# Chapter 43 - Restraints on Publication of National Security Information

## Introduction to the Pentagon Papers

### Reflect on whether this long term secrecy, including secret wars in Laos and Cambodia is possible in the modern, connected world.

#### This is a piece of the larger picture of secrecy and governmental abuse that shaped the authors and my own views of the government.

#### Is this different from the WMD debates over the 2nd Iraq war?

##### How long was the government able to hide the absence of WMDs?

#### If the world has changed to make long term secrecy impossible and to limit even short term secrecy, does this make our concerns with privacy and limitations on government powers out of date?

### What did the Pentagon Papers show?

### Why was this critical to undermining the support for the Vietnam War?

#### How McGovern lost anyway, in a landslide, is the story of the first modern campaign. See Fear and Loathing on the Campaign Trail in 1972.

### How much do you think this was an essential predicate to the impact of Watergate?

### What did CJ Burger say the NYT should have done when they were given the papers?

### What did the NYT’s outside counsel advise?

### Did they even read the papers?

### Why?

### You have read the espionage laws – were the lawyers correct at the time?

#### What did the AG threaten?

#### Does the opinion change this analysis?

#### What do you think was driving the Times analysis of the risk of publishing?

#### Was it really a legal decision?

## Notes and Questions

### 2. Role of the Media Lawyer

#### Is it ever appropriate for an attorney to refuse to examine any material relevant to the case against her client?

#### Should it matter that the client asks the attorney to make such an examination?

### 2. Institutional Role of the Press

#### What was Justice Stewart’s view of the Constitutional status of the press?

#### Is this view universally accepted?

### 3. A Symbiotic Relationship Between Press and Government.

### What did the Times say in their filing in the case about interdependence of the press and the government and the use of secret information?

#### This is echoed in Rosen.

### 4. Press Self-Censorship

### What did Kennedy say about the Times suppressing their story about the Cuban invasion that became the Bay of Pigs?

### Did the Times publish all of the Pentagon Papers?

### Should the media self-censor stories?

#### Can they work with the government in making these decisions?

#### What is the risk of trying to work with the government before publication?

## 2. An Inherent Power of the Executive to Censor?

### What did the Times reply to the AG’s threatening telegram?

### After the publication of the first installment, the government moved for an injunction – what law did they base this initial request on?

### Who represented the Times and why?

### What was the government’s argument for a delay in publication?

#### Why was this disingenuous?

### Did the judge grant the injunction?

### What might have influenced him?

### How long did the government get to brief the case?

### What did Ellsworth do when the second installment was not published?

### What authority did the government cite in the brief?

### Why did the government rely on *In re Debs*, 158 U.S. 564, 586 (1895) for?

### What did the government argue that the court must presume about classified information?

### What factual issue killed the government’s case?

### What did Judge Gurfein rule?

### The government immediately asked the Appeals Court to enjoin the Post on Friday afternoon. What judge did it draw and what did he rule?

### Was this his first case?

### What did he rule?

### What did the appeals panel rule at AM Sat?

### How was the hearing conducted?

### What did Gesell rule on Monday?

### How did the government amend the record?

### Should this have been allowed?

### Was the retraining order continued pending Supreme Court appeal?

## New York Times Co. v. United States, 403 U.S. 713 (1971)

### What did Black say about the president’s inherent power to censor?

### How did he balance national security secrets against free speech?

### What did Douglas say about problems with the government claiming that the publication would impede its fighting of the war?

### What did Brennan say about the war status argument?

### What did Burger say in his dissent that he thought the Times should have done before publishing?

### What did Harlan say were the two proper inquires by the court?

### Did he support the specific factual inquiry that the district courts required, i.e., their inquiry into which parts of the papers really affected national security?

### How would he resolve the factual questions?

### What warning did Blackmum give the papers?

### What did White say about whether the 1st Amendment would protect against criminal prosecution?

## Notes and Questions

### 1. Who Really Won?

#### Some think the press’s lawyers yielded too much ground and actually emerged with a balancing test where previously there had been an absolute rule against prior restraint.

#### What did Bickel say had been lost?

### 2. The Holding.

#### Bartnicki v. Vopper, 532 U.S. 514 (2001) concerned the broadcasting of a illegally obtained phone conversation.

##### What did the court rule about the right of the broadcaster?

##### How might this have changed if the broadcaster had made the illegal recording?

##### Does this really tell us anything about national security?

### 3. The Secret Pleadings.

#### What had Ellsberg withheld from the papers?

#### Given the way the war ended, Ellsberg regretted withholding the documents.

### 5. Balancing Freedom and Death.How would you answer this question:

#### Let us assume that when the members of the Court go back and open up this sealed record we find something there that absolutely convinces us that its disclosure would result in the sentencing to death of a hundred young men whose only offense had been that they were 19 years old and had low draft numbers. What should we do?

## *US v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979)

### This may be the only actual federal judge ordered prior restraint.

### What was the article about?

### What made the restraint so absurd?

### Why did the government eventually drop the case?

## Notes and Questions

### 1. Balancing Openness Against Possible Annihilation.

### What did Edward Teller advise about government science secrets?

## Stopped here

## C. PUBLICATION AS A CRIME?

### Review the provisions of the Espionage Act, p. 1303

### Does publication appear in the statute?

### Is there an espionage statute that does address publication?

### What is the significance of addressing in one place but not another?

### What was in the original 1917 Act that was rejected by Congress?

### What did the court uphold in the indictment in Rosen that would provide grounds for prosecuting a reporter?

### Where the did the Rosen court find authority for this?

### Notes and Questions

### 2. More Legislative History.

#### What additional legislative history did Douglas add that supports the district court in the Pentagon Papers Case?

### 3. Criminal State of Mind.

#### What is the intent provision and how was it interpreted in the Gorin case?

#### How would this apply to Wikileaks, based on its claim that it seeks‘‘to reveal ‘unethical behavior’ by governments and corporations?

#### How does the intent provisions of the espionage laws complicate prosecuting journalists and publishers?

#### How does the conspiracy law, 18 U.S.C. §793(g) complicate the scienter requirement?

#### Can you violate the conspiracy law without the intent necessary to be convicted under the espionage laws?

#### How would such as prosecution depend on the relationship between the publisher and the leaker?

#### Where does Wikileaks fit in this analysis?

##### Is it a publisher?

##### A journalist?

##### Did the information arrive unsolicited as in the *Pentagon Papers* case?

### 4. Statutes That Expressly Criminalize Publication.

#### What are examples of statutes that criminalize publication”

18 U.S.C. §797 (2006), which prohibits publication of photographs or other graphic representations of military installations, and

18 U.S.C. §798 (2006), supra p. 1264, which prohibits publication of ‘‘any classified information . . . concerning the communication intelligence activities of the United States’’ (including codes) or information obtained from such activities.

The Intelligence Identities Protection Act, 50 U.S.C. §§421-426 (2006), as amended by Pub. L. No. 111-259, §363, 124 Stat. 2654, 2701-2702 (2010), criminalizes the intentional disclosure of information identifying a covert agent.

#### What did United States v. Boyce tell us about the intent requirement?

#### Why do you suppose Congress forbade the disclosure of certain specified kinds of information in some sections of the Espionage Act, while in other sections it described protected information in more general terms?

#### What are the first Amendment problems with the statutes?

### 6. Shooting the Messenger’s Messenger?

#### What is a press shield law?

#### Does the US have one?

#### Does the 1st Amendment protect against reports against being forced to disclose sources?

#### What is the Case for ‘‘Benign Indeterminacy?

## D. INNOVATIONS IN CENSORSHIP

### Can the government use cyberattacks against sites like Wikileaks?

### What about going after all the information about WikiLeaks supporters?

### What about books that are already published?

#### What did DOD do with *Operation Dark Heart*?

#### How can the publisher fight this?

#### Would the publisher want to?

### What does the eventual fate of the *Progressive* case tell us about the modern world in which documents get put on the internet and are quickly so dispersed that it is impossible to retrieve them?

### Does blogging merge publishing and reporting – thinking about *Rosen* and the *Pentagon Papers*, how would you argue that a blogger/reporter has more legal protection than a traditional reporter who is not also the publisher?

### What about laws that criminalize publication of certain classified information without a scienter requirement that you believe it would hurt the US?

#### Can these circumvent 1st Amendment protections?

## Department of Justice Report on Review of News Media Policies

### Parse the policy using the handout on the screen.

### What does this memo concern?

### What is the presumption of advance notice?

### When can the AG waive this notice?

### What are Enhanced Approvals and Heightened Standards for Use of Search Warrants and Section 2703(d) Order?

## United States v. Sterling

### What is this case about?

### What legal demand is he fighting?

### When did the Branzburg Court find that a reporter did have some protection against this type of request?

### What crime does defendant have knowledge of?

### What is the only available constitutional claim?

### Does the common law recognize a reporter privilege?

### What does Federal Rule of Evidence 501, in its current form, provide?

### What is the problem with this court trying to create a privilege?

### How is this different from the psychotherapist-patient privilege that the United States Supreme Court created?