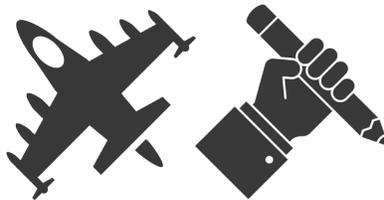


# Stopping the Presses: *National Security Meets Freedom of Speech*



BY HEIDI KITROSSER

**T**here are at least two points of consensus among those who study national security secrecy: First, the government must keep some secrets in order to protect national security. Second, a well-informed populace is essential to a healthy democratic system. The further one departs from these abstractions, the more elusive consensus becomes. It is easy to conclude that some national security secrets must be maintained, but much harder to construct criteria to identify those necessary secrets. More contentious still is the question of who ought to make those judgments: The president? The courts? Congress? Civil servants? It is equally difficult to determine how to implement such judgments without unduly chilling speech.

These conundrums are both longstanding and especially timely at this moment. The United States has had a

permanent, government-wide system of classified information since 1951.<sup>1</sup> Although no American law explicitly criminalizes the sharing of all classified information, prosecutors and courts have interpreted the 1917 Espionage Act to very similar effect.<sup>2</sup>

Nonetheless, for more than eight decades after its passage, the Act was used predominantly to prosecute spies; prior to 9/11, it was invoked only three times to pursue leaks of information to the media.<sup>3</sup>

Such prosecutorial restraint is a thing of the past. In the past 15 years or so, prosecutors have used the Act more than a dozen times to prosecute media leaks.<sup>4</sup> Furthermore, although the Nixon administration famously tried, without success, to stop the presses — specifically, to obtain restraining orders against *The New York Times* and the *Washington Post* to cease publishing the Pentagon Papers — the United States had never indicted a publisher under the Espionage Act solely for publishing information until 2019, when it indicted Julian Assange.<sup>5</sup> Also subject to high-profile conflicts of late is the system of pre-publication review, whereby persons given access



NATIONAL SECURITY, LEAKS  
& FREEDOM OF THE PRESS:  
THE PENTAGON PAPERS  
FIFTY YEARS ON

LEE C. BOLLINGER AND GEOFFREY R. STONE, EDs.  
(Oxford University Press, 2021)

to classified information must agree to submit future writings for government review before publication. The best-known recent fracas involved the Trump administration's unsuccessful effort to stop the publication of former National Security Advisor John Bolton's book, *The Room Where It Happened*.<sup>6</sup>

Amid these events, First Amendment experts Lee Bollinger and Geoffrey Stone's co-edited new book is especially welcome. The book — *National Security, Leaks & Freedom of the Press: The Pentagon Papers Fifty Years On* — is a rich and diverse collection of essays by authors from the worlds of national security, journalism, and academia. The book is anchored by two introductory essays and two concluding essays. Between those anchors are 16 essays: five from “the national security perspective,” five from “the journalist perspective,” and six from “the academic perspective.”

The book works extraordinarily well on at least two levels. First, it offers thick, layered background on the major issues involving national security leaks and press freedoms. Readers learn of key legal cases and norms as well as new and evolving developments, including the impact of technological changes. This is especially true of the “Opening Statement” by Bollinger and Stone (pp. xv–xviii) and a more detailed introductory essay that follows it by a group of six attorneys — including former Solicitor General Seth Waxman — from the law firm of WilmerHale (pp. 1–21). These initial essays enable expert readers to brush up on the issues and fill gaps in their knowledge base while also providing a rich and accessible crash course to nonexperts. In their Opening Statement, for example, Bollinger and Stone introduce readers to *New York Times v. United States*,<sup>7</sup> the famous 1971 “Pentagon Papers case.” They explain

**[The Pentagon Papers] case's symbolic associations with press freedoms and the dangers of government secrecy have been deeply influential, contributing to a longstanding norm against prosecuting the press for publishing classified information.**

that there is both less and more to the case than is often remembered. The case's holding, which rejects a prior restraint on speech under the particular facts at issue, is much narrower than the mythology surrounding the case might suggest (p. xvi). On the other hand, the case's symbolic associations with press freedoms and the dangers of government secrecy have been deeply influential, contributing to a longstanding norm against prosecuting the press for publishing classified information (pp. xvi–xvii).

In the WilmerHale attorneys' essay that follows — titled “The Pentagon Papers Framework, Fifty Years Later” — the authors elaborate on the mixture of law and norms that constitute the “Pentagon Papers framework,” (pp. 1–2) and on developments in U.S. law since the Pentagon Papers case (pp. 2–14). Among other things, they summarize the state of the law regarding pre-

publication review, criminal exposure for persons who leak classified information to the press, and the government's obligation (or lack thereof) to provide public access to information (pp. 4–8, 10–14). The authors also review some of the major changes — including those in technology and in the structure of the news media — that threaten to unsettle the Pentagon Papers framework (pp. 18–22).

Beyond its nuanced discussions of the legal and socio-political infrastructure, the book offers powerful analyses and illuminating firsthand accounts from journalists, former government officials with national security expertise, and academics. As one who has spent years obsessing about these issues and who has some strong views about them,<sup>8</sup> I found the depth of experience and range of perspectives represented very satisfying. I nodded my head in agreement with some ►

essays and shook it in disagreement with others, but in each case I gained a deeper understanding of the issue and an appreciation for the author's view.

Perhaps most importantly, the book as a whole — though it features many essays that are excellent in their own rights — is greater than the sum of its parts. Many of the authors effectively are in conversation with one another. I do not mean this literally; each essay is freestanding and the book does not feature direct exchanges between the various writers. However, the variety of perspectives represented generates a similar effect.

For example, a number of the essays reference Edward Snowden's leaks, and it is fascinating to read the contrasting takes on the leaks' value and the degree to which they harmed national security. In a co-written essay, former national security officials Keith Alexander and Jamil N. Jaffer acknowledge that Snowden's initial disclosures "focused on a major classified government program whose sheer scale and scope gave rise to significant privacy and civil liberties concerns" (p. 42). Yet the "vast majority" of his subsequent disclosures, they argue, "had little to no impact whatsoever on the privacy and civil liberties of Americans" (p. 42) and had a "catastrophic" effect on national security (pp. 43–44). Former Acting and Deputy Director of the CIA Michael Morrell makes similar points (pp. 62, 65–66). Former national security official Lisa Monaco also deems Snowden's leaks damaging to national security (p. 74), but emphasizes that they generated an "important," "democracy-enhancing," and "overdue" debate; the debate involved not only particular programs but also failings in congressional intelligence oversight and other post-Watergate checks and balances (pp. 80–90). Journalist Ellen Nakashima

**The *Times* reporters and the officials reached agreement on omitting some details from the story, but a more fundamental difference remained. "[A]t the end of the meeting," Sanger reports, the officials "asked what always becomes the key question in national security reporting: Why write the story at all?"**

— who was on the *Washington Post* team that worked with the Snowden documents — also stresses the materials' contributions to informed public debate (pp. 111–14, 116, 121). Although she acknowledges the sensitivity of many of the documents, she emphasizes the care that journalistic organizations like the *Post* took in determining what to publish (pp. 106, 109–12, 117) and pushes back against some of the government's national security arguments (pp. 112–14, 119–20).

Several of the essays — particularly those of Morell, Nakashima, and journalist David Sanger of *The New York Times* — offer firsthand accounts of the process whereby members of the press consult with national security officials before publishing sensitive information (pp. 70–71; 105–23; 170–85). Such consultations are an important piece of the Pentagon Papers framework, and these on-the-ground accounts bring the exchanges

to life. The accounts also shed light on journalists' and national security officials' respective institutional values, and their corresponding assessments of particular leaks.

For example, Sanger discusses a meeting with White House officials regarding a planned *Times* story concerning cyberwarfare between the United States and North Korea (pp. 170, 172–73). The *Times* reporters and the officials reached agreement on omitting some details from the story, but a more fundamental difference remained. "[A]t the end of the meeting," Sanger reports, the officials "asked what always becomes the key question in national security reporting: Why write the story at all? ... Isn't it enough to simply say the United States is protecting citizens from foreign threats and avoid discussing how?" (p. 173). The *Times*, unsurprisingly, disagreed. To it, says Sanger, "the import of the story was clear" — as the

use of cyber weapons became more widespread, it “had huge implications for strategic stability. . . . And yet there had been little public discussion about whether the use of cyberweapons by the United States . . . made Americans safer or less safe” (p. 173).

Nakashima recounts similar disagreements between the *Washington Post* team and the officials whom they consulted regarding the Snowden files. She recalls, for example, that officials were adamantly opposed to the *Post*’s reporting the names of “nine major tech firms that provided data to the government pursuant to court order” as part of a program called PRISM (pp. 112–13). Naming the companies, officials feared, “would chill their cooperation with the NSA” (p. 113). The *Post* team concluded that this was not a reason to refrain from publishing. Nakashima’s colleague Bart Gellman recalled telling the government, “If the harm you’re worried about is the public won’t like something and the company will stop doing it because the public disapproves, then that’s why we publish it. Any harm that comes that way is the normal operation of the marketplace, or of democracy” (p. 113). Nakashima recounts several other instances of similar back-and-forth between the *Post* team and the government. As she puts it, “journalists and government officials did their best to serve their missions and the values they stand for: advancing the public’s right to know

. . . and defending the security of the American homeland while respecting civil liberties” (pp. 106–07).

The book’s essays are also filled with thoughtful proposals to address a range of problems relating to national security secrecy. This is true of the 16 core essays and one of the book’s two concluding essays, labeled “The Report of the Commission” (pp. 273–88). The commission consists of Stone and Bollinger and five additional experts whom they selected “from the national security and journalism worlds” (p. xviii). The five experts are Eric Holder, John O. Brennan, Ann Marie Lipinski, Kathleen Carroll, and Stephen W. Coll. Their report (p. xviii) reflects the group’s “consensus about how best to refine the system inherited from the Pentagon Papers era” (p. xviii). The proposals in the 16 essays and the commission’s report include, among many other ideas, improving the efficacy of nonleak options for whistleblowing and generally improving oversight of the national security community (pp. 36–37; 50–55; 85–90; 215, 228; 270–71; 277); providing some statutory protection for leakers and publishers who publish classified information that is in the public interest (pp. 150–55; 266–70; 279–80); and recognizing a presumptive right of public access to information (pp. 230–45).

The collection, in short, is a treasure trove of information, ideas, and first-hand narratives from authors boasting

a diverse array of experiences and perspectives. Those already immersed in these issues will find much to agree and disagree with, along with fascinating accounts that enhance their understanding of the issues. The book also has much to offer readers who are not already steeped in these topics. Its detailed introductory essays, as well as expository aspects of many of its core essays, bring nonexperts up to speed and enable them to appreciate the book’s more advanced discussions. Experts and nonexperts alike, then, are well-advised to add a new “must-read” to their list of books to buy or borrow: Bollinger and Stone’s *National Security, Leaks & Freedom of the Press*.



**HEIDI KITROSSER** is the Robins Kaplan professor at the University of Minnesota Law School and the Jack N. Pritzker Visiting Professor

at Northwestern – Pritzker School of Law. Kitrosser is an expert on the constitutional law of federal government secrecy and on separation of powers and free speech law more broadly and has written, spoken, and consulted widely on these topics. She is also a 2017 Guggenheim Fellow.

<sup>1</sup> See *U.S. Adds Controls on Security Data*, N.Y. TIMES (Sept. 26, 1951), [https://timesmachine.nytimes.com/timesmachine/1951/09/26/82111393.pdf?pdf\\_redirect=true&ip=0](https://timesmachine.nytimes.com/timesmachine/1951/09/26/82111393.pdf?pdf_redirect=true&ip=0) [<https://nytimes/3zU1CkR>].

<sup>2</sup> Heidi Kitrosser & David Schulz, *A House Built on Sand: The Constitutional Infirmity of Espionage Act Prosecutions for Leaking to the Press*, 19 FIRST AM. L. REV. 153, 163–64, 175–79 (2021).

<sup>3</sup> *Id.* at 173–77.

<sup>4</sup> *Id.* at 178.

<sup>5</sup> See, e.g., Gabe Rottman, *Special Analysis of the*

*May 2019 Superseding Indictment of Julian Assange*, REPS. COMM. FOR FREEDOM OF THE PRESS (May 30, 2019), <https://www.rcfp.org/may-2019-assange-indictment-analysis/>; see also Gabe Rottman, *The Assange Indictment Seeks to Punish Pure Publication*, LAWFARE BLOG (May 24, 2019, 8:16 PM), <https://www.lawfareblog.com/assange-indictment-seeks-punish-pure-publication>.

<sup>6</sup> See, e.g., Anjali Berdia, *Trump’s efforts to block publication of books highlights concerns about prior restraint orders*, REPS. COMM. FOR FREEDOM OF THE PRESS (JULY 30, 2020), <https://www.rcfp.org/rcfp-fights-prior-restraint-orders/>; see also

*Press Statement: Knight Institute Reacts to Ruling in U.S. v. Bolton*, KNIGHT FIRST AMENDMENT INST. AT COLUM. UNIV. (Jun. 20, 2020), <https://knightcolumbia.org/content/knight-institute-reacts-to-ruling-in-us-v-bolton>.

<sup>7</sup> 403 U.S. 713 (1971).

<sup>8</sup> See, e.g., Kitrosser & Schulz, *supra* note 2; see also Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT’L. SEC. L. & POL’Y 409 (2013).