



Anatomy of a Secret

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Anatomy of a Secret

by H.D.S. Greenway
Shorenstein Center Fellow, Spring 2012
Formerly, *The Boston Globe*

with research assistance by Leora Falk

Joan Shorenstein Center

PRESS • POLITICS



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Harvard University
John F. Kennedy School of Government

“The first criterion is that you make the decision, not they.”

–Benjamin Bradlee

“Not every secret yearns to be published.”

–Arthur Sulzberger Jr.

There can be no more agonizing decision that newsmen and women are asked to make than whether to publish or broadcast a story that entails a risk to national security. After all, the entire purpose of newsgathering is to get at the truth, and a healthy skepticism of any effort to withhold the truth is essential to a free press. And in journalism, a highly competitive business, there is always the danger that if you don't publish, somebody else will.

There is also a constitutional bias in favor of publication in this country. The First Amendment to the Constitution says: “Congress shall make no law...abridging the freedom of the press....”

Yet none will deny that government has a right and a duty to protect information that could harm the security of the United States, and responsible news outlets do not wish to harm their country. So the question is ever: Would printing this story really harm the country? Or, is the request to hold the story a cover-up or an attempt to avoid embarrassment?

What follows is the story of a secret which the U.S. government dearly wanted to keep. It is the story of how that secret came to be known by *The New York Times*, and of how the *Times* at first agreed to keep that secret at the government's request, and then, after agonizing about it for more than a year, decided to run it.

The case is unusual in that the pressure not to publish went right up to the highest level of government. In a unprecedented step, the President of the United States summoned the publisher and the editor of *The New York Times* to the Oval Office to make a final pitch not to publish.

In all the months that the *Times* held the story competing papers never got wind of it. And that, too, is unusual.

If the tension between government and the press over secrets is the storyline, a subtext is the natural tension between impatient reporters who wanted their story to be published right away, and their editors who felt a responsibility to further consider the government's case for not publishing.

STELLAR WIND

Never in the history of the United States, nor anywhere else for that matter, had there been such a massive terrorist attack as the one on September 11, 2001. And the shadowy nature of the non-state actor as enemy, instead of the traditional nation state, was alarming. It was a whole new concept of war, and, although this nation would invade both Iraq and Afghanistan in response, it was quickly realized that this would be an intelligence war, and that military solutions would be inadequate.

Terrorism could not be defeated. It was a means for Islamic extremists to vent their frustrations upon the West. Preventing further attacks depended on knowing the when, where and how of terrorist plans. The old methods, means and scope of traditional intelligence gathering would no longer do, or so it was thought by the badly shaken administration of a new president, George W. Bush.

When the Bush administration came into office, it was generally considered that domestic spying was off limits for the CIA and the National Security Agency (NSA), the ultra-secret agency tasked with electronic eavesdropping. Both had been in trouble before for keeping tabs on American citizens, but the rules had been tightened.

In the wake of 9/11, however, how could we be sure that our own citizens had not been drawn into the jihadist cause? Wouldn't the new, unprecedented threat justify eavesdropping on Americans? "Basically all the rules were thrown out the window," according to Adrienne Kinne, a former NSA employee, "and they would use any excuse to justify a waiver to spy on Americans."¹

Thus was Stellar Wind born, an operation which resulted in an unprecedented encounter in the Oval Office between President George W. Bush and *New York Times* publisher Arthur Sulzberger Jr. over whether a news story should ever see the light of day.

According to William Binney, a former NSA cryptologist, Stellar Wind information was gathered through a network of windowless wiretapping rooms around the country, known as “switches,” which could gain access to international and domestic communications. AT&T and Verizon were drawn into an eavesdropping network of vast scale.²

The Federal Intelligence Surveillance Act (FISA) had established courts to quickly provide warrants to intelligence agencies in the 70’s. But Stellar Wind bypassed that process. This was to be a warrantless wiretap, for reasons that have never adequately been explained. Perhaps, despite how easy warrants were to obtain, NSA decided that the process would be too restricting and complicated. Perhaps NSA just couldn’t be bothered. The disgruntled Binney would tell author James Bamford that “they violated the Constitution” setting up Stellar Wind “but they didn’t care. They were going to do it anyway, and they were going to crucify anyone who stood in the way.” Bamford alleged that the “NSA illegally...allowed wholesale monitoring of millions of American phone calls and emails.”³

In the wake of the program’s exposure, Congress passed the FISA Amendment Act in 2008 which largely made the practices legal. But that does not address whether Stellar Wind was illegal when it was first set up after 9/11. To some, the 2008 FISA Act was akin to declaring a burglary legal after the burglars had been caught.

Was Stellar Wind illegal? *The New York Times* came to think so. But General Michael Hayden, who was head of NSA at the time, holds a different opinion. I asked him if he had any doubts. “I still say no,” he said. “The wiretaps were perfectly lawful and provided useful intelligence.”⁴

In defense of the wiretaps Hayden wrote, “the program was crucial in addressing one of the most stinging criticisms of the 9/11 Commission—the need to reduce the gap

between foreign intelligence and domestic security. This was an especially difficult task, which helps explain both the program's importance and its sensitivity. The program was lawful, effective and necessary....Here I must point out that agency lawyers, career attorneys with deep expertise in the law, privacy and intelligence, assisted their professional Justice Department counterparts in their review of the program but remained comfortable throughout with the lawfulness of all aspects of the surveillance effort....The elements of the program made public in news reports in December of 2005 had been consistently deemed lawful by the Justice Department."⁵

The "news reports" to which Hayden was referring ran on page one of *The New York Times* under the headline: "BUSH LETS U.S. SPY ON CALLERS WITHOUT COURTS," by James Risen and Eric Lichtblau. It told of "eavesdropping inside the country without court approval" that was "a major shift in American intelligence gathering practices." The story equivocated on the legal implications by questioning, rather than stating, whether the NSA "stretched, if not crossed, constitutional limits on legal search."⁶

But if NSA was acting in an unusual manner, so was the *Times*. The story revealed that the article had been held for a year. "The White House had asked *The New York Times* not to publish this article," Risen and Lichtblau wrote, arguing that to do so could jeopardize continuing investigations and alert would-be terrorists that they might be under scrutiny. The story had been delayed for additional reporting, Risen and Lichtblau wrote, and "some of the information that administration officials argued could be useful to terrorists has been omitted."⁷ In actuality, however, the story had been held a bit more than a year, and that later led to controversy.

Hayden's allegations, and later the White House's contention, that everybody was on board with the legal implications of Stellar Wind do not appear to have been true in all cases. Justice Department reporter Lichtblau would later write: "The source had come to me blindly at the outset—what the CIA would call a 'walk -in.' Walk-ins pose a risk, be they government whistle-blowers or Russian double agents. Some may have an agenda, an ax to grind. Others may lack credibility. Some may not even be who they claim to be. This one had checked out on all counts. He wouldn't give me his real name

at first, and initially, I would have to make contact through an intermediary to arrange meetings, usually at a bookstore or a coffee shop in the shadows of Washington's power corridors....He was agitated about something going on in the government's intelligence community, but just what was not clear. Was it even worth my time?"⁸

Lichtblau recognized that "this was one of the lesser known by-products of the *All the President's Men* phenomenon. Just as Bob Woodward and Carl Bernstein had inspired a generation of young journalists like myself to become government watchdog sleuths, they had also given rise to armies of self-styled Deep Throats," he wrote.⁹

According to Lichtblau, his sources enabled him to go to other sources and, in collaboration with Jim Risen, piece together, bit-by-bit, like a jigsaw puzzle, the story of Stellar Wind.¹⁰

"It soon became clear that the nervousness that the source alluded to was roiling the executive branch," Lichtblau wrote. It became apparent that there were real worries within the administration about Stellar Wind's legality. An election was coming, and if John Kerry won who could tell what investigations there might be?¹¹

Lichtblau and Risen, whom Lichtblau described as the odd couple—"Felix Unger and Oscar Madison in reporters' garb"—came to the story from different angles. Lichtblau had been looking at the FBI as the source of what was going on, but Risen suspected that NSA was involved. When Risen called Hayden at NSA the administration became alarmed that their big cat was out of the bag.¹²

In November of 2004, the administration made the highly unusual step of allowing the *Times'* Washington Bureau Chief, Philip Taubman, to visit NSA headquarters at Fort Meade, Maryland. He met General Hayden, his general counsel, "and several top NSA aides who managed the surveillance program," Taubman said. Hayden "argued that the surveillance program was critically important to preventing another terror attack like 9/11." He and his team cited several examples of plots that had been foiled," and they described a series of internal safeguards to ensure the program was carefully and legally managed."¹³

“I was against publishing it, at least initially,” Taubman told me. “The administration had persuaded Bill [Keller] and me at the time that we literally might be putting American lives in danger.” Keller was, at the time, executive editor of the *Times*. “Also,” Taubman said, “the story wasn’t ready for primetime. Jim and Eric had done a terrific job of reporting, but there were gaps. Put yourself in the mindset of where we were. There was a growing sense that the Bush administration might be contravening the law, but we were persuaded after meeting with Condoleezza Rice and Hayden that it was critical to preventing terrorism.” It was left open that the *Times* might eventually publish the story.¹⁴

The administration’s team “described a series of internal safeguards to ensure the program was carefully and legally managed,” Taubman told me. He had his doubts about the case they were selling, but “I thought the case sufficiently strong to hold off on publication,” he said. “I thought the potential damage to national security outweighed questionable aspects of the program.... I kept saying, ‘General Hayden, wouldn’t it make sense to bring in an outside panel of former intelligence people and judicial?’ If they had just gone to Congress, instead of just the gang of eight intelligence committee members, to the majority and minority leaders, [NSA] would have gotten approval.” Bill Keller agreed with Taubman about holding the story for further reporting.¹⁵

An example of the kind of thing NSA eavesdropping had prevented was a plot by a man named Iyman Faris, a naturalized American in Ohio, who had planned to drive to New York and bring down the Brooklyn Bridge with blowtorches.¹⁶ It was an example that the *Times* would later decide lacked seriousness.

Jim Risen never had any question that his story about warrantless wiretapping was true, Bill Keller said in an interview, “and in the course of trying to persuade us not to run the story they confirmed every bit of it.”¹⁷

According to Keller, there were two considerations in deciding whether to publish or not. “One, were they [NSA] breaking the law, and, two, will this give comfort to al Qaeda?” If al Qaeda were to know that their communications with the United States,

presuming there were any, were being overheard al Qaeda would cease communicating, or change how they went about it.

The administration “tried to convince us that this was really important,” Keller said, but Risen and Lichtblau were pushing hard to go to print. “Initially the government was convincing,” Keller said, “but we hadn’t heard enough yet to say whether it was illegal.”¹⁸

Another argument against publishing, Keller said, was that in 2004 “key sources were pushing us to publish before the general election, threatening to take the story to another paper. They wanted to hurt Bush,” Keller said, “and that set off alarm bells with me. Wait a second! This guy has a political agenda!”¹⁹

Risen, Lichtblau and Rebecca Corbett, the Washington bureau’s investigative reporting editor, did not agree with the decision to hold the story. They thought the story should go to print right then without further delay. Taubman understood their frustration. He had been in the position of eager reporter versus a cautious editor. Risen and Lichtblau were very discouraged, Taubman recalled. He wouldn’t have blamed them if they thought their editors cowardly.²⁰

“Cowardly? I wouldn’t put it that way,” said Risen, “but Eric and I were pushing to have it published.” Was the story improved by more reporting? “We did get more stuff,” said Risen, “but I still think we should have published in 2004. But that said, I give them [the editors] credit. It was a great public service that we published it when we did. Other papers might not have published it at all. You have to give *The New York Times* credit.” Risen said that there was worry in the White House that some of them might be prosecuted if the story got out. It was a cover-your-ass proposition as much as it was a national security issue, in Risen’s opinion.²¹

“I didn’t think it [holding the story] was the right decision either,” Lichtblau told me. He thought that Keller and Taubman had been “pretty actively misled by the administration,” and that this was the basis for holding the story. “In my opinion, all the important elements of the story were there in 2004,” he said.²²

In his book, however, Lichtblau wrote that “on sensitive stories the reporters are the ones invariably pushing to publish, but unlike bloggers and other instant journalists in the new Internet Age, we as reporters don’t have the ability to simply publish something of our own accord. Which is the way it should be. The ‘mainstream media,’ as the bloggers like to call us, have a built-in backstop, a check and balance, and it’s called the editor. Editors are the ones who ultimately decide what goes in the paper and what prominence it should be given.”²³

And so the story was held, and went into a state of suspended animation. It hadn’t been spiked, but it wasn’t being worked on either. Joseph Lelyveld, Keller’s predecessor and mentor, sympathized with the decision to hold, but questioned the length of the hold. “You have to have a lot of confidence to bring out a story like that just before an election,” Lelyveld later recalled. “But if the story wasn’t ready to go in 2004, why didn’t it appear in early 2005? Why not push forward until everybody was satisfied? Did they take their eye off the ball?”²⁴

Sort of. “Jim went off on book leave pretty soon after the new year,” said Rebecca Corbett, “and Eric was off doing other things. And there was a certain angst about the decision to hold the story.” What Corbett regrets is that the story that was held was in draft form, not a finished, polished product that could be discussed in light of completion.²⁵

Taubman wonders to this day whether Risen’s book leave wasn’t spurred by frustration over having the story held.²⁶ But that frustration was soon to be eased. One evening Risen asked Lichtblau to stop by his house and have a look at a chapter of the book he was working on. What Lichtblau saw, with raised eyebrows, was: “The Bush administration has swept aside nearly thirty years of rules and regulations and has secretly brought the NSA back into the business of domestic espionage. The NSA is now eavesdropping on as many as five hundred people in the United States at any given time and it potentially has access to the phone calls and emails of millions more. It does this without court approved search warrants and with little independent oversight....Several government officials who know about the NSA operation have come forward to talk

about it because they are deeply troubled by it, and believe that by keeping silent they would become complicit in it. They strongly believe that the president's secret order is in violation of the Fourth Amendment of the Constitution...."²⁷ Now Lichtblau and Risen were ready for new negotiations with their editors.

Keller told me that over time he began to see the story in a new light, especially when good sources began to question the White House assertion that the domestic eavesdropping was legal. "I had been seeing it as an intelligence-methods story," Keller said, a type of story the *Times* would have less trouble keeping secret. "But al Qaeda must know we are doing everything to impede them. Al Qaeda would assume they were being eavesdropped." Also, it was very easy to get a warrant, but the NSA didn't want the inconvenience. "NSA just wanted the bad guys." Going to court, the NSA must have felt, would have been "time wasting nonsense," Keller said.²⁸

In a "Talk to the Newsroom" feature that the *Times* ran on its website in March, 2006, Keller made the case that the government had made a "concerted, top-level appeal" to hold the story. "They laid out a detailed argument that publishing what we then knew would compromise ongoing anti-terrorist operations, and they challenged our reporting on the issue of whether the eavesdropping program was subject to serious oversight by the courts or Congress. Their arguments were compelling enough that we felt the responsible course was to hold the story and do further reporting."²⁹

Select congressmen had been briefed by the government. Lichtblau recalled running into Jane Harman, ranking Democrat on the House Intelligence Committee, who was in the know. Lichtblau dropped some hints to Harman as to what he knew. "'You should not be talking about that here,' she scolded me in a whisper. 'They don't even know about that,' she said, gesturing to her aides, who were looking on...with obvious befuddlement."³⁰

"While Jim and Eric had some evidence of dissent within the government about the program, we had yet to learn how fierce and widespread the dissent was within the executive branch," said Taubman. Nor did the *Times* know the full extent of the Bush administration's use of "extraordinary techniques" to collect intelligence on other

matters. “Jim and Eric had done a brilliant job of learning about the program and its implications and shaky legal status, but I thought further reporting was warranted before we would have the story ready for publication. As I recall Keller agreed on these points,” Taubman said.

Taubman said that he would still have been willing to withhold publication despite Risen’s book, although that would have made the *Times* look bad. But Taubman thought that the story belonged to the *Times*, not “just Jim Risen and his agent.”³¹

Now the story was back on. “Weeks of agonizing discussion preceded the decision not to run the story in 2004,” Keller said. “I expect it left the reporters disheartened, and the editors moved on to other stories. Over the ensuing months a bunch of things happened. The reporter developed additional information regarding the legality of the eavesdropping program, a painstaking process.”³²

Had the threat of Jim Risen’s book scooping his own paper been a catalyst? “Jim Risen put the issue back in play by saying he wanted to write about it in his book,” Keller admitted. “Jim said he would omit the NSA material if we told him to, but this certainly helped rekindle the discussion. The Bush administration’s credibility on matters of national security was declining. Then once we decided to publish, we owed the administration ample opportunity to make their case against. I can’t really tell you an exact formula of considerations that got the decision [to hold the story] reversed, but it was a slow accumulation of factors.”³³

On November 30, 2005—according to Taubman—Taubman, Keller and Lichtblau met at the White House with Stephen Hadley, who had replaced Condoleezza Rice as National Security Advisor. Rice, now Secretary of State, was also in attendance, as was Harriet Miers, White House Counsel; James Comey, Deputy Attorney General; and John Negroponte, Director of National Intelligence. General Hayden, who had moved over to direct the CIA, led the discussion.³⁴

According to Lichtblau, Vice President Cheney “had thought about attending...” He had been the principle advocate for Stellar Wind but the vice president decided, “with

some justification," that his relations with the *Times* might prejudice the president's efforts to kill the story.³⁵

"The message was clear from the long, grave faces around the room and the stern words of warning," Lichtblau would later write. "If the story was published and the United States was attacked again, *The New York Times* would share the blame for the next attack."³⁶

When the administration saw that this top-level meeting with *The New York Times* wasn't going to be enough, the White House took the unprecedented step of asking the paper's publisher, Arthur Sulzberger Jr., to come down to Washington to be lectured to by the president himself. Never before had a request to hold a story been delivered to a publisher by a president in the Oval Office. The *Times'* editors, who had at long last decided to go to press with the story, nonetheless wanted to give the White House one last chance to talk them out of it.

The meeting took place on December 5, 2005, with Sulzberger, Keller and Taubman for the *Times*, and with President Bush, Miers and Hayden speaking for the administration. Taubman remembers it being cold, "snowing a bit." There was concern lest they be recognized, so they were picked up by the Treasury Building and escorted past the East Wing and into the West Wing via the Rose Garden, Taubman said. "Lots of drama."³⁷

"Bush opened the meeting with a cogent, four- to five-minute explanation of why he felt so strongly that the *Times* shouldn't publish the story," Taubman recalled. "He then asked Hayden to describe the program. He did so in considerable detail for 20 to 25 minutes. There was a general discussion among us after that, with Bush and Hayden doing most of the talking for the administration. Arthur, Bill and I asked questions."³⁸

Arthur Sulzberger went into the meeting determined to be fair and to listen carefully. It would be a big decision. "Not a bet-the-company decision," Sulzberger told me, but a decision that could affect the reputation of his newspaper. "You had to go in with an open mind."³⁹

Sulzberger found President Bush and his team “stunningly unconvincing” when it came to the plots that their domestic eavesdropping had unearthed. The idea that someone could bring down the Brooklyn Bridge with a blowtorch was risible, and Sulzberger thought he detected a faint smile on the president’s lips when Hayden mentioned it. But when Sulzberger smiled, Hayden turned on him and snapped: “It’s not funny,” Sulzberger remembered.⁴⁰

“The president was gracious, but was silent through most of it,” Sulzberger said. “He did say we could be called to defend what we had done” if publishing resulted in an attack on the United States. “But history suggests that the story did not make security worse.”⁴¹

Sulzberger said he sympathized with the White House. “Their day job is to think of the worst case scenarios, and not all information yearns to be published.” There were technical and operational details that the *Times* was perfectly willing to leave out of the story.⁴²

It was on the question of whether NSA had broken the law that Sulzberger would have liked to have taken “a deeper dive,” he recalled. He asked the president and his team if he could speak to three or four other people on the question of legality. Sulzberger would have liked more sourcing, “Journalism 101,” he said, “but I never heard back. They never even called back to say no.”⁴³

Hayden, however, has no recollection of Sulzberger’s request for more information, “but I reject the proposition that we closed off the dialogue. If there is an exposed flank, it is *The New York Times*,” he said. Hayden recalls that the *Times* promised to notify the White House if and when they were about to go to press with the story. “They did not,” Hayden told me with some bitterness. “They put it up on their website, and only when it had been up for a while did Keller call [Chief of Staff] Andy Card and tell him.”⁴⁴

Hayden came out of the White House meeting thinking that “Sulzberger didn’t listen much, but I think it was Keller’s decision to publish. Taubman would not have, I believe.” Who was the most receptive to the administration’s arguments? “Taubman by

a long shot,” said Hayden. “He was the most straightforward and interested in our arguments.”⁴⁵

Taubman remembered that there were further discussions with the administration about the story, but never again at the same level.⁴⁶

“On the way back to New York,” Keller said, “Arthur and I agreed that that was powerful stuff, but nothing had changed my mind about publishing. Arthur agreed.”⁴⁷ And so now, more than a year later, the story was ready to run.

“With the story on what seemed like a clear track to publication,” Lichtblau later wrote, “we were hopeful that it would run in the next day or two. Instead, there was the promise of still more meetings set up by the White House—meetings that could, conceivably, produce substantive information about the program and its evolution. The editors thought it was worth waiting out the White House. Days passed.”⁴⁸

In the meantime, legislation extending the Patriot Act was imminent. Was the White House just stringing the *Times* along to get the Patriot Act extension into law before the NSA story muddied the waters? “Bill Keller made clear that the timing of the Patriot Act would not push the story into the paper,” Lichtblau wrote. “‘We should publish when we’re ready to publish,’ he told me in one email as we waited for the final decision.”⁴⁹

Tension rose. Jim Risen was so nervous about their story that, according to Lichtblau’s account, Risen even emailed then Managing Editor Jill Abramson saying: “‘I am not a religious person, but I have prayed about this. I do believe that there are a few points in our lives when we must make moral choices. Sometimes we don’t recognize those moments until they have passed. To me, this moment has hit me in a very clear and painful way. To me this has been like a stone in my shoe. I can’t walk away from it...But all I want is this story to be told, so the American people can decide what they think about it.’”⁵⁰

What broke the logjam was Lichtblau’s hearing that the White House was considering a Pentagon Papers–style injunction to stop publication. The now galvanized *Times* feared that the tactic used against them three decades before might be used again. An injunction might halt the presses, at least temporarily, before a court decided in the

Times' favor, as had happened 30 years before. But it couldn't shut down the Internet in time, so the story was put out on *The New York Times'* website on the evening of December 15, before the story hit the print front page on December 16.⁵¹ It was an unusual step, because the *Times'* scoop would be on the web for all to see before it appeared in the paper. But the Internet was fast becoming king.

There was still the question of how the *Times* should play the story on page one. Keller previously had gone to Joseph Lelyveld to ask his advice. "It's the only time he's asked me about a story," Lelyveld told me. Lelyveld's advice was "'play it as Abe [Rosenthal] played the Pentagon Papers,'" the newspaper's great scoop of a generation before. "'Make it the off-lead with a great deal of detail.' I said, 'don't cover yourself,' meaning don't go into a lot of explanations of why you held the story. The focus has to be on the story, not the *Times*. Otherwise the story won't be about warrantless wiretaps, but about the *Times*.'"⁵²

And so it ran; not as prominently as Risen and Lichtblau might have wanted, but then as Lichtblau later wrote: "Keller had decided he didn't want it to look like we were poking the White House in the eye with a big screaming headline.... The story would speak for itself.... After all this time, we were just relieved to see the story in the newspaper after all; in the back of the paper among the bra ads would have been fine."⁵³

But keeping the *Times* out of the story proved impossible. The paper's public editor, Byron Calame, noticed that Risen and Lichtblau's article had said the story had been held for a year, but, in fact, had been held for more than a year. In a blistering column, Calame wrote that neither Keller nor Sulzberger had responded to his list of 28 questions. "Stonewalling," he called it, claiming that the *Times'* explanation for the delay was "woefully inadequate... despite the paper's repeated pledges of greater transparency."⁵⁴

"Barney Calame spent at least one column wondering whether my disclosure that we had held the story 'for a year' was a sly attempt to mislead readers," Keller told me. "If it had been literally a year that would have meant we didn't have the story until after the '04 election. To some readers, the fact that we could have published before the

election compounded the sin of withholding because the story might have changed the election outcome. I thought we were doing the right thing by letting readers know that we had held the story for a long time. The election aspect did not seem as meaningful to me as it did to some of our conspiracy-minded readers.”⁵⁵

“First our policy is that we publish stories when they are ready,” Keller said, “without regard to their possible impact on elections. In fact, on the eve of the ‘04 election, we did publish the damning story about the failure to secure a storehouse of high-explosives in Iraq, and we were hammered by the right for supposedly trying to defeat Bush.” Keller doesn’t buy that the NSA story would have necessarily “converted Bush supporters to opponents. In fact it might have helped him,” Keller said.⁵⁶

Few cases demonstrate the tensions between government and press over national security secrets more than Stellar Wind. Even to this day, the participants remain convinced that their side was right.

The story won Risen and Lichtblau Pulitzer Prizes, one of the highest honors that American journalism can bestow. But Hayden still maintains that the *Times*’ decision was wrong and that the truth of Sulzberger’s claim that breaking the story did not really hurt the nation’s security is unknowable. “It is impossible to measure phone calls that you didn’t intercept,” he said.⁵⁷

A senior figure in the Bush administration who was involved in the case, but chose not to be named or even quoted directly, still feels, to this day, that *The New York Times* was both arrogant and irresponsible. Publishing the story after the President of the United States had personally intervened was akin to slapping the president in the face, the source said.⁵⁸

The New York Times certainly leaned over backwards to check the story out and gave the government a chance to present its best arguments. The paper agreed to keep certain details secret. All the parties agree that the whole story of what went on with Stellar Wind has never been revealed. But the question for *The New York Times* was not whether there are good reasons to publish. Publishing is what newspapers and news organizations do. There has to be an overwhelming reason not to publish.

In the end, the *Times* decided that illegality trumped national security concerns in the Stellar Wind story, but it was one of the more difficult calls that a newspaper has ever had to make with merit on both sides of the question. The controversy has never ended. In May of 2012 the Supreme Court agreed to hear legal challenges to the 2008 FISA Act Amendment, but even if the court upholds the 2008 law, it may not answer questions concerning NSA's actions prior to that amendment.

CONCLUSION

The New York Times ran into a fire of criticism over their handling of the NSA story, and there were the usual threats of prosecution. But the Bush administration never followed through on the threats. I asked General Michael Hayden who was head of NSA, and then later CIA, why the government had not taken *The New York Times* to court. "Our overall judgment was not to go in that direction," he said.⁵⁹

As governments struggle to keep their secrets, the press charges that government secrecy is obsessive. A CIA public affairs officer, Bill Harlow, once said that there is much government angst over leaks and press complaints about over-classification, "and they're both right. They are all reasonable people, but coming to common ground on the issue is difficult."⁶⁰

How newspapers ferret out classified secrets is always of concern to governments. But for every direct leak, such as Daniel Ellsberg handing *The New York Times* the Pentagon Papers, there are dozens more where the secret is "assembled like a Lego skyscraper, brick by brick....Often the sources who help the reporters doing it don't even realize they have contributed a brick or two in the construction," wrote Robert Kaiser, a former managing editor of *The Washington Post*. Typically, many of these sources don't know the whole story themselves, "just a sliver of it. A good reporter can spend weeks or months on a single story looking for those slivers or bricks," Kaiser wrote.⁶¹

In the case of Stellar Wind, reporters Seymour Hersh, James Risen and Eric Lichtblau may have had a tip that started them thinking, but their stories were built brick by brick as they teased the information out of many different sources.

Bill Keller and Arthur Sulzberger made their decision to publish at a time when it was beginning to seep out that the Bush administration was circumventing civil liberties and laws. It was a time of which Harvard law professors Gabriella Blum and Philip Heymann would write: “The administration found peacetime domestic law to be irrelevant” in the new age of terrorism, “and international law inapplicable....” Therefore the Bush administration operated within a “No-law Zone.”⁶²

Thus, the legality of Stellar Wind began to overshadow the national security aspects, in the minds of *The New York Times* editors, even though the government officials involved at the time still insist that what they did was legal. The *Times* put great store in the discovery that Stellar Wind was controversial within the Bush administration and that government approval was not monolithic.

Should there be rules governing how the press should handle national security matters? John Deutch, who served as CIA director in President Bill Clinton’s time, is of the opinion that “there is no question of what the rules should be. You [journalists] should go and find as much as you can and publish it as soon as you can.” To do otherwise would put journalists in conflict with their purpose in life. In Deutch’s experience, editors have been willing to hold a story when the national security implications have been made known to them—albeit while “gnashing their teeth.” He told me.⁶³

Joseph Lelyveld, former executive editor of *The New York Times*, made it a rule that if the government wanted to hold up a story the request had to come from the top. It had to be the director of the CIA, or the NSA, not some underling. Lelyveld felt that insisting on the top official to make the government’s pitch would weed out trivial complaints from bureaucrats.⁶⁴

Sometimes an editor will spike a story, even though it might be true, on the grounds that it would be misleading. James Hoge was editor of the *Chicago Sun Times* when the Vietnam War was raging. According to Hoge: “Tom Ross of the *Sun-Times* Washington Bureau was tipped off by a Pentagon source that some consideration was being given to employing a nuclear bomb to incapacitate Haiphong harbor. “Presumably, this was

expected to alter the course of the war and maybe even end it. Pentagon officials were contacted to confirm, deny or elaborate on the leaked information.” The officials described how there were contingency plans for just about every conceivable alternative, but that nobody in government was ever considering nuking Haiphong harbor.⁶⁵ “*The Sun-Times* agreed that disclosure of a theoretical but non-operative option would be unjustifiably inflammatory and misleading,” said Hoge. So the story never saw the light of day.⁶⁶

“We [the press] don’t assert that the government has no right to keep secrets,” *The Washington Post*’s Bob Kaiser wrote. “On the contrary, we have helped the government keep secrets more often than we should have.”⁶⁷

Bill Keller added: “*The Washington Post*, in disclosing that the CIA was imprisoning terror suspects at secret locations in allied countries, withheld the identities of the host countries at the urging of the White House. *The Los Angeles Times* chose not to publish the contents of computer hard drives purchased by reporters in an Afghan bazaar. The hard drives, either stolen or discarded from official American outposts in the country, contained information about American espionage and surveillance activities in Afghanistan.” *The New York Times* “held articles that, if publishable, might have jeopardized efforts to protect vulnerable stockpiles of nuclear material.”⁶⁸

Bill Keller and Dean Baquet, a former editor of *The Los Angeles Times*, wrote an op-ed article together saying: “No article on a classified program gets published until the responsible officials have been given a fair opportunity to comment. If they want to argue that publication represents a danger to national security, we put things on hold and give them a respectful hearing. Often we agree to participate in an off-the-record conversation with officials so they can make their case without fear of spilling more secrets onto our front pages. Finally, we weigh the merits of publishing against the risk of publishing. There is no magic formula, no neat metric for either the public’s interest or the dangers of publishing sensitive information. We make our best judgment.”⁶⁹

But “the American model can only work when the powerful are held accountable, and accountability is only possible when citizens, including members of Congress, know

what is going on,” according to Kaiser. “None of us has ever been held accountable for an act no one knew we committed.”⁷⁰

People may be shocked at revelations that appear in the press, but, as Kaiser asked: “Would we have preferred not to know of them at all? If a war is being waged in America’s name, shouldn’t Americans understand how it is being waged?”⁷¹

When the storms over a particular story and its secrets are long over, participants often take a more detached view. “I have come to realize,” said Ben Bradlee, former editor of *The Washington Post*, now 90 years old, “that the mystery and secrecy and all that [expletive deleted] doesn’t stay important very long. It is good to get a scoop, but a couple of weeks later it doesn’t really matter. And too often it was just reputations they were trying to protect, not preventing people from getting killed.”⁷²

Former government official, and later journalist and president of the Council on Foreign Relations, Leslie Gelb, who directed the Pentagon Papers project at the Pentagon, told me that he once passionately believed that printing the Pentagon Papers while the war was going on would make it more difficult to negotiate with the North Vietnamese. But today he takes a different view.⁷³

“The Pentagon Papers were, and are, an invaluable source of understanding how government worked then, and still works.” Gelb told me. The fact that the entire project was “my baby” unduly influenced his thinking at the time, he said.⁷⁴

One wonders how much the “my baby” factor drives government officials when they passionately argue a story shouldn’t run. For the former government official, Gelb, and for the newspaperman, Bradlee, however, time erases urgency.

When an administration is simply covering up wrongdoing or trying to prevent embarrassment, the press should have little sympathy. National security, however, is a different matter. The NSA case fell into that grey area, where the national security issues were real.

As for government attempts to plug leaks and punish leakers, Phillip Heymann, a professor at Harvard Law School and a former deputy attorney general, said there are ways to punish leakers short of sending them to jail for espionage. It may be punishment

enough to have them lose their jobs. There are laws against stealing government property, but should a leak be defined as theft? Heymann said that laws against theft shouldn't spill over into the realm of censorship.⁷⁵

Heymann feels it would be a mistake, in a democracy, to allow the government to keep complete control over information. But he suggested that one answer, when it comes to a difficult judgment call on whether to print or not to print, would be to put the matter before a third party, perhaps a judge.⁷⁶

Bill Keller would beg to differ. "Making those decisions is the responsibility that falls to editors, a corollary to the great gift of your independence. It is not a responsibility we take lightly. And it is not one we can surrender to the government. This is exactly why the inventors of this country, having emerged from an imperial form of government, embraced an unruly press."⁷⁷

"When it comes to national security," Keller said, "it is not my job to tell you whether eavesdropping without warrants, or military tribunals, or water boarding are legitimate tools of national security. My job is to tell you what you need to know to judge for yourselves how the government is doing its job of keeping you safe."⁷⁸

I will let that most famous of all newspaper editors in the last half of the 20th century, Ben Bradlee of *The Washington Post*, have the last word: "The first criterion is that you [the editor] make the decision, not they [the government]. But with that comes the responsibility to listen to their arguments. If they were to say that you can't name two CIA spies in country X because it might cost them their lives, you have to listen. But often there is a way around it. Maybe the names don't really matter to the story, or maybe the spies will be coming out soon. But you have to enter the fight with the determination to print. Your driving impetus must be getting at the truth along with your desire to print it."⁷⁹

Afterword

On July 20, 2012, *The Wall Street Journal* reported that “National Security Agency spy activities on at least one occasion have violated the Fourth Amendment protections against unreasonable search and seizure, according to a ruling by the U.S.’s secret national security court. The ruling...represented the first time the government has acknowledged U.S. spy activities violated the constitution since the passage of a 2008 law that overhauled surveillance laws following the uproar over the NSA’s warrantless wiretapping program in the George W. Bush Administration.” The paper reported that government officials have subsequently “remedied” the situation, “according to a letter Kathleen Turner, a senior official in the Office of the Director of National Intelligence, sent to Democratic Sen. Ron Wyden of Oregon. The letter said subsequent government eavesdropping requests have been approved by the Foreign Intelligence Surveillance Court.” What specific violations of the Fourth Amendment NSA was found to have committed in the case of Operation Stellar Wind have never been revealed.

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