WikiLeaks, the Proposed SHIELD Act, and the First Amendment

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The release of formerly classified documents and government cables by the whistle-blower website WikiLeaks in 2010 poses a dilemma. The government often has exclusive possession of information about its policies, programs, processes, and activities that would be of great value to informed public debate. But government officials often insist that such information be kept secret, even from those to whom they are accountable – the American people. How should we resolve this dilemma? The issue is complex and has many dimensions.

Following release of the documents, the Securing Human Intelligence and Enforcing Lawful Dissemination (SHIELD) Act was introduced in Congress.[1] The proposed legislation would amend the Espionage Act of 1917[2] to make it a crime for any person knowingly and willfully to disseminate, in any manner prejudicial to the safety or interest of the United States, "any classified information . . . concerning the human intelligence activities of the United States or . . . concerning the identity of a classified source or informant" working with the intelligence community of the United States.

Although the Act might be constitutional as applied to a government employee who "leaks" such classified material, it is plainly unconstitutional as applied to other individuals who might publish or otherwise disseminate such information. With respect to such other individuals, the Act violates the First Amendment unless, at the very least, it is expressly limited to situations in which the individual knows that the dissemination of the classified material poses *a clear and present danger of grave harm to the nation*.[3]

The clear and present danger standard, in varying forms, has been a central element of our First Amendment jurisprudence ever since Justice

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1. Securing Human Intelligence and Enforcing Lawful Dissemination Act, H.R. 6506, 111th Cong. (2d Sess. 2010). The bill was reintroduced to the 112th Congress as H.R. 703.

2. Espionage Act of 1917, 18 U.S.C. §798 (2006) (pertaining specifically to disclosure of classified information).

3. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

Oliver Wendell Holmes first enunciated it in his 1919 opinion in *Schenck v. United States*. In the ninety years since *Schenck*, the precise meaning of "clear and present danger" has shifted,[4] but the principle that animates the standard was stated eloquently by Justice Louis D. Brandeis in his brilliant 1927 concurring opinion in *Whitney v. California*:

> Those who won our independence by revolution were not cowards. . . . They did not exalt order at the cost of liberty. . . . Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such . . . is the command of the Constitution. It is, therefore, always open to Americans to challenge a law abridging free speech . . . by showing that there was no emergency justifying it.[5]

With that observation in mind, I will examine two central questions: (1) Does the clear and present danger standard apply to unlawful leaks of classified information by public employees? (2) Does the clear and present danger standard apply to the dissemination of classified information derived from those unlawful leaks? These are fundamental First Amendment questions. Before turning to them, though, a bit of historical context is necessary.

I. NATIONAL SECURITY AND FREE SPEECH

A wartime environment inevitably intensifies the tension between individual liberty and national security. But there are wise and unwise ways to strike the appropriate balance. Throughout American history, our government has excessively restricted public discourse in the name of national security. In 1798, for example, on the eve of a threatened conflict with France, Congress enacted the Sedition Act of 1798, which effectively made it a crime for any person to criticize the President, the Congress, or the government itself.[6] During the Civil War, the government shut down "disloyal" newspapers and imprisoned critics of the President's policies.[7] During World War I, the government enacted the Espionage Act of 1917 and the Sedition Act of 1918, which made it unlawful for any person to criticize the war, the draft, the government, the President, the flag, the

4. *See* Frank R. Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg – and Beyond*, 1969 SUP. CT. REV. 41 *passim*. *Compare Schenck*, 249 U.S. at 52, *with* Dennis v. United States, 341 U.S. 494 (1951); Brandenburg v. Ohio, 395 U.S. 444 (1969); and New York Times Co. v. United States, 403 U.S. 713 (1971). *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004).

5. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (footnote omitted).

6. *See* GEOFFREY R. STONE, WAR AND LIBERTY: AN AMERICAN DILEMMA 1-21 (2007).

7. *See id*. at 22-40.

military, or the cause of the United States, with the consequence that free and open debate was almost completely stifled.[8] And during the Cold War, as Americans were whipped into frenzy by fear of the "Red Menace," loyalty programs, political infiltration, blacklisting, legislative investigations, and criminal prosecutions of supposed Communist "subversives" and sympathizers swept the nation.[9]

Over time, we have come to understand that these episodes demonstrate grievous errors in judgment, when fear and anxiety overrode good judgment and an essential commitment to individual liberty and democratic self-governance. In order to maintain a robust system of democratic self-governance, our government cannot constitutionally be empowered to punish speakers, even in the name of national security, without a *compelling* justification.[10] This is especially true in the realm of government secrets, for as James Madison observed, "[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."[11] As Madison warned, if citizens do not know what their own government is doing, then they are hardly in a position to question its judgments or to hold their elected representatives accountable. Government secrecy, although sometimes surely necessary, can also pose a direct threat to the very idea of self-governance.

II. THE DILEMMA

The reasons that government officials want secrecy are many and varied. They range from the truly compelling to the patently illegitimate. Sometimes, government officials want secrecy because they fear that the disclosure of certain information might seriously undermine the nation's security (for example, by revealing detailed battle plans on the eve of battle). Sometimes, they want secrecy because they simply do not want to deal with public criticism of their decisions, or because they do not want the public, the Congress, or the courts to be in a position to override their decisions, which they believe to be sound. Sometimes, they want secrecy because disclosure will expose their own incompetence or foolishness or wrongdoing. Some of these reasons for secrecy are obviously much more worthy of respect than others. Part of the problem is that government officials who want secrecy for questionable reasons are often tempted to

8. *See id*. at 41-63.

9. *See id*. at 85-106.

10. *See* STONE, PERILOUS TIMES, *supra* note 4, at 550-558.

11. Letter from James Madison to W. T. Barry (Aug. 4, 1822), *in* 9 JAMES MADISON, THE WRITINGS OF JAMES MADISON 130 (Gaillard Hunt ed., 1910).

"justify" their actions in ways that seem compelling but are in reality exaggerated or even disingenuous.

Adding to the complexity, the contribution of any particular disclosure to informed public discourse may vary widely depending upon the nature of the information and the surrounding circumstances. The disclosure of some classified information may be extremely valuable to public debate (for example, the revelation of possibly unwise or even unlawful or unconstitutional government programs, such as the secret use of coercive interrogation or the secret authorization of widespread electronic surveillance). The disclosure of other confidential information, however, may be of little or no legitimate value to public debate (for example, the publication of the specific identities of covert American agents in Iran for no reason other than exposure).

The most vexing problem arises when the public disclosure of secret information is both harmful to the national security *and* valuable to self-governance. Suppose, for example, the government undertakes a study of the effectiveness of security measures at the nation's nuclear power plants. The study concludes that several nuclear power plants are especially vulnerable to terrorist attack. Should this study be kept secret or should it be disclosed to the public? On the one hand, publishing the report will reveal our vulnerabilities to terrorists. On the other hand, publishing the report would alert the public to the situation, enable citizens to press government officials to remedy the problems, and empower the public to hold accountable those public officials who failed to keep them safe. The public disclosure of such information could both harm and benefit the nation. Should the study be made public?

In theory, this question can be framed quite simply: Do the benefits of disclosure outweigh its costs? That is, does the value of the disclosure to informed public deliberation outweigh its danger to the national security? Alas, as a practical matter this simple framing of the issue is not terribly helpful. It is exceedingly difficult to measure in any objective, consistent, predictable, or coherent manner either the "value" of the disclosure to public discourse or its "danger" to national security. And it is even more difficult to balance such incommensurable values against one another.

Moreover, even if we were to agree that this is the right question, we would still have to determine who should decide whether the benefits outweigh the costs of disclosure. Should this be decided by public officials whose responsibility it is to protect national security? By public officials who might have an incentive to cover up their own mistakes? By low-level public officials who believe their superiors are keeping information secret for inadequate or illegitimate reasons – that is, by "leakers"? By reporters, editors, bloggers, and others who have gained access to the information? By judges and jurors, in the course of criminal prosecutions of leakers, journalists, and publishers?

In this article, I will focus on two questions: First, under what circumstances can the government constitutionally punish a public employee for *disclosing* classified information to a journalist for the purpose of publication? That is, under what circumstances may the government punish "leakers"? Second, under what circumstances can the government constitutionally punish the *publication or public dissemination* of classified information? Should it matter whether the publisher or disseminator obtained the information through an illegal leak?

III. THE RIGHTS OF PUBLIC EMPLOYEES

The first question concerns the First Amendment rights of public employees. To understand those rights, we must establish a baseline. Let us begin, then, with the rights of individuals who are *not* government employees. That is, under what circumstances may ordinary people, who are *not* public employees, be held legally accountable for revealing information to another for the purpose of publication? Answering that question will enable us to establish a baseline definition of First Amendment rights. We can then inquire whether the First Amendment rights of government employees are any different.

In general, an ordinary individual (that is, an individual who is not a government employee) has a broad First Amendment right to reveal information to journalists or others for the purpose of publication. There are a few limitations, however.

First, the Supreme Court has long recognized that there are certain "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 therefore of only low First Amendment value.[12] Such speech may be restricted without satisfying the usual demands of the First Amendment. For example, if X makes a knowingly false and defamatory statement about Y to a journalist, with the understanding that the journalist will publish the information, X might be liable to Y for the tort of defamation.[13]

Second, private individuals sometimes voluntarily contract with other private individuals to limit their speech. Violation of such a private agreement may be 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 lists to competitors, he might be liable for breach of contract if he reveals the lists to a reporter for a trade journal, with the expectation that the journal will publish the list. In such circumstances, the individual has voluntarily agreed to limit what otherwise

12. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942).

13. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

would be a First Amendment right. Such privately negotiated waivers of constitutional rights are generally enforceable.[14]

Third, there may be situations, however rare, in which an individual discloses previously non-public information to a journalist under circumstances in which publication would be so dangerous to society that the individual might be punishable for disclosing the information to the journalist for purposes of further dissemination. For example, suppose a privately-employed scientist discovers how to manufacture anthrax bacteria at home. The harm caused by the public dissemination of that information might be so likely, imminent, and grave that the scientist could be punished for facilitating its publication.[15]

These examples illustrate the few circumstances in which an individual might be held legally responsible for disclosing information to another for the purpose of public dissemination. In general, however, the First Amendment guarantees individuals *very* broad freedom to share information with others for the purpose of publication.

To what extent is a *government employee* in a similar position? When we ask about the First Amendment rights of public employees, we must focus on the *second* of the three situations examined above. That is, it is the waiver of rights issue that poses the critical question. Although the first and third situations can arise in the public employee context, it is the waiver issue that is at the core of the matter.

At its most bold, the government's position is simple: Like a private actor, it should be able to enter into contracts in which constitutional rights are voluntarily waived; as long as the waiver is voluntary, it should be enforceable. That is not the law, however. The Supreme Court has long recognized that, unlike private entities, the government *cannot* constitutionally insist that individuals surrender their constitutional rights as a condition of public employment or receipt of other government benefits. It would be unconstitutional, for example, for the government to require individuals to agree as a condition of government employment that they will never criticize the President, never practice the Muslim faith, never have an abortion, or never assert their constitutional right to be free from unreasonable searches and seizures.[16]

It would be no answer for the government to point out that the individuals had *voluntarily* agreed not to criticize the President, practice their faith, have an abortion, or assert their Fourth Amendment rights; for, even if individuals consent to surrender their constitutional rights in order to

14. *See* Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

15. *See* United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

16. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (noting that "even 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.").

obtain a government job, the government cannot constitutionally condition employment on the waiver of those rights. As the Supreme Court has long held, "unconstitutional conditions" on public employment violate the Constitution. The government cannot legitimately use its leverage over jobs, welfare benefits, drivers licenses, tax deductions, zoning waivers, and the like to extract waivers of individual freedoms.[17]

This does not mean, however, that the government can *never* require individuals to waive their constitutional rights as a condition of public employment. There are at least two circumstances, relevant here, in which the government may restrict the First Amendment rights of its employees. First, as the Supreme Court recognized in its 1968 decision 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."[18] The problem, the Court said, is to arrive at a sensible 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 its activities.

The Hatch Act, for instance, prohibits public employees from taking an active part in political campaigns.[19] The goal is to insulate government employees from undue political pressure and improper influence. To enable public employees to perform their jobs properly, the government may require them to waive what would otherwise be the First Amendment right to participate in partisan political activities.[20] Similarly, a government employee's disclosure of confidential information to a journalist might jeopardize the government's ability to function effectively. For example, if an IRS employee gives an individual's confidential tax records to a reporter, this breach might seriously impair the public's confidence in the tax system and thus undermine the government's capacity to function efficiently.

A second reason that 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 other citizens can speak, but something else entirely for it to prohibit them from speaking in ways other citizens *cannot* speak. If a government employee gains access to confidential

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

18. Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

19. Hatch Act, 5 U.S.C. §§1501-1508 (2006).

20. *See* U.S. Civil Serv. 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).

information only *because* of his public employment, then prohibiting him from disclosing that information to anyone outside the government might be said not to substantially restrict his First Amendment rights, because he had no right to *know* the information in the first place.[21]

There is little clear law on this question. In its 1980 decision in *Snepp v. United States*, 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" without prior approval.[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 to a journalist or other disseminator *classified* information, the disclosure of which could appreciably harm the *national security,* has violated his position of trust, and ordinarily may be discharged and/or criminally punished without violating the First Amendment.

Now, it is important to note that this conclusion is specific to public employees. It does not govern those who are *not* public employees. Unlike government employees, who have agreed to abide by constitutionally permissible restrictions of their speech, journalists and others who might disseminate such information have *not* agreed to waive their rights. This distinction between public employees and other individuals is critical in the context of confidential information. 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, for example, about a political candidate's finances.

In theory, of course, it would be possible for courts to decide in each instance whether the First Amendment protects an unauthorized disclosure of confidential information by a public employee by deciding whether the value of the information to the public outweighs the government's interest in secrecy. But, as I have already noted, such case-by-case judgments would put courts in an exceedingly awkward and difficult position, and would in effect convert the First Amendment into a constitutional Freedom of Information Act. The Supreme Court has eschewed that approach and has instead granted the government considerable deference in deciding whether and when public employees have a constitutional right to disclose confidential government information. In short, the courts have generally held that the government may punish a public employee for the

21. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984); Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 190-201.

22. Snepp v. United States, 444 U.S. 507, 508 (1980).

23. *Snepp*, 444 U.S. at 511-512. *See also* Haig v. Agee, 453 U.S. 280 *passim* (1981).

unauthorized disclosure of classified information as long as the disclosure would be "potentially damaging to the United States."[24]

This is a far cry from requiring the government to prove that the disclosure will 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 public employees and the rights of other individuals. 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 as an employer in the management of its internal affairs.

There is, of course, a fundamental disadvantage in this approach. Information may be *both* potentially dangerous to national security *and* valuable to public debate. Consider, for example, evaluations of new weapons systems or government policies regulating the permissible conduct of covert agents. One might reasonably argue that this information should be available to the public to enable informed public discussion of such policies. But the approach to public employee speech that I just described ordinarily will empower the government to forbid the disclosure of such information, regardless of its value to public discourse. We accept this approach largely for the sake of simplicity and ease of administration. We should be under no illusions, however, about its impact. This standard gives inordinate weight to secrecy at the expense of accountability and public deliberation.

IV. THE RIGHT TO DISSEMINATE INFORMATION

This, then, brings me to the second question: Under what circumstances may the government constitutionally prohibit an individual or organization from *publishing or disseminating* unlawfully leaked classified information? In the entire history of the United States, the government has never successfully prosecuted *anyone* (other than a government employee) for publicly disseminating such information.

Because there has never been such a successful prosecution, the Supreme Court has never had occasion to rule on such a case. The closest it has come to such a situation was *New York Times Co. v. United States*,[25] the Pentagon Papers case, in which the Court held unconstitutional the government's effort to enjoin *The New York Times* and *The Washington Post* from publishing a purloined copy of a top secret Defense Department study of the Vietnam War. Justice Potter Stewart's opinion best captures the view of the Court: "We are asked," he wrote, "to prevent the

24. United States v. Morison, 844 F.2d 1057, 1071-1072 (4th Cir. 1988); United States v. Rosen, 445 F. Supp. 2d 602, 621 (E.D. Va. 2006).

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

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*."[26]

Thus, in the Pentagon Papers case, the Court held that although elected officials have broad authority to keep classified information secret, once that information gets into other hands 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 others, why can't it enjoin the recipients of that material from disseminating it further? But one could just as easily flip the question. If individuals have 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 disclosing that information to others merely because it poses a potential danger to the national security? If we view the issue from the perspective of *either* the public's interest in informed discourse *or* the government's interest in secrecy, it would seem that the same rule logically should apply to both public employees and those who would disseminate the information. The very different standards governing public employees, on the one hand, and other speakers, on the other, thus present a puzzle.

In fact, there are quite sensible reasons for this seemingly awkward state of affairs. Although the government has broad authority to prohibit public employees from leaking classified information, that rule is based not on a careful or definitive balancing of the government's need for secrecy against the public's interest in the information, but on the need for a clear and easily administrable rule for government employees. For the sake of simplicity, the law governing public employees *overprotects* the government's legitimate interest in secrecy relative to the public's legitimate interest in learning about the activities of the government. But the need for a simple rule for public employees has nothing to do with the rights of others who would publish the information or the needs of the public for an informed public discourse. And under ordinary First Amendment standards, those who wish to disseminate such information have the right to do so – unless the government can demonstrate that the publication presents a clear and present danger of grave harm. In this situation, the law arguably *overprotects* the right to publish, as compared to a case-by-case balancing of costs and benefits.

As Justice Stewart observed in the Pentagon Papers case, even though the publication of some of the materials at issue might harm "the national interest," their dissemination could not constitutionally be prohibited unless

26. *Id*. at 730 (Stewart, J., concurring) (emphasis added).

their dissemination would "surely result in direct, immediate, and irreparable damage to our Nation or its people."[27] It is important to note that there are sound reasons for this conclusion.

First, the mere fact that dissemination might harm the national interest does not mean that the harm outweighs the benefits of publication.

Second, a case-by-case balancing of harm against benefit would ultimately prove unwieldy, unpredictable, and impracticable. Thus, just as in the government employee situation, there is a compelling need for a clear and predictable rule.

Third, as we have learned from our own history, there are great pressures that lead both government officials and the public itself to underestimate the benefits of publication and overstate the potential harm of publication in times of national anxiety. A strict clear and present danger standard serves as a barrier to protect us against this danger.

And fourth, a central principle of the First Amendment is that the suppression of public speech must be the government's last resort in addressing a potential problem. If there are other means by which government can prevent or reduce the danger, it must exhaust those other means before it can suppress the freedom of speech. This, too, is an essential premise of the clear and present danger standard. In the secrecy situation, the most obvious way for government to prevent the danger is by ensuring that seriously damaging information is not leaked in the first place. Indeed, the Supreme Court made this point quite clearly in its 2001 decision in *Bartnicki v. Vopper*, in which a radio commentator received in the mail from an anonymous source a tape recording of an unlawfully intercepted telephone conversation, which the commentator then played on the air. The Court held that the broadcast was protected by the First Amendment, even though the anonymous source could be prosecuted for committing the unlawful wiretap. The Court saw the question presented as being whether an individual who receives information "from a source who has obtained it unlawfully" may be punished for publicly disseminating information relevant to public discourse, "absent a need of the highest order."[28] The Court reasoned that if "the sanctions that presently attach to [unlawful wiretapping] do not provide sufficient deterrence," then "perhaps those sanctions should be made more severe," but "it would be quite remarkable to hold" that an individual constitutionally can be punished merely for disseminating information because the government failed to "deter conduct by a non-law-abiding third party."[29]

27. *Id*.

28. Bartnicki v. Vopper, 532 U.S. 514, 528 (2001).

29. *Id*. at 516, 529-530.

CONCLUSION

This is surely a "disorderly situation," but it seems the best possible solution. If we grant the government too much power to punish those who disseminate information useful to public debate, then we risk too great a sacrifice of public deliberation; if we grant the government too little power to control confidentiality "at the source," then we risk too great a sacrifice of secrecy and government efficiency.[30] The solution is thus to reconcile the irreconcilable values of secrecy and accountability by guaranteeing *both* a strong authority of the government to prohibit leaks *and* an expansive right of others to disseminate them.

Three questions remain. First, does the same constitutional standard govern criminal prosecutions and prior restraints? Second, what sorts of disclosures might satisfy the clear and present danger standard? And third, how should we deal with information that both satisfies the clear and present danger standard *and* contributes significantly to public debate?

First, in the Pentagon Papers case, the Court emphasized that it was dealing with an injunction against speech. An injunction is a prior restraint, a type of speech restriction that, in the Court's words, bears a particularly "heavy presumption against its constitutionality."[31] This raises the question whether the test stated in the Pentagon Papers case should govern criminal prosecutions as well as prior restraints.

In dealing with expression at the very heart of the First Amendment – speech about the conduct of government itself – the distinction between prior restraint and criminal prosecution should not carry much weight. The standard applied in the Pentagon Papers case is *essentially* the same standard the Court would apply in a criminal prosecution of an organization or individual for publicly disseminating information about the conduct of government. The clear and present danger standard has never been limited to cases of prior restraint.

Second, is there *any* speech that could constitutionally be punished under this standard? The example traditionally offered was "the sailing dates of transports" or the precise "location of combat troops" in wartime. The publication of such information would instantly make American troops vulnerable to enemy attack and thwart battle plans already underway. Other examples might include publication of the identities of covert CIA operatives or public disclosure that the government has broken the al Qaeda's secret code, thus alerting the enemy to change its cipher. In situations like these, the harm from publication might be sufficiently likely, imminent, and grave to warrant punishing the disclosure.

30. *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 80-81 (1975).

31. *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971); *id.* at 723 (Douglas, J., concurring).

Third, an important feature of these examples often passes unnoticed. What makes these situations so compelling is not only the likelihood, imminence, and magnitude of the harm, but also the implicit assumption that these sorts of information do not meaningfully contribute to public debate. In most circumstances, there is no evident need for the public to know the secret "sailing dates of transports" or the secret "location of American troops" on the eve of battle. It is not as if these matters will instantly be relevant to political discussion. After the fact, of course, such information may be critical in evaluating the effectiveness of our military leaders, but at the very moment the ships are set to sail or the troops are set to attack, it is less clear what contribution the information would make to public debate. My point is not that these examples involve "low" value speech in the conventional sense of the term, but rather that they involve information that does not seem particularly "newsworthy" at the moment of publication, and that this factor seems to play an implicit role in making the illustrations so compelling.

The failure to notice this feature of these hypotheticals can lead to a critical failure of analysis. Interestingly, an analogous failure was implicit in the famous example Justice Holmes first used to elucidate the clear and present danger test – the false cry of fire in a crowded theatre.[32] 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 must be whether it creates a clear and present danger of serious harm.

But Holmes' reasoning was incomplete. Suppose the cry of fire is *true*? In that case, we would *not* punish the speech – even though it still causes a mad dash to the exits – because the value of the speech *outweighs* the harm it creates. Thus, at least two factors must be considered in analyzing this situation – the harm caused by the speech *and* the value of the speech. Suppose, for example, a newspaper accurately reports that American troops in Afghanistan recently murdered twenty members of al Qaeda in cold blood. As a result of this publication, al Qaeda predictably kidnaps and murders twenty American citizens. Can the newspaper constitutionally be punished for disclosing the initial massacre? The answer must be "no." Even if there was a clear and present danger that the retaliation would follow, and even if we agree – as we must – that this is a grave harm, the information is simply too important to the American people to punish its disclosure.

What this suggests is that to justify the criminal punishment of the press for publishing classified information, the government must prove not only that the defendant published classified information, the publication of which would result in likely, imminent, and grave harm to the national

32. Schenck v. United States, 249 U.S. 47, 52 (1919).

security, but *also* that the publication would *not* significantly contribute to public debate.

The bottom line is this: The proposed SHIELD Act is plainly unconstitutional. At the very least, it must limit its prohibition to those circumstances in which the individual who publicly disseminates classified information knew that the dissemination would create a clear and present danger of grave harm to the nation or its people.