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The Gray Lady in shadow

Could publication of the domestic-spying story lead to indictment of the *New York Times*?

By **HARVEY SILVERGLATE** | January 05, 2006

Fearful that his presidency could be swept into the same historical dustbin as Richard Nixon's, an unrepentant President George W. Bush seems intent on prosecuting the sources who leaked to the *New York Times* the details of his administration's warrantless domestic spying. But does Bush have the chutzpah to go after the *Times* itself?

A variety of federal statutes, from the Espionage Act on down, give Bush ample means to prosecute the *Times* reporters who got the scoop, James Risen and Eric Lichtblau, as well as the staff editors who facilitated publication. Even Executive Editor Bill Keller and Publisher Arthur "Pinch" Sulzberger Jr., could become targets — a startling possibility, just the threat of which would serve as a deterrent to the entire Fourth Estate.

Legal means are one thing, but political will is another. If Bush goes after the *Times*, he could spark a conflagration potentially more destructive to a free press — or to his administration — than Nixon's 1971 *Pentagon Papers* machinations, which included efforts to stop publication of the classified study of the Vietnam War, the aborted prosecution of leaker Daniel Ellsberg, and the intention to prosecute newspapers (and their employees) that ran the document. All backfired on Nixon.

Many believe that the *Times* performed an incalculably valuable service when it reported last month on a top-secret National Security Agency program — almost certainly unlawful — involving presidentially (but not court-) approved electronic surveillance of message traffic between people in this country and locations abroad. The leak investigation by the Department of Justice (DOJ) has begun. What has received virtually no attention is that the *Times* and its reporters, editors, and publisher are at serious risk of indictment by a vengeful White House concerned not so much with disclosure of national secrets as with revelation of its own reckless conduct.

TARGETING THE *TIMES*

The *Times*' December 16 front-page exposé made headlines around the world. The warrantless eavesdropping the newspaper uncovered is an almost certain violation of Americans' privacy

rights and is very likely a crime. Diverting questions about the highly suspect program, the administration repeatedly makes the absurd claim that this disclosure has tipped off the terrorists that their electronic communications are being monitored. In truth, it's been well-known for decades by the terrorists and just about anyone else with even glancing knowledge of intelligence-gathering that such surveillance is done *lawfully* with an order issued by a top-secret national-security court that rarely turns down a government request. That the surveillance under Bush is done *unlawfully* hardly will change the terrorists' communications practices.

The DOJ announced on December 30 that it has opened a criminal-leak investigation. The announcement was greeted with only muted criticism from media and civil-liberties circles, perhaps because it looked like nothing more than a replay of the still-ongoing Valerie Plame–outing fiasco. Anthony Romero, executive director of the ACLU, and Marc Rotenberg, executive director of the Electronic Privacy Information Center, welcomed an investigation but suggested that the object should be the warrantless surveillance program, not those within the government who leaked it. Neither seemed to sense the threat to yet another target: the newspaper that published the story.

Those who don't see the danger in the DOJ probe of the leaks underestimate how far zealous federal prosecutors can carry such an investigation. Prosecutors' enormous discretionary latitude, derived from the extraordinary range of narrow, broad, and in some instances dangerously vague criminal statutes that control the disclosure of supposed national-security secrets, renders any such investigation dangerous to a free press.

Forget for a moment the fate of leakers who could be subject to prosecution for anything from disseminating stolen government property to mail and wire fraud, espionage, or even to the capital crime of treason. Instead, consider the lot of the paper that had the courage to spotlight the administration's potentially criminal conduct: it now faces the prospect of criminal indictment. (When asked directly if the investigation extended to the publication of the information, a DOJ official remarked broadly to reporters that he could not comment on any aspect of the investigation.)

There is little reason to suppose that the administration would refrain from indicting the newspaper, its reporters, and its higher-ups unless the political downside was too substantial. Indeed, with undoubted additional deep and dark secrets not yet exposed, one assumes that the administration would like to go beyond terrorizing leakers and reach those who report leaks to the public. Historical and legal precedent that suggests the legal viability of such a prosecution has gone largely unnoticed in the public arena — though not likely at the DOJ.

That precedent comes from the Nixon administration, which contemplated indicting the three newspapers that published excerpts from *The Pentagon Papers* in the waning years of the Vietnam War — namely the *New York Times,* the *Boston Globe,* and the *Washington Post* — along with some of the individuals involved. Indeed, when the Supreme Court in 1971 turned down the Nixon DOJ's request for an injunction against publication, there were three justices

(Burger, Harlan, and Blackmun) who thought the court should have prevented publication altogether, and three (White, Stewart, and, again, Blackmun) who went out of their way to suggest that the DOJ consider indicting the newspapers *after* publication. The Nixon administration's failure to prevent publication, warned justices White, Stewart, and (agreeing in his separate opinion) Blackmun, "does not measure its constitutional entitlement to a conviction for criminal publication." In other words, although the First Amendment might prevent a prior restraint on publication, this did not mean that publishing was legal or that the publishers could escape criminal prosecution.

The White-Stewart opinion, approved by Blackmun, proceeded to list numerous statutes arguably rendering such publication criminal, including the Espionage Act and a plethora of laws prohibiting communication of documents relating to the national defense, as well as the "willful publication" of any classified information concerning "communication intelligence activities" of the United States. Two justices (Burger and Harlan) did not specifically address the question of post-publication criminal prosecution of the newspapers, but their endorsement of the idea can be inferred from the fact that they approved of an injunction against publication in the first place.

So let's not kid ourselves: *five of the nine justices would have approved of criminal prosecution of the newspapers* in the *Pentagon Papers* case, even though a majority would not authorize a pre-publication injunction. Therefore, this often-touted victory for freedom of the press was in fact quite limited and foreshadowed a battle of monumental proportions.

NIXON UNBOUND

In his authoritative 1972 book, The Papers *and the Papers,* Sanford J. Ungar concluded that the main reason Nixon and Attorney General John N. Mitchell did not prosecute media targets was because by that time the Watergate scandal had broken. (Disclosure: I represented Ungar during the *Pentagon Papers* episode.) Nixon was on his way to impeachment or resignation while Mitchell was on his way to indictment and federal prison. Later, Whitney North Seymour, the moderate Republican US attorney for New York at the time of the *Pentagon Papers* imbroglio, wrote in his autobiography that the DOJ sent emissaries to enlist the cooperation of Seymour's office in securing an indictment of the newspapers and of individual employees, but that Seymour responded "Not in this District." Soon thereafter, Watergate came to the rescue.

But it is not far-fetched to assume that the current administration — just as obsessed with secrecy as Nixon's and equally determined to cover up its derelictions and crimes, and with few if any voices of moderation the likes of Seymour's — will pick up the cudgel the Nixon team abandoned.

Such an indictment could be brought in short order. It would be unnecessary for the DOJ to complete the leak investigation before indicting media defendants, since the mere publication of the story would be the alleged crime regardless of the identity of the leakers. Nor would

the *Times*' publisher, editors, and reporters be able to claim ignorance of the top-secret nature of the information published: surely the president and his aides made that very clear at a meeting held with Keller and Sulzberger in the Oval Office last year. Besides, the *Times*' voluntary postponement of publication for a year prior to that meeting could readily be spun as indicating knowledge that harm to national interests was possible.

This is not to say that prosecution would be a cakewalk for the DOJ. Although it easily could obtain an indictment, getting a conviction is another story. The media defendants would doubtless be represented by top-flight lawyers — this time, however, by criminal-defense lawyers skilled at convincing ordinary people, rather than First Amendment counsel arguing nice legal points to judges as was the case in the *Pentagon Papers* conflict as well as in the disastrously unsuccessful Plame "reporter's privilege" battle. In addition, the case likely would be tried in either New York or Washington, DC, where prosecutors would be confronted with those cities' famously skeptical and independent — even ornery — jurors, who would be required to agree *unanimously* in order to convict.

Defense lawyers would doubtless argue, probably effectively, that their clients performed a public service by exposing official wrongdoing at the highest levels of government. Bush would, in effect, be placed on trial, along with the *New York Times*. One can imagine defense counsel quoting Thomas Jefferson that "between a government without newspapers or newspapers without government, I would surely choose the latter." It would be one helluva fight — the fight that we never got to see between Nixon and the media.

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