures the view of the Court: “We are asked . . . to prevent the publication . . . of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.”⁴⁶

⁴⁰ GEOFFREY R. STONE, *PERILOUS TIMES* 504 (2004).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 325 (S.D.N.Y. 1971).

⁴⁵ *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

⁴⁶ *Id.* at 730 (Stewart, J., concurring). The government filed criminal charges against Ellsberg for leaking the Pentagon Papers, but the prosecution was abandoned as a result of prosecutorial misconduct. See Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 *STAN. L. REV.* 311 (1974).

B

A fundamental question posed by the Pentagon Papers controversy is *who* should decide whether classified information should be made public. In the first instance, it would seem that our elected officials, who are charged with the responsibility of protecting the national security, must have the authority to decide such matters. But we know that these officials may sometimes have mixed motives for keeping secrets. They may be concerned not only with protecting the national security, but also with covering up their own mistakes, misjudgments, and wrongdoings. To give them the final say would risk depriving the American people of critical information about the conduct of their elected officials.

In the Pentagon Papers case, the Supreme Court held that although elected officials have broad authority to keep classified information secret, once that information gets into the hands of the press, the government has only very limited authority to prevent its further dissemination. This may seem an awkward, even incoherent, state of affairs. If the government can constitutionally prohibit public employees from disclosing classified information to the press in the first place, why can it not enjoin the press from publishing that information if a government employee unlawfully discloses it?

But one could just as easily flip the question. If the press has a First Amendment right to *publish* classified information unless publication will “surely result in direct, immediate, and irreparable damage to our Nation or its people,” why should the government be allowed to prohibit its employees from *revealing* such information to the press merely because it poses a potential danger to the national security? If we view the issue from the perspective of *either* the public’s right to know *or* the government’s interest in secrecy, it would seem logical that the same rule should apply to both public employees and the press. The very different standards governing public employees, on the one hand, and the press, on the other, present a puzzle.

However, there are good reasons for this state of affairs. As we have seen, the government has broad authority to prohibit public employees from disclosing classified information to the press. This rule is based *not* on a careful balancing of the government’s need for secrecy and the public’s need for information, but on a combination of the employee’s consent to this limitation on his freedoms and the government’s reasonable desire for a clear, easily administrable rule for public employees. For the sake of efficiency and simplicity, the law governing public employees substantially overprotects the government’s legitimate interest in secrecy. But the employee’s consent and the need for a simple rule have nothing to do with the rights of the press or the needs of the public. Under ordinary First Amendment standards, the press has broad freedom to publish informa-

tion of value to public debate unless, at the very least, the government can prove that the publication poses a clear and present danger of serious harm.⁴⁷

As Yale constitutional scholar Alexander Bickel once observed, this may seem a “disorderly situation.”⁴⁸ But it works. If we grant the government too much power to punish the press, we risk too great a sacrifice of public deliberation; if we give the government too little power to control confidentiality “at the source,” we risk too great a sacrifice of secrecy.⁴⁹ The solution, which has stood us in good stead for more than two centuries, is to reconcile the conflicting values of secrecy and accountability by guaranteeing both a strong authority of the government to prohibit leaks and an expansive right of the press to publish them.⁵⁰ This solution may seem awkward in theory and unruly in practice, but it has withstood the test of time.⁵¹

⁴⁷ See *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978) (requiring not only clear and present danger, but also that the magnitude of the danger be serious); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that even express advocacy of unlawful conduct can be proscribed only if the advocacy “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959) (same); *Bridges v. California*, 314 U.S. 252, 263 (1941) (noting that in order to punish expression, “the substantive evil must be extremely serious and the degree of imminence extremely high”); see also Kent Greenawalt, “*Clear and Present Danger*” and *Criminal Speech*, in LEE C. BOLLINGER & GEOFFREY R. STONE, *ETERNALLY VIGILANT* 119 (2002) (noting that to punish speech, the evil must be imminent, likely, and grave); Bernard Schwartz, *Holmes v. Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 240–41 (“[T]he immediate law violation must be likely to occur.”).

⁴⁸ ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 80 (1975).

⁴⁹ *Id.* at 79–82.

⁵⁰ This approach is not unique to the national security context. The Court has applied it to a broad range of issues involving the publication of confidential government information. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (publication of rape victim's name); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (publication of the name of a juvenile offender); *Landmark Commc'ns*, 435 U.S. 829 (publication of confidential matters before judicial review board); *Okla. Publ'g Co. v. District Court*, 430 U.S. 308 (1977) (publishing the name of a juvenile offender); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (publication of information about criminal defendant before trial); *Cox Broad. v. Cohn*, 420 U.S. 469 (1975) (publication of rape victim's name). In all these decisions, the Court invoked the principle that although the government could prohibit public employees from disclosing the information in the first place, it could not thereafter enjoin or punish the media for further disseminating the information once it fell into the public domain.

⁵¹ A slightly different variant of this doctrine involves not unlawful disclosures by public employees, but some other underlying illegality. In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), for example, Vopper, a radio talk show host, was prosecuted for broadcasting a recording of a private telephone conversation. The recording had been made by a third person in violation of the federal law and was sent to Vopper. Although the recording was unlawful, the Court held that Vopper could not constitutionally be held liable for damages for broadcasting it. The only decision in which the Supreme Court has held that a publisher could be punished for distributing speech because the speech was produced or made available to the press as a result of an unlawful act involved child pornography. See *New York v. Ferber*, 458 U.S. 747 (1982). But the child pornography issue is readily distinguishable from all other situations, including the disclosure of classified information by public employees, because the images presented in child pornography can easily be generated without engaging in actual child sexual abuse. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (holding that government cannot punish the exhibition of *images* of children en-

C

Three questions remain: (1) Does the same constitutional standard govern criminal prosecutions and prior restraints? (2) What disclosures might satisfy the *Pentagon Papers* standard? (3) What about information that satisfies the *Pentagon Papers* standard and contributes to public debate?

In the *Pentagon Papers* case, the Court emphasized that it was dealing with a prior restraint, a type of speech restriction that bears a particularly “heavy presumption against its constitutional validity.”⁵² This raises the question whether the test stated in *Pentagon Papers* governs criminal prosecutions as well as prior restraints. The inquiry is important because Justices White and Stewart intimated in *Pentagon Papers* that this was an open question.⁵³

The concept of prior restraint is deeply embedded in the history of the First Amendment. Historically, censorship took the form of licensing. No one could publish without first obtaining a license from the government. Anyone who published without one could be punished, even if he could prove that he would have been issued a license. The failure to comply with the system was itself a crime.

Injunctions operate in much the same way. If a publication is enjoined, and a publisher violates the injunction, he can be punished for violating it even if the injunction was improperly granted. In this sense, licensing requirements and injunctions are different from ordinary criminal laws. A speaker who is prosecuted for violating a criminal law can assert the defense that the law is unconstitutional. Licensing schemes and injunctions, on the other hand, cannot be challenged in this manner. They are ordinarily governed by the “collateral bar rule,” which provides that they can be challenged only by appealing the issuance of the injunction or the denial of the license. As a consequence, injunctions and licensing requirements are arguably more likely than criminal statutes to induce compliance with their terms, at least for the time it takes to appeal.⁵⁴

On the other hand, the penalties for violating a licensing requirement or an injunction are usually much less severe than those for violating a criminal law, and a system of prior restraint actually enables the speaker to know in advance whether his speech is subject to punishment. As a consequence, the logic of the prior restraint doctrine has often been questioned. As Harvard law professor Paul Freund observed more than fifty

gaged in sex if they are produced by computer simulation or the use of body double rather than by actual child sexual abuses). In the classified information situation, the information made available to the public would not exist but for the underlying unlawful disclosure.

⁵² *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

⁵³ See *id.* at 730 (Stewart, J., concurring); *id.* at 737 (White, J., concurring).

⁵⁴ See Stephen Barnett, *The Puzzle of Prior Restraint*, 29 *STAN. L. REV.* 539, 551–53 (1977).

years ago, “it will hardly do to place ‘prior restraint’ in a special category for condemnation.”⁵⁵

Whatever one thinks of the prior restraint doctrine, its primary significance involves issues like obscenity and libel. When the government regulates low value speech, it ordinarily may do so on the basis of a relatively undemanding standard. In that setting, the prior restraint doctrine has real bite.⁵⁶ But in dealing with expression that lies at the very heart of the First Amendment—speech about the conduct of government—the distinction between prior restraint and criminal prosecution carries much less weight.

The Supreme Court has made clear that the government ordinarily may not criminally punish speech about public affairs because of its content unless, at the very least, it creates a clear and present danger of serious harm. Although the precise words may differ from one case to another, the basic elements of the test are the same. Thus, as a practical matter, the standard used in *Pentagon Papers* is essentially the same as the standard the Court would use in a criminal prosecution of the press for publishing information about the activities of the government.⁵⁷ Indeed, in the thirty-five years since *Pentagon Papers*, the Supreme Court has not once upheld a content-based criminal prosecution of truthful speech relating to the activities of the government that did not involve some special circumstance, such as public employment. That, in itself, speaks volumes. I conclude that the test articulated in *Pentagon Papers* is essentially the standard the Court would have applied in a criminal prosecution of the *Times* for publishing the Pentagon Papers. And even if that was not obvious in 1971, it is certainly clear today.⁵⁸

What is an example of information the publication of which could be criminally punished? The traditional example was “the sailing dates of transports” or the “location of troops” in wartime.⁵⁹ In some circumstances, the publication of such information could instantly alert the enemy and endanger American lives. There might be little the government could do

⁵⁵ Paul Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951); see also Stephen Barnett, *The Puzzle of Prior Restraint*, *supra* note 54; Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245 (1982); Martin Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

⁵⁶ See, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965) (obscenity); *Near v. Minnesota*, 283 U.S. 697 (1931) (libel).

⁵⁷ See David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in BOLLINGER & STONE, *ETERNALLY VIGILANT*, *supra* note 47, at 58 (“[I]t is difficult to believe that the Court would have allowed newspaper editors to be punished, criminally, after they published the [Pentagon] Papers.”).

⁵⁸ See, e.g., *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829 (1978); *Worrell Newspapers v. Westhafer*, 739 F.2d 1219 (7th Cir. 1984), *aff’d* 469 U.S. 1200 (1985).

⁵⁹ *Near*, 283 U.S. at 716 (1931).

to protect our sailors and soldiers from attack. Other examples might include disclosure of the identities of covert CIA operatives⁶⁰ or disclosure that the government has secretly broken the enemy's code, thus alerting the enemy to change its cipher. In such situations, the harm from publication might be thought sufficiently likely, imminent, and serious to justify punishing the disclosure.

An important feature of these illustrations often passes unnoticed: what makes these examples so compelling is not only the nature and magnitude of the harm, but also the implicit assumption that the information does not meaningfully contribute to public debate. In most circumstances, there is no apparent value in having the public know the secret "sailing dates of transports" or "location of troops" when there is no time for political action. Later, of course, such information may be critical in evaluating the effectiveness of our military leaders, but at the very moment the troops are set to attack it is unclear how publication of their location could meaningfully contribute to public discourse. The same may be said about disclosing publicly that the U.S. government has broken an enemy's code. My point is not that these illustrations involve "low" value speech in the conventional sense of that term, but that they involve information that does not seem particularly "newsworthy" and that this factor plays a significant role in making the illustrations persuasive.

The failure to notice this feature of these examples can lead to a serious failure in analysis. Indeed, just such a failure was implicit in the memorable hypothetical Justice Holmes first used to elucidate the clear and present danger test—the false cry of fire in a crowded theatre.⁶¹ Why can the false cry of fire be restricted? Because it creates a clear and present danger of a mad dash to the exits. Therefore, Holmes reasoned, the test for restricting speech is whether it creates a clear and present danger of serious harm. But the reasoning is spurious. Suppose the cry of fire is true. In that case, we would *not* punish the speech—even though it still would cause a mad dash to the exits—because the value of the speech would outweigh the harm it would create. Thus, at least two factors must be considered in analyzing this situation—the *harm* caused by the speech and the *value* of the speech.

Similarly, the reason for protecting the publication of the Pentagon Papers was not only that the disclosure would not "surely result in direct, immediate, and irreparable damage" to the nation, but also that the Pentagon Papers made a meaningful contribution to informed public discourse. Suppose a newspaper accurately reports that American troops in Iraq recently murdered twenty insurgents in cold blood. As a result of this publication,

⁶⁰ See *Haig v. Agee*, 453 U.S. 280 (1981) (upholding the Secretary of State's revocation of a former CIA employee's passport for exposing the identities of covert CIA agents around the world).

⁶¹ *Schenck v. United States*, 249 U.S. 47, 51 (1919).

insurgents quite predictably kidnap and murder twenty Americans. Could the newspaper constitutionally be punished for disclosing the initial massacre? I would argue that it could not. Even if there were a clear and present danger that the retaliation would follow, the information is simply too important to the American people to punish its publication.

What this suggests is that to justify the criminal punishment of the press for publishing classified information, the government must prove that the publisher knew that (a) it was publishing classified information, (b) the publication of which would result in likely, imminent, and serious harm to the national security, *and* (c) the publication of which would not meaningfully contribute to public debate. In practical effect, this has been the law of the United States for more than half a century,⁶² although there is no holding to this effect.

III. JOURNALISTS

In what circumstances may the government criminally punish a journalist for receiving or soliciting classified information from a government employee for the purpose of publication? This is a novel question: in all of American history, no journalist has *ever* been prosecuted under such a theory.

A

The best place to begin is with ordinary criminal law principles. Such principles do not trump the Constitution, but they provide a touchstone for analysis. We can divide the most likely scenarios into three categories.

First, a journalist would violate ordinary criminal law principles if he knowingly *coerces, bribes, or defrauds* a public employee, causing her to

⁶² Requirement (c) may seem novel, but it is embedded in both First Amendment principle and First Amendment doctrine. Without some such requirement, no balance takes place and the First Amendment side of the equation is simply ignored. Without (c), the test would blithely assume that the harm of publication outweighs the value of publication. I should emphasize that (c) is *not* a requirement in considering the constitutionality of regulations of low value speech, content-neutral regulations, content-based regulations that are not directed at particular ideas, items of information or viewpoints, or even regulations directed at particular ideas, items of information, or viewpoints in special environments (such as public employment, schools, and government subsidy programs). But when the government attempts generally to restrict speech at the very core of the First Amendment, requirement (c) plays an important role in the analysis. The best illustration of the relevance of this requirement is in the evolution of the Court's doctrine in the area of speech causing unlawful conduct, where the Court requires both express incitement and clear and present danger. See Lee C. Bollinger & Geoffrey R. Stone, *Dialogue*, in BOLLINGER & STONE, *ETERNALLY VIGILANT*, *supra* note 47, at 4–6 (Stone); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754, 755 (1975); Schwartz, *supra* note 47, at 240–41.

disclose classified information, provided that the employee could constitutionally be punished for disclosing that information.⁶³

Second, a journalist would violate ordinary criminal law principles if he knowingly *encourages, incites, persuades, or solicits* a public employee to disclose classified information, provided that the employee could constitutionally be punished for disclosing that information.⁶⁴

Third, a journalist would violate ordinary criminal law principles if he knowingly *receives* from a public employee (or, indeed, from any source) classified information that could not lawfully be disclosed by a public employee.⁶⁵

Thus, a journalist who obtains classified information by bribery, solicitation, or passive receipt may be guilty of a crime, *unless* the First Amendment affords him protection. An ordinarily unlawful act is not unlawful if it is protected by the First Amendment.

For example, the government can make it unlawful for any person to obstruct the draft. An individual who physically blocks access to a selective service office can be punished for doing so. But an individual who distributes leaflets criticizing the draft as immoral cannot constitutionally be punished, even though his ideas might persuade some people to refuse induction.⁶⁶ The criminal law principles are the same, but the pamphleteer is protected by the First Amendment. Put simply, that the government can make certain conduct unlawful does not mean that it can punish that conduct when it is protected by the First Amendment.

B

What does it mean to say that the conduct is “protected by the First Amendment?” This question is more complicated than one might expect, as there are many ways in which laws limit speech. First, a law may ex-

⁶³ Getting the employee drunk would also fall into this category.

⁶⁴ This category includes the crimes of conspiracy and attempt. On the crime of solicitation, see Model Penal Code § 5.02; WAYNE R. LAFAVE, CRIMINAL LAW § 11.1 (4th ed. 2002); Kent Greenawalt, *supra* note 47, at 113–19.

⁶⁵ This is merely an application of the traditional crime of receiving stolen property. There are subtleties in the meaning of “stolen” as applied to information, as distinct from documents, but the basic principle of the traditional criminal law concept would clearly apply to information as well as objects in situations like the one under consideration. It is a defense to the crime that the recipient intends to return the property (or information) to its lawful owner without in any way using it. Thus, a reporter who receives such a document and immediately returns it to the government and never discloses it or its contents to anyone else would not be guilty of a crime. On the crime of receipt of stolen property, see Model Penal Code § 223.6; LAFAVE, *supra* note 64, at § 20.2.

⁶⁶ In the early years of First Amendment doctrine, the Supreme Court upheld convictions in such circumstances. See *Schenck*, 294 U.S. 47; *Debs v. United States*, 249 U.S. 211 (1919). Over time, however, the Court embraced a much more speech-protective approach. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see generally Gunther, *supra* note 62; Schwartz, *supra* note 62; Frank Strong, *Fifty Years of “Clear and Present Danger”*: *From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41.

pressly restrict the communication of particular points of view, ideas, or items of information. For example, “No one may publicly criticize the war” or “No one may publish classified information.” Because such laws may seriously distort the content of public debate and are often enacted for constitutionally questionable reasons, they are presumptively unconstitutional.⁶⁷

Second, a law may expressly restrict communication, but *not* on the basis of content. For example, “No one may distribute leaflets in a public park” or “No one may erect a billboard near a public highway.” Because such laws regulate speech, but not on the basis of content, they are analyzed through a process of balancing, in which the court determines whether the government interest outweighs the impact on speech.⁶⁸

Third, a law may restrict what is essentially non-communicative conduct, but in a way that has an *incidental* impact on speech. For example, “No one may appear naked in public,” as applied to an individual who marches naked on Main Street to protest anti-obscenity laws, or “No one may engage in wiretapping,” as applied to a reporter who wiretaps a congressman in the hope of hearing him accept a bribe. Because such laws do not expressly restrict speech, they are presumptively constitutional. A court will invalidate such laws only if the incidental effect on speech is substantial and significantly outweighs the government’s interest in enforcing the law.⁶⁹

⁶⁷ As we saw in Part I, in the public employment situation, such regulations may not be presumptively unconstitutional. On content-based restrictions of speech, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 494–508 (1996); Paul Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Susan Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991). As noted, laws regulating low value speech on the basis of content involve a separate analysis under the First Amendment.

⁶⁸ See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

⁶⁹ On “incidental” restrictions, see Michael Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996) (arguing that although “sound reasons can be advanced for taking direct burdens more seriously than incidental burdens,” this does not mean “that incidental burdens should never count as constitutional infringements”); Kagan, *supra* note 67, at 494–508 (arguing that the distinction between direct and incidental restrictions in First Amendment analysis can be explained largely in terms of the concern with avoiding possible improper governmental motivation); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 769 (2001) (arguing that “there is no such thing as a free speech immunity based on the claim that someone wants to break an otherwise constitutional law for First Amendment purposes”); Stone, *supra* note 68, at 114 (arguing that although “[t]he general presumption is that incidental restrictions do not raise a question of First Amendment review,” courts will invalidate such restrictions if they have “a highly disproportionate impact” or particular viewpoints or “significantly limit the opportunities for free expression”).

For illustrative decisions upholding laws having an incidental impact on speech, see *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (nude dancing); *Arcara v. Cloud Books*, 478 U.S. 697 (1986) (closing buildings used for prostitution, as applied to “adult” bookstore); *United States v. O’Brien*, 391 U.S. 367 (1968) (draft card burning). In a few decisions, the Court has found incidental restrictions unconstitutional. See *Boy Scouts of*

In considering whether a law violates the First Amendment, it is necessary to determine which of these models applies. A law expressly prohibiting the press from publishing classified information clearly regulates content. Such a law would therefore be held to the highest degree of First Amendment scrutiny.

But what kind of laws are we dealing with here? In the first instance, we must look to the terms of the legislation.⁷⁰ If the government prosecutes a journalist for violating a law making it unlawful to encourage a public employee to disclose classified information for the purpose of publication, the law would seem to fall squarely within the first category. It regulates expression on the basis of content. Viewed in this light, the journalist presumably would be protected by the First Amendment to the same extent as the newspaper that publishes the information.

But it is not so simple. Suppose the journalist is prosecuted under a general law prohibiting any person from soliciting the commission of a felony. This statute would apply to solicitation to commit murder, rape, arson, burglary, and fraud, as well as unlawfully to disclose classified information. It is not expressly directed at *communicative* crimes.⁷¹ Hence, this would seem to fall into the third category. Like laws prohibiting public nudity and wiretapping, laws prohibiting solicitation to commit felonies have only an incidental effect on expression. Such a law would be presumptively constitutional.

How should we deal with such laws? The simplest way is for the government to prosecute those who bribe or solicit public employees to disclose classified information only under general laws prohibiting bribery and solicitation, rather than under laws expressly targeting communicative crimes. The laws currently on the books are all over the lot in this respect. Because my interest in this Essay is in the First Amendment rather than the statutory issues, I will assume that we are dealing with prosecutions under general laws prohibiting bribery, solicitation, and the receipt of stolen property, which makes the problem more challenging.⁷²

Let us assume, then, that a journalist is prosecuted for soliciting a public employee to reveal classified national security information, a disclosure for which the employee could constitutionally be punished. Let us as-

America v. Dale, 530 U.S. 640 (2000) (antidiscrimination law); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) (disclosure of campaign contributions); NAACP v. Alabama, 357 U.S. 449 (1958) (disclosure of NAACP membership lists).

⁷⁰The most comprehensive source on the relevant laws is Harold Edgar & Benno Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973).

⁷¹Of course, solicitation, like bribery and conspiracy, involves the use of words. But, at least in the context of private (as opposed to public) speech, such language is assumed to have the quality of an "act" and does not itself raise serious First Amendment issues. See Frederick Schauer, "Private" Speech and the "Private" Forum: *Givhan v. Western Line School District*, 1979 SUP. CT. REV. 217.

⁷²For examples of the relevant laws, see 18 U.S.C. §§ 793 *et seq.*; 50 U.S.C. § 421 *et seq.*

sume further that the journalist is prosecuted under a general criminal statute prohibiting any person from soliciting another to commit a crime. As we have seen, if this law has only an incidental effect on speech, it will likely be constitutional, even as applied to a journalist.

But *why* should this be so? The answer is, simply, that almost every law can have an incidental effect on speech. A law against public nudity (think of nude sunbathing) punishes public nudity by a person whose bare bottom is intended as a form of political protest. A law against speeding makes it more difficult for individuals to get to a demonstration or lecture on time. A law against open fires in public prohibits flag-burning. A sales tax reduces the amount of money you have to support your favorite political causes. A law against wiretapping makes it more difficult for reporters to gather news.⁷³

The rationale of the incidental effects doctrine is largely one of practicality. Because almost every law can have some effect on speech, and because individuals would readily claim they were engaged in speech if that claim could make out a defense to a criminal charge, an approach that required courts seriously to consider the incidental effects of laws on speech-related activities in *every* case would be a judicial nightmare.

Moreover, in almost all of these instances the individual has many other ways to achieve his goals. Instead of walking down Main Street naked, the protester could carry a sign criticizing anti-obscenity laws. Instead of speeding to get to the lecture, the lecture-goer could have left on time. Instead of burning a flag in public, the war opponent could shred his flag and thus avoid the prohibition on open fires. In short, the *actual* impact of most laws having incidental effects on free expression is usually slight.

For these reasons, the Supreme Court has reasonably held that laws having only an incidental effect on free expression are presumptively constitutional and may be invalidated only in the very unusual situation in which they have a *substantial* impact on free expression.⁷⁴ This suggests that general laws prohibiting bribery and solicitation are not unconstitutional merely because they have an incidental effect on journalists who would like to bribe or solicit public employees to disclose classified information for the purpose of publication.

⁷³ See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (no First Amendment press exemption from breach of contract law); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (no First Amendment press exemption from newsroom searches); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (no First Amendment-based journalist-source privilege); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (no First Amendment press exemption to NLRA).

⁷⁴ For examples of decisions invalidating laws on this basis, see cases cited *supra* note 69.

C

Once again, however, it is not so simple. The incidental impact of these laws on the freedom of the press may be sufficiently serious to justify their invalidation. Certainly, some of the information that could be disclosed unlawfully could be of considerable value to the public. But the same would be true of unlawful journalistic wiretaps and burglaries. In some circumstances, journalists would be better able to discover valuable information if they could wiretap the offices of senators or burgle the homes of corporate executives. But I doubt we are about to hold wiretapping, trespass, and burglary laws unconstitutional as applied to journalists (though such a claim is not absurd). Because the seriousness of the incidental impact of laws against wiretapping and burglary is not much different from that of the incidental impact of laws against bribery and solicitation, the incidental impact of bribery and solicitation laws on freedom of the press would not seem sufficiently substantial to justify invalidating those laws as applied to journalists.

But we are not dealing here with a conventional incidental impact situation, where the underlying crime is not inherently expressive. Speeding, public nudity, wiretapping, burglary, making an open fire, and paying taxes are not inherently expressive acts. If the First Amendment is implicated in those situations, it is only because laws regulating those acts *occasionally* have an effect on expressive behavior. The effect on speech, in other words, is merely “incidental.”

But in the public disclosure situation, the issue is more complex, because it involves two levels of conduct—the solicitation and the disclosure. Although a general law prohibiting solicitation of a crime has only an incidental effect on journalists who solicit public employees to disclose classified information, the crime solicited is itself a communicative act, and it is that *communication* that causes the harm: a subtle but important distinction.

In the burglary situation, for example, it is the invasion of the homeowner’s property and privacy that causes the harm. It makes no difference to the criminal law whether the burglar is interested in stealing money, jewels, or information. That a journalist commits burglary to gather news rather than steal cash is irrelevant to the reason for prohibiting burglary. But if a journalist is punished for soliciting classified information from a public employee, the underlying act of disclosure causes harm precisely because it involves expression. It is, indeed, the communication of the *information* that the government seeks to prevent. Thus, unlike burglary, bribery and solicitation are only *quasi*-incidental impact problems.⁷⁵

⁷⁵ All this may seem needlessly abstruse and complex, but this is sometimes the nature of legal reasoning. General principles are useful to distinguish among different types of cases, but the principles are almost always imprecise at the margins. There are gradations.

These situations defy easy categorization either as laws that have only an incidental effect on expression or as laws that regulate the content of expression. It would be simplistic to pretend that these are routine cases of mere incidental effect.⁷⁶

Perhaps, most important, it is essential to recall how we came to the conclusion that the government can constitutionally prohibit public employees from disclosing classified information to reporters for the purpose of publication. As we saw in Part I, that issue poses a potentially serious conflict between the First Amendment and the government's interests in efficiency and security. We allow the government to prohibit its employees from revealing information to the public not because the *danger* of disclosure necessarily outweighs the *value* of disclosure, but because public employees have consented to such a limitation of their rights and because it is useful for the government to have clear and simple rules for its employees. Although that approach may be justified for internal management purposes, it substantially undervalues the potential importance of the disclosures to informed public debate.

As discussed in Part II, the government may not hold the press to the same standard it applies to its employees. For the same reason that the standard for government employees does not govern the press, it also should not govern the newsgathering activities of journalists.

In effect, newsgathering is an intermediate case. To resolve it, we must explore two competing principles: the government's authority to regulate the speech of its employees and the press's authority to publish information of value to the public.

D

At this point, it is necessary to return to the three ways in which journalists might obtain classified information from public employees: (1) bribery, coercion, or fraud; (2) solicitation, persuasion, or incitement;

Sometimes it is best to ignore the gradations for the sake of simplicity, sometimes it is best to take the gradations into account.

⁷⁶ Another example of this sort of problem involves prosecutions of speakers under breach of the peace statutes. Such laws ordinarily do not specify any particular *content* for restriction. Rather, they prohibit any conduct that causes (or knowingly or intentionally causes) a breach of the peace. It matters not under the statute whether the conduct is speech or whether the speech carries any particular message. Viewed from this perspective, such laws might be thought to have only an incidental effect on expression. In fact, however, the Supreme Court has always treated such laws as content-based restrictions of speech whenever the conduct prosecuted is speech and the breach of the peace was caused by the content of the speech. Put differently, a law is analyzed as content-based, regardless of how it is drafted, whenever its application turns on the communicative impact of speech. *See, e.g.*, *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *see also* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 111 (1980) (a law is content-based when it turns in application on "how people will react to what the speaker is saying"); Rubinfeld, *supra* note 69, at 777; Stone, *supra* note 67, at 207–17.

and (3) passive receipt. In the real world, of course, the lines blur, for the relationships between journalists and their sources are subtle and complex. Nonetheless, unless we embrace an all-or-nothing approach for the sake of simplicity, distinctions must be made.

Situations (3) and (1) are the most straightforward. Situation (3) is illustrated by the *Pentagon Papers* case, in which Daniel Ellsberg sent the Papers unsolicited to Neil Sheehan of the *New York Times*. A similar situation arose in *Bartnicki v. Vopper*,⁷⁷ in which Vopper, a radio commentator, aired a tape recording of an unlawfully intercepted telephone conversation that an anonymous source had mailed to him. In both cases, the journalists passively received the information, though both knew or should have known that it had been obtained and disclosed to them unlawfully.

Under traditional criminal law principles, both Sheehan and Vopper knowingly received “stolen” property. Nonetheless, because the information in both cases involved matters of public concern, both Sheehan and Vopper were protected by the First Amendment. As the Court explained in *Bartnicki*, when a journalist receives information “from a source who has obtained it unlawfully,” the journalist may not be punished for the receipt or publication of the information, “absent a need . . . of the highest order.”⁷⁸

In rejecting the argument that the government can punish journalists in order to deter those who unlawfully intercept conversations, the Court in *Bartnicki* reasoned that if “the sanctions that presently attach to [the unlawful acts] do not provide sufficient deterrence,” then “perhaps those sanctions should be made more severe,” but “it would be quite remarkable to hold” that a law-abiding journalist can constitutionally be punished merely for receiving and publishing that information “in order to deter conduct by a non-law-abiding third party.”⁷⁹

Thus, in the passive receipt situation, neither the journalist nor the publisher can be criminally punished for receiving or possessing unlawfully disclosed information, the publication of which could not constitutionally be punished.

Situation (1) seems equally straightforward. The government has a legitimate interest in expecting its employees to obey the law. For a jour-

⁷⁷ 532 U.S. 514 (2001).

⁷⁸ *Id.* at 528.

⁷⁹ *Id.* at 529–30. In *Boehner v. McDermott*, 441 F.3d 1010 (D.C. Cir. 2006), the court of appeals held that *Bartnicki* could be distinguished from a case in which a member of Congress, McDermott, received an envelope containing a tape recording of an unlawfully intercepted telephone conversation involving other members of Congress. After opening the envelope and listening to the tape, McDermott shared the tape with reporters, who proceeded to report on its contents. The Court distinguished *Bartnicki* on the ground that in the instant case, McDermott knew the tape had been unlawfully made *before* he opened the envelope and knew the identity of the person who provided him with the tape. In dissent, Judge Sentelle, who clearly had the better of the argument, correctly explained that these distinctions are without significance under the law. The D.C. Circuit has agreed to hear the case en banc.

nalist to bribe, coerce, or defraud a public employee to disclose classified national security information unlawfully seems analogous to the wiretapping and burglary examples. Like wiretapping and burglary, bribery, coercion, and fraud are well-established crimes, far removed from the traditional processes of newsgathering. Although it might be useful for reporters to bribe and extort classified information from public employees, and although such conduct would sometimes result in the disclosure of valuable information, the government's legitimate interest in not having its employees bribed, coerced, or defrauded seems sufficiently weighty to justify the prohibition of such conduct.

Situation (2) is the trickiest. Like bribery, coercion, and fraud, solicitation is ordinarily unlawful. But that is also true of receiving stolen property and, as we have seen, that an act is *ordinarily* unlawful does not provide a conclusive answer in the First Amendment context. Although it would be easy to envision a legal regime in which journalists would be prohibited from encouraging public employees to reveal classified information, such a regime would disregard the need to strike a proper balance between government secrecy and an informed public.

Just as we grant the government "too much" authority to protect secrecy at its source, we must also grant the press "too much" authority to probe that secrecy. To make it a crime for journalists to attempt to persuade public employees to disclose classified information that might contribute to public debate would place too much weight on the secrecy side of the scale. The standard that defines the government's power to punish its employees for disclosing classified information ("potential harm to the national security") was *not* designed to determine the balance between government secrecy and freedom of the press.

Indeed, building upon the Court's reasoning in *Bartnicki*, it would seem that the appropriate government response to such solicitations is not to prosecute journalists, but to increase the penalties for government employees who violate the law. Moreover, an effort to apply the crime of solicitation to the myriad interactions between journalists and their sources would prove just as messy as an effort to regulate more precisely the relationship between the government and its employees. Because it is often difficult to define when a conversation passes the line between a discussion of policy and a solicitation of a crime, the enforcement of solicitation law in this setting would be uncertain, confusing, and treacherous. The interjection of the government into the very heart of the journalist-source relationship could have a serious chilling effect on journalist-source exchanges.

One way to address these concerns (indeed, probably a constitutional requirement), would be to limit the crime of solicitation in this context to *express incitement* of unlawful conduct (e.g., "give me that classified document, the disclosure of which is unlawful"). But as First Amendment history and doctrine teach, even a requirement of express incitement is an

inadequate safeguard. The Court has held (at least in the context of public speech) that even express incitement of unlawful conduct cannot constitutionally be proscribed, unless it creates a likely and imminent danger of serious harm.⁸⁰

The most sensible course is to hold that the government cannot constitutionally punish journalists for encouraging public employees unlawfully to disclose classified information, unless the journalist (a) expressly incites the employee unlawfully to disclose classified information, (b) knows that publication of this information would likely cause imminent and serious harm to the national security, *and* (c) knows that publication of the information would not meaningfully contribute to public debate.

Adhering to these guidelines would not render the government powerless. As in *Bartnicki*, the government retains its ability to protect its legitimate interests by punishing its employees for disclosing classified information.

The United States has made it through more than two hundred years without ever finding it necessary to prosecute a journalist for soliciting a public employee to disclose confidential national security information. This is not because such solicitations have never occurred, but because employees have usually complied with the law and, when they have not, the press has either acted responsibly or the resulting harm has not been thought sufficiently serious to justify an intrusion into the freedom of the press.⁸¹

E

At least one vexing question remains unresolved: who is a journalist? Surely, reporters for the *Washington Post* or CNN qualify. But what about a professor writing a book, a blogger, an editor of a school newspaper, a lobbyist, or a spy?⁸² The prospect of courts deciding as a matter of con-

⁸⁰ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁸¹ Another possibility is that public officials are loathe to prosecute the press because they are reluctant to trigger widespread press criticism.

⁸² *United States v. Rosen*, No. 1:05CR225, 2006 WL 2345914 (E.D. Va., Aug. 9, 2006), involved the prosecution of two lobbyists employed by the American Israel Public Affairs Committee. The defendants allegedly obtained classified information from an employee of the Department of Defense, which they then allegedly transmitted to members of the media, foreign policy analysts, and officials of a foreign government. The public employee pled guilty to violating 18 U.S.C. §§ 793(d) and (g), 50 U.S.C. § 783 and 18 U.S.C. § 371. The defendants were charged with violating 18 U.S.C. § 793(g), which prohibits any person from conspiring to transmit classified information to any person not entitled to receive it. The district court rejected the defendants' motion to dismiss the indictment on the ground that it violated the First Amendment.

The district court properly recognized that collecting information about foreign policy "is at the core of the First Amendment's guarantees," that "the mere invocation of 'national security' or 'government secrecy' does not foreclose a First Amendment inquiry," and that the First Amendment provides less protection to public employees than to those who do

stitutional interpretation who is a member of the “press” for First Amendment purposes is daunting, at best.

Indeed, the Supreme Court acknowledged as much in *Branzburg v. Hayes*,⁸³ in which the Court declined to recognize a robust First Amendment-based journalist-source privilege in part because recognition of such a privilege would make it “necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher.”⁸⁴

This sort of problem arises whenever *anyone* challenges a law because of its incidental effect on speech, which is one reason why the Court has been reluctant to invalidate incidental impact laws. Despite this difficulty, however, the Court has invalidated laws when their impact on free expression was sufficiently severe. In *NAACP v. Alabama*,⁸⁵ for example, the Court held that Alabama could not constitutionally require the NAACP to disclose its membership lists, explaining that the disclosure of such information in Alabama at the height of the civil rights movement might “induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs.”⁸⁶ The Court therefore held the law unconstitutional as applied to the NAACP, opening the door to similar challenges to other laws by other individuals and organizations.⁸⁷

Similarly, in *Boy Scouts of America v. Dale*,⁸⁸ the Court invalidated a state antidiscrimination law as applied to the Boy Scouts. The Court held that for the state to require the Boy Scouts to allow gay scoutmasters would seriously impair the group’s right of “expressive association.”⁸⁹ This de-

not “have access to the information by virtue of their official position.” The district court then erred, however, in holding that *New York Times v. United States* is limited to prior restraints and, astonishingly, that lobbyists (and presumably even journalists) may constitutionally be punished for knowingly disseminating information that is “potentially harmful” to national security. See *Rosen*, 2006 WL 2345914, at *18, *19, *22, *26. The district court cited no precedents to support this conclusion, which flies in the face of at least fifty years of Supreme Court jurisprudence. The district court correctly treated 18 U.S.C. § 793(g) as a content-based restriction of potentially important speech, but, in effect, the district court seemed to have simply ignored its own admonition that the First Amendment treats nonpublic employees quite differently than public employees. In practical effect, the court applied the standard it had carefully enunciated for the former to the latter. In this respect, the decision seems clearly erroneous. Even if *New York Times* is limited to prior restraints, the standard in this context at the very least must embody an element of “clear and present danger.”

⁸³ 408 U.S. 665 (1972).

⁸⁴ *Id.* at 704.

⁸⁵ 357 U.S. 449 (1958).

⁸⁶ *Id.* at 463.

⁸⁷ See, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (invalidating the provisions of a state campaign reporting law as applied to the Socialist Workers Party, “a minor political party that historically has been the object of harassment”).

⁸⁸ 530 U.S. 640 (2000).

⁸⁹ *Id.* at 644.

cision, too, opened the door to challenges by other groups to similar laws and regulations. Although the question “Who is the press?” is not identical to the questions “What organizations are like the NAACP?” or “What organizations are like the Boy Scouts?,” the nature of the inquiries is the same.

There are three possible responses to the challenge of identifying who is a “member of the press.” First, rather than making the distinction at all, we could conclude that the best course is to protect *anyone* who solicits classified information from public employees. This approach would extend First Amendment protection to some individuals who are not engaged in First Amendment activity. The primary justification for this approach would be that it avoids the need to decide who is a member of the “press.” This is not as peculiar as it might seem, for in this context, unlike most incidental restriction situations, a very high percentage of those who engage in the activity of soliciting classified information from public employees are likely to be journalists. Thus, the over-inclusiveness of this approach would be relatively small.

Second, we could treat journalists as if they were not journalists. That is, to avoid having to decide who is a member of the press, we could hold that even mainstream members of the press can be punished for the receipt or solicitation of classified information. In light of the analysis up to this point, however, this approach seems too drastic. Ironically, it would undermine the freedom of the press in order to avoid deciding who is entitled to the freedom of the press.

Though ironic, this judgment would not be unprecedented—to the contrary, the Court’s reasoning in *Branzburg* was similar. But *Branzburg* is distinguishable. In *Branzburg*, the Court concluded that a journalist-source privilege was unnecessary. Whatever the merits of that conclusion, the idea that the government can criminally punish reporters merely for receiving or requesting classified information (even though the press has a First Amendment right to *publish* that information) in order to avoid deciding who is a journalist seems perverse.

Third, we could bite the bullet and decide, as a matter of First Amendment interpretation, who is a member of the press. This endeavor might not be quite as difficult as it seems, or at least as difficult as the Court thought it would be at the time of *Branzburg*. In the years since that decision, forty-nine states and the District of Columbia have adopted some form of journalist-source privilege statute,⁹⁰ all of which require courts to answer the question, “Who is a journalist?” Courts therefore have plenty of experience with this issue. Of course, deciding this as a constitutional matter is different from deciding it as a matter of statutory interpretation.⁹¹

⁹⁰ See Stone, *supra* note 7, at 42 & n.12.

⁹¹ See *id.* at 47–48. Similar issues arise with respect to the priest-penitent privilege. Deciding who is protected by the priest-penitent privilege raises potentially thorny First

The most straightforward definition would be a functional one—that is, a member of the press for these purposes is a person who seeks the information for the purpose of disseminating it to the public. This inquiry seems both manageable and preferable to the alternatives.⁹²

But what about *spies*? What is to prevent an enemy spy from creating a blog, soliciting classified information from public employees, and then insulating herself from criminal punishment by publishing the classified information on her blog, rather than transmitting it secretly to the enemy? One answer, of course, is that in many instances this tactic would significantly dilute the value of the spy's work. Espionage is most valuable when the nation spied upon does not *know* its secrets are not secret.

But this is a more fundamental issue, of a sort that arises throughout First Amendment law. In deciding whether an individual may be punished for her speech, it is necessary to focus on what she says and on the danger she creates, rather than on her motives. Is a person who criticizes the war in Iraq attempting to weaken our national resolve in order to aid the enemy, or is he participating constructively in public debate? Is he a traitor or a patriot? The words he uses and the harm he causes may be precisely the same, regardless of his motive. In the evolution of First Amendment jurisprudence, we learned long ago that inquiries into subjective intent and personal motivation are usually fruitless—and often dangerous—in the context of free speech. Even a traitor or a spy can meaningfully contribute to public debate, despite her bad motivations.⁹³

CONCLUSION

As this Essay suggests, it is not easy to reconcile the nation's important interest in security with its equally important interest in preserving a free and responsible press and an informed citizenry. My conclusions are as follows:

Amendment concerns, but courts have dealt with them for centuries. See Ronald J. Colombo, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225 (1998). In that context, courts have usually taken a functional approach to the inquiry. See, e.g., *In re Grand Jury Investigation*, 918 F.2d 374, 377 (3d Cir. 1990); *Eckmann v. Bd. of Educ.*, 106 F.R.D. 70 (E.D. Mo. 1985); *In re Verplank*, 329 F. Supp. 433 (C.D. Cal. 1971).

⁹² See *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998); *von Bulow v. von Bulow*, 811 F.2d 136, 143–45 (2d Cir. 1987).

⁹³ On the other hand, there are many circumstances in which the law regulates individuals who are “agents” of a foreign power. The criminal punishment of such individuals for soliciting classified information from public employees with the intent of harming the United States might well be a permissible accommodation to the legitimate needs of the nation. Certainly, the mere pretext of being a journalist need not insulate such individuals from prosecution. See *Edgar & Schmidt*, *supra* note 27, at 407 (“Publication and espionage should not be encompassed within a single prohibition, except in those rare instances where the type of information at issue is extremely sensitive and of little value to informed public debate.”).

First, the government constitutionally can discipline, discharge, and/or criminally punish a public employee who knowingly discloses classified information to a journalist for the purpose of publication if (a) the information was not already in the public domain and (b) its disclosure has the potential to harm the national security, *unless* the disclosure reveals *unlawful* government action and the employee has complied with reasonable whistleblower procedures governing the disclosure of the information.

Second, the government constitutionally can punish the press for publishing classified information if the publisher knew that (a) it was publishing classified information, (b) its publication would likely result in imminent and serious harm to the national security, and (c) the publication would not meaningfully contribute to public debate.

Third, the government constitutionally can punish a journalist for bribing, coercing, or defrauding a public employee, causing her to disclose classified information if the employee could constitutionally be punished for disclosing the information.

Finally, the government constitutionally can punish a journalist for receiving or soliciting the disclosure of classified information from a public employee if the journalist (a) expressly incited the employee to disclose classified information, (b) knew that publication of the information would result in likely, imminent, and serious harm to the national security, and (c) knew that publication of the information would not meaningfully contribute to public debate.

It is surely tempting to err on the side of government secrecy. But, as the Declaration of Independence stated, a free society must rest on “the consent of the governed.” There is “no meaningful consent when those who are governed do not know to what they are consenting.”⁹⁴

⁹⁴ DAVID WISE & THOMAS B. ROSS, *THE INVISIBLE GOVERNMENT* 6 (1964).

