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The Regulation of Extremist Speech in the Era of Mass Digital Communications: Is Brandenburg Tolerance Obsolete in the Terrorist Era?

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The Regulation of Extremist Speech in the Era of Mass Digital Communications: Is *Brandenburg* Tolerance Obsolete in the Terrorist Era?

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Both the general theme of this symposium and the specific topic of this panel give me the opportunity to stress how conservative we civil libertarians are! We do not think the Constitution should stay "in tune with the times"[1] by diluting its human rights protections in times that are seen as especially dangerous. And, of even greater weight than what current civil libertarians think, or what current Justices say, is what the First Amendment Framers did: they deliberately omitted a general national security exception. In short, both the plain language[2] and the original intent of the First Amendment belie any post-9/11 exception for any speech.[3]

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* Professor of Law, New York Law School; President, American Civil Liberties Union. Most of the footnotes were prepared by my Chief Aide, Steven Cunningham (NYLS '99), based on my guidance and with the assistance of my Research Assistants Benjamin Stewart (NYLS '10), Joshua Shoenfeld (NYLS '10), Jennifer Bellusci (NYLS '10) and Susan Schrank (NYLS '10). Accordingly, Steven Cunningham bears both the responsibility and credit for the footnotes.

This Essay is based on a presentation I made on April 4, 2008 at Pepperdine Law Review's Annual Symposium—*Free Speech and Press in the Modern Age: Can 20th Century Theory Bear the Weight of 21st Century Demands?*—Panel on "The Regulation of Extremist Speech in the Terrorist Era." I am delighted to join this great group of friends and colleagues, and I thank Barry McDonald (Associate Professor of Law, Pepperdine University) for his wonderful work in planning this impressive symposium. I also want to thank Barry and Margaret Barfield (Staff, Pepperdine University of Law) for their graciousness and helpfulness with all of the arrangements.

1. Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

3. *See* Nadine Strossen, *Foreword* to *Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post 9/11 America*, 57 AM. U. L. REV. 1197 (2008); Nadine Strossen, *Constitutional Overview of Post 9/11 Barriers to Free Speech and a Free Press*, 57 AM. U. L. REV. 1204 (2008).

This is just one of the major reasons why I reject any post-9/11 reductions to free speech protection. However, rather than addressing that general issue, I will add the most diversity to our discussion by raising some of the most serious threats to free speech in what has been called our "digital terrorist age." I would also like to draw upon the ACLU's extensive experience in countering seemingly countless erosions of free speech in this so-called "post-9/11" era.

While there certainly have been some heavy-handed frontal assaults on dissent and advocacy,[4] those situations are of minor concern compared to other government measures that are more severely curbing First Amendment freedoms. Likewise, judicial rulings that apply *Brandenburg v. Ohio*[5] and other speech-protective First Amendment doctrines less than rigorously[6] are of much less concern than the many court rulings that are not grounded on substantive First Amendment doctrine at all, but instead, are decided on threshold issues concerning matters such as privilege and justiciability. In effect, these latter cases do more damage since they do not just reduce constitutional protection for First Amendment rights, but rather, completely immunize violations of these rights.

Let me cite a few examples of government measures and judicial responses. I will start by listing some of the post-9/11 government measures that most seriously undermine First Amendment rights. They all have the effect of stifling information and ideas at the source, thereby adversely affecting not only the silenced speakers, but also all the rest of us, the potential audience, and they do so concerning topics that are especially important in the effort to counter terrorism. Therefore, all of these measures thwart not only individual liberty—which would be worrisome enough—but also national security.[7]

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4. Press Release, ACLU, Government Revoked Muslim Nuclear Physicist's Security Clearance To Retaliate For Criticism Of U.S. Policy, Says ACLU, Lawsuit Charges Government is Hiding Behind "National Security" Claim (June 26, 2008), *available at* http://www.aclu.org/freespeech/gen/35789prs20080626.html; Press Release, ACLU, Federal Court Rules That D.C. Police Unlawfully Arrested Anti-Bush Protesters On Inauguration Day (June 18, 2008), *available at* http://www.aclu.org/freespeech/protest/35748prs20080618.html; Press Release, ACLU, ACLU Slams Administration Attempts to Curb First Amendment (Apr. 4, 2008), *available at* http://www.aclu.org/freespeech/gen/34796prs20080404.html.

5. 395 U.S. 444 (1969).

6. *See* United States v. Al-Timimi, No. 05-4761, 2006 U.S. App. LEXIS 32554 (4th Cir. Apr. 25, 2006); Turney v. Pugh, 400 F.3d 1197 (9th Cir. 2005).

7. *See, e.g.*, Alasdair Roberts, *National Security and Open Government*, 9 GEO. PUB. POL'Y REV. 69 (2004).

My listing follows:

- Excessive government secrecy including cutbacks on the Freedom of Information Act,[8] over-classification of documents,[9] closed judicial proceedings,[10] secret evidence,[11] and sealed court decisions.[12]
- Routine retaliation against national security whistleblowers, with inadequate legal protections for them.[13]
- Subpoenaing reporters who publish information obtained from whistleblowers and other confidential sources, with no federal shield law.[14]

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8. 5 U.S.C. § 552 (2007).

9. Eric Lichtblau, *F.A.A. Alerted on Qaeda in '98, 9/11 Panel Said*, N.Y. TIMES, Sept. 14, 2005, at A1, A27, *available at* http://www.nytimes.com/2005/09/14/politics/14terror.html?_r=1&oref=slogin.

10. *Dimming the Beacon of Freedom U.S. Violations of the International Covenant on Civil & Political Rights—Executive Summary*, ACLU, http://www.aclu.org/intlhumanrights/gen/25937res20060620.html (last visited Jan. 15, 2009); Press Release, ACLU, ACLU Files First Post-Sept. 11 Challenge To Closed Immigration Hearings on Behalf of MI Congressman and Journalists (Jan. 29, 2002) [hereinafter Post-Sept 11 Challenge], *available at* http://www.aclu.org/immigrants/detention/11596prs20020129.html; Press Release, ACLU, ACLU Disappointed Over Federal Appeals Court Decision to Not Rehear Case Challenging Closed Hearings (Dec. 4, 2002) [hereinafter ACLU Disappointed], *available at* http://www.aclu.org/safefree/general/17083prs20021204.html.

11. Press Release, ACLU, Through Gag Orders and Secret Evidence, Government Is Suppressing Information About Controversial Patriot Act Powers, ACLU Charges (Aug. 19, 2004), *available at* http://www.aclu.org/safefree/patriot/18489prs20040819.html.

12. *See* Post-Sept 11 Challenge, *supra* note 10; ACLU Disappointed, *supra* note 10; Press Release, ACLU, In Unprecedented Order, FISA Court Requires Bush Administration to Respond to ACLU's Request That Secret Court Orders Be Released to the Public (Aug. 17, 2007), *available at* http://www.aclu.org/safefree/spying/31356prs20070817.html.

13. *See* Press Release, ACLU, ACLU Urges Congress to Adopt Stronger Whistleblower Protections, Warns Against Legislation to Penalize Workers That Bring Abuses to Light (Mar. 14, 2006), *available at* http://www.aclu.org/safefree/general/24552prs20060314.html; Press Release, ACLU, FBI Retaliated Against Whistleblower for Reporting National Security Breaches, Inspector General Report Concludes (Dec. 4, 2005), *available at* http://www.aclu.org/natsec/emergpowers/22153prs20051204.html; MELISSA GOODMAN, CATHERINE CRUMP & SARA CORRIS, ACLU, DISAVOWED: THE GOVERNMENT'S UNCHECKED RETALIATION AGAINST NATIONAL SECURITY WHISTLEBLOWERS 11 (2007), *available at* http://www.aclu.org/pdfs/safefree/disavowed_ report.pdf; Neil A. Lewis, *The Libby Verdict; Libby, Ex-Cheney Aide, Guilty of Lying in C.I.A. Leak Case*, N.Y. TIMES, Mar. 7, 2007, at A1, *available at* http://query.nytimes.com/gst/fullpage.html?res=9B07EEDA1531F934A35750C0A9619C8B63; David Stout, *Subject of C.I.A. Leak Testifies on Capitol Hill*, N.Y. TIMES, Mar. 16, 2007, at A1, *available at* http://www.nytimes.com/2007/03/16/washington/16cnd-plame.html?hp.

14. *See* JAMES THOMAS TUCKER & FRANK KNAACK, ACLU, PUBLISH AND PERISH: THE NEED FOR A FEDERAL REPORTERS' SHIELD LAW 4 (2007), *available at* http://www.aclu.org/pdfs/freespeech/publishperish_20070314.pdf; Editorial, *Time for a Federal Shield Law*, N.Y. TIMES, July 21, 2005, at A28; Editorial, *The Need for a Federal Shield*, N.Y. TIMES, Feb. 17, 2005, at A28;

- Sweeping surveillance of communications without warrants, notice, or judicial review.[15]
- "Ideological exclusions" from this country of scholars and others who have been invited to teach and speak at U.S. universities and other forums.[16]
- "Gag rules" imposed on individuals who are subject to surveillance, barring them from discussing the situation with everyone from their own professional colleagues, to members of Congress, to journalists and scholars.[17]
- An overly broad concept of "material support" for terrorism that encompasses even minor charitable contributions to humanitarian causes.[18]

Now let me cite some examples of the threshold legal doctrines on which too many judges have relied to immunize too many of these government measures that undermine First Amendment rights. The first such exception is an overly broad concept of the so-called "state secrets privilege," supporting wholesale dismissals of lawsuits at the pleading stage.[19] The second such issue is an overly narrow concept of standing that

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Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

15. *See* JAY STANLEY & BARRY STEINHARDT, ACLU, BIGGER MONSTER, WEAKER CHAINS: THE GROWTH OF AN AMERICAN SURVEILLANCE SOCIETY (2003), *available at* http://www.aclu.org/FilesPDFs/aclu_report_bigger_monster_weaker_chains.pdf; Press Release, ACLU, ACLU Urges Senate to Reject Unconstitutional Surveillance Bill (June 26, 2008), *available at* http://www.aclu.org/safefree/spying/35786prs20080626.html; Press Release, ACLU, House Approves Unconstitutional Surveillance Legislation (June 20, 2008), *available at* http://www.aclu.org/safefree/general/35740prs20080620.html.

16. ACLU.org, Ideological Exclusion—Censorship at the Border, http://www.aclu.org/safefree/general/21211prs20051110.html (last visited Jan. 15, 2009).

17. *See, e.g.*, Doe v. Gonzales, 449 F.3d 415 (2nd Cir. 2006); ACLUNC.org, Internet Archive v. Mukasey: FBI Withdraws Unconstitutional NSL Served on Internet Archive, http://aclunc.org/cases/active_cases/internet_archive_v._mukasey.shtml (last visited Jan. 15, 2009).

18. Press Release, ACLU, UCLA Testimony on Material Support for Terrorism Laws: Section 805 of the Patriot Act and Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004 Before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security (May 10, 2005), *available at* http://www.aclu.org/safefree/general/17536leg20050510.html.

19. Press Release, ACLU, Federal Appeals Court Denies Day in Court for Victim of CIA Kidnapping, Citing "State Secrets" (Mar. 2, 2007), *available at* http://www.aclu.org/safefree/rendition/28772prs20070302.html; Press Release, ACLU, Government Cannot Shirk Accountability for Illegal Surveillance by Claiming State Secrets, ACLU Tells Chicago Judge (July 13, 2006), *available at* http://www.aclu.org/safefree/nsaspying/26146prs20060713.html; Press Release, ACLU, State Secrets Privilege Dangerously Overbroad (Feb. 13, 2008), *available at* http://www.aclu.org/safefree/general/34087prs20080213.html; Press Release, ACLU, ACLU Welcomes Proposed State Secrets Fix, Applauds Senator Kennedy for Introduction of Legislation (Jan 22, 2008), *available at* http://www.aclu.org/safefree/general/33768prs20080122.html; Eric Lichtblau, *U.S. Cites 'Secrets' Privilege as It Tries to Stop Suit on Banking Records*, N.Y. TIMES, Aug. 31, 2007, at A17; Press Release, ACLU, Government is Abusing "States Secrets Privilege" to Cover Up National Security Blunders, ACLU Says (Jan 12, 2005), *available at* http://www.aclu.org/safefree/general/18815prs20050112.html; THE CONSTITUTION PROJECT, REFORMING THE STATE SECRETS PRIVILEGE: STATEMENT OF THE CONSTITUTION PROJECT'S LIBERTY AND SECURITY COMMITTEE &

creates a Catch-22 for individuals who reasonably fear that their telephone and internet communications are subject to sweeping secret surveillance and therefore refrain from such communications. Specifically, judges have ruled that if you cannot prove that your communications have been subject to secret surveillance measures, you have no standing to challenge these measures, even if you can prove that your communications have been chilled.[20] The third restrictive legal doctrine is a combination of the two prior doctrines, which is a double Catch-22 (I guess that makes it a "Catch-44"!): some judges have held that you only have standing to challenge secret surveillance measures if you can prove that your communications have been subject to such measures, but that any evidence that could prove such surveillance would be barred under the "state secrets privilege."[21] The fourth example is a broad concept of mootness that allows the government to escape judicial review by claiming that it has changed a policy, even in situations where the government remains free to re-institute the challenged policy.[22]

The ACLU has issued detailed reports[23] about many of these free speech threats and others that have also been the subject of extensive courtroom and legislative battles.[24] In my limited time, I will briefly comment on a couple of these issues that I think are relatively under-publicized, proportionate to

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COALITION TO DEFEND CHECKS AND BALANCES (2007), *available at* http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_ Statement.pdf.

20. *Top court rejects ACLU domestic spying lawsuit*, Feb. 19, 2008, http://www.msnbc.msn.com/id/23235602; Press Release, ACLU, Government is Illegally Using Evidence from Secret Court Wiretaps in Criminal Cases, ACLU Charges (Sept. 19, 2003), *available at* http://www.aclu.org/safefree/general/17692prs20030919.html.

21. ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007); *see also* Posting of Melissa Goodman to ACLU Blog of Rights, *Sixth Circuit Dismisses Illegal Spying Challenge*, http://blog.aclu.org/2007/07/06/sixth-circuit-dismisses-illegal-spying-challenge (July 6, 2007, 2:33 PM).

22. *See* Posting of Art Hale to ACLU Blog of Rights, *Standing, Mootness, and the 4th . . .* , http://blog.aclu.org/2007/02/01/standing-mootness-and-the-4th (Feb. 1, 2007, 9:02 PM); Brief For The Respondents In Opposition at 4, 13, N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (No. 02-1289).

23. *See* JAMES THOMAS TUCKER & SOPHIE ALCORN, ACLU, RECLAIMING OUR RIGHTS: DECLARATION OF FIRST AMENDMENT RIGHTS AND GRIEVANCES (2007), *available at* http://www.aclu.org/symposium/reclaiming_our_rights.pdf; GOODMAN ET AL., *supra* note 13; TUCKER & KNAACK, *supra* note 14; ACLU, FREEDOM UNDER FIRE: DISSENT IN POST-9/11 AMERICA (2003), *available at* http://www.aclu.org/FilesPDFs/dissent_report.pdf; ACLU, THE EXCLUDED: IDEOLOGICAL EXCLUSION AND THE WAR ON IDEAS (2007), *available at* http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf.

24. *See* ACLU.org, Safe and Free: Legal Documents, http://www.aclu.org/safefree/relatedinformation_legal_documents.html (last visited Oct. 18, 2008), ACLU.org, Safe and Free: Legislative Documents, http://www.aclu.org/safefree/relatedinformation_legislative_documents.html (last visited Jan. 15, 2009).

their seriousness. In doing this, I will also flag some of the pertinent legislative measures—again in the spirit of highlighting matters that tend to receive less attention. We constitutional law professors understandably tend to focus on the Constitution and the courts and to focus less on the significant role that legislation can play in protecting free speech.

Let me start by stressing the deep chill on the free flow of information that results from electronic surveillance in the name of national security. As the Supreme Court stated in its 1972 *Keith* decision:

> National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. . . . The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security."[25]

These free speech dangers that the *Keith* Court stressed back in 1972 have been greatly magnified by the dramatic increase in the government's covert national security surveillance since 9/11. Consider, for example, the government's surveillance under the Foreign Intelligence Surveillance Act (FISA).[26] By 2006, that surveillance had more than doubled from its pre-9/11 level, and the government has even more exponentially increased its use of National Security Letters, which it issues on its own accord, without court-issued warrants, and which impose a strict gag on recipients.[27] Last March, the Justice Department's Inspector General reported that the FBI had issued more than 140,000 National Security Letters between 2003 and 2005, which was a hundredfold increase over historic norms and which, the Inspector General stressed, involved substantial misuse and abuse of this covert surveillance tool.[28] We have no statistics about the NSA's

25. United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 313–14 (1972).

26. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1811, 1821–1829, 1841–1846, 1861, 1862 (2006).

27. Press Release, ACLU, ACLU Challenges National Security Letters In Congress And Court (Apr. 15, 2008), *available at* http://www.aclu.org/safefree/general/34903prs20080415.html; Press Release, ACLU, 30,000 National Security Letters Issued Annually Demanding Information about Americans: Patriot Act Removed Need for FBI to Connect Records to Suspected Terrorists (Nov. 7, 2005), *available at* http://www.aclu.org/natsec/warpowers/21261prs20051107.html; Press Release, ACLU, FBI Improperly Using Patriot Act Surveillance Powers, ACLU Charges (Nov. 29, 2007), *available at* http://www.aclu.org/safefree/nationalsecurityletters/32904prs20071129.html.

28. U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FBI'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 (2008), *available at* http://www.usdoj.gov/oig/special/s0803b/final.pdf; Press Release, ACLU, National Security Letters by the Numbers (Mar. 19, 2007), *available at* http://www.aclu.org/safefree/nationalsecurityletters/29069leg20070319.html.

completely warrantless domestic surveillance program, which has led prominent journalists and scholars, as well as lawyers and others, to cease their electronic communications because they reasonably believe the government is monitoring them.[29]

The last time we learned that the government had been engaging in massive unauthorized electronic surveillance, thanks to the celebrated Church Committee hearings in the 1970s,[30] Congress stepped into the breach with FISA, and in July 2008, Congress passed new legislation to amend FISA.[31] No sooner had this law been signed by President Bush than the ACLU brought a lawsuit challenging it on constitutional and other grounds, on behalf of a diverse array of individuals and organizations who would be adversely affected by it, including those harmed by the stifling and chilling of vital communications. As I have already indicated, though, too many judges have been unwilling to address the legal challenges to the NSA and other surveillance measures which have been brought on several constitutional and statutory grounds, including under the First Amendment. Instead, these judges have dismissed such legal challenges at the threshold, invoking door-closing doctrines such as privilege and standing.[32] Therefore, if the courts refuse to rule on the merits of the ACLU challenge to the amended FISA, Congress could effectively have the last word on free speech protections in this important context, as it did by enacting FISA initially.

We all learned of the NSA's sweeping, unwarranted domestic surveillance program thanks to courageous government whistleblowers and the journalists with whom they communicated.[33] Yet both whistleblowers and journalists who provide this kind of vital information are subject to retaliation which not only punishes them individually but also deters others from continuing to inform "We the People" about essential national security issues. Since 9/11, the government has been routinely retaliating against

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29. Press Release, ACLU, ACLU Demands Disclosure of Legal Documents on NSA Wiretapping, Cautions Senate Committee Against Telecom Inoculation for Domestic Spying (May 16, 2007), *available at* http://www.aclu.org/safefree/general/29753prs20070516.html.

30. FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755 (2d Sess. 1976); Bruce Fein, *Trusting the White House*, WASH. TIMES, Jan. 9, 2007, at A13.

31. *Bush Signs Eavesdropping Law*, N.Y. TIMES, July 11, 2008, at A12; Eric Lichtblau, *Deal is Struck to Overhaul Wiretap Law*, N.Y. TIMES, June 20, 2008, at A1; James Risen, *Senate Panel Drops Immunity From Eavesdropping Bill*, N.Y. TIMES, Nov. 16, 2007, at A20.

32. *See* ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

33. Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1; Press Release, ACLU, Stunning New Report on Domestic NSA Dragnet Spying Confirms ACLU Surveillance Warnings (Mar. 12, 2008), *available at* http://www.aclu.org/privacy/gen/34441prs20080312.html.

government employees who disclose weaknesses in our anti-terrorism policies.[34] Yet the current First Amendment law, as well as statutory law, leaves these courageous whistleblowers unprotected. In 2006, in the case of *Garcetti v. Ceballos*, the Supreme Court held that the First Amendment does not even apply to government employees' speech that is part of their official duties.[35] Accordingly, the Court rejected the First Amendment claims of an assistant district attorney who blew the whistle on official misconduct in his office.[36] On a personal note, the last time I had the pleasure of visiting Pepperdine Law School, it was to judge a moot court argument on the *Garcetti* case before the Supreme Court decided it. My two fellow "Justices" were Ken Starr[37] and Alex Kozinski.[38] You will not be surprised that we issued a split decision!

Ironically, one of the rationales that the Supreme Court's majority opinion cited in *Garcetti* for denying First Amendment protection for whistleblowers' speech was that such speech could be adequately protected by statute.[39] However, as the three of the four dissenters argued in that case, such statutory protection is very spotty for all whistleblowers, in general.[40]

Moreover, when it comes to national security whistleblowers in particular, that statutory protection is essentially non-existent.[41] In particular, the federal Whistleblower Protection Act[42] literally does not apply at all to employees of most agencies involved in intelligence and national security including the FBI, the CIA, the NSA, and the Defense Intelligence Agency.[43] National security whistleblowers may be retaliated against, without legal recourse, even when they disclose wrongdoing to Congress.[44] Moreover, the few national security employees who are covered by the Whistleblower Protection Act still receive little protection since that Act has been interpreted very narrowly by the administrative and federal circuit courts that oversee these claims.[45] Congress has already

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34. GOODMAN ET AL., *supra* note 13 Bill Gertz, *NSA Whistleblower Asks to Testify; Vows to Describe Illegal Intelligence Operations*, WASH. TIMES, Jan. 5, 2006, at A04.

35. 547 U.S. 410, 421 (2006).

36. *Id.* at 421–23.

37. Kenneth W. Starr, Duane and Kelly Roberts Dean and Professor of Law, Pepperdine University.

38. Chief Judge, U.S. Court of Appeals for the Ninth Circuit.

39. *Garcetti*, 547 U.S. at 425–26.

40. *Id.* at 439–41 (Souter, J., dissenting).

41. GOODMAN ET AL., *supra* note 13, at 7.

42. Whistleblower Protection Act of 1989, 5 U.S.C. §§ 1201–1222.

43. *See* GOODMAN ET AL., *supra* note 13, at 7.

44. *See id.* at 12.

45. *See id.* at 15; *Today in Business; Whistleblower Suit Dismissed*, N.Y. TIMES, Sept. 9, 2006, at C2; *Judge Limits Protections Allowed to Federal Whistle-Blowers*, N.Y. TIMES, Dec. 25, 2004, at A15.

amended the Act at least twice to correct such unduly narrow interpretations.[46]

Last year, the House of Representatives overwhelmingly approved the Whistleblower Protection Enhancement Act,[47] which would fix many of the problems in this area. However, the Senate has yet to vote on the measure.[48]

There is a parallel situation concerning the absence of a federal shield law. Although forty-nine states and the District of Columbia recognize some form of reporters' privilege through either statute or common law,[49] the absence of a federal shield law has undercut these state laws. Reporters are increasingly being subpoenaed to identify their sources in federal matters and threatened with imprisonment, thus further jeopardizing the public's right to know.[50]

In a bipartisan vote last fall, the House of Representatives passed the "Free Flow of Information Act,"[51] which is an important step in the right direction. It would establish a qualified privilege to protect journalists from being compelled to reveal their anonymous sources. It includes an exception if there is an actual and imminent danger to national security or public safety. Again, though, the Senate has not yet acted.

Now let me cite yet another post-9/11 free speech threat that could well be remedied through federal legislation. In February, 2008, the Senate Judiciary Committee held hearings[52] on the bipartisan State Secrets Protection Act whose chief sponsors are Ted Kennedy and Arlen Specter.[53]

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46. *See Senate Passes Whistleblower Law*, PROF'L SAFETY, Mar. 1, 2008, at 20.

47. H.R. 985, 110th Cong. (2007), *available at* http://oversight.house.gov/documents/20070214164051-26052.pdf.

48. On March 15, 2007 the bill was received by the Senate and referred to the Committee on Homeland Security and Governmental Affairs, which then referred it to the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia on June 6, 2007.

49. Geoffrey R. Stone, *We Need a Federal Shield Law Now!*, HUFFINGTON POST, July 16, 2005, http://www.huffingtonpost.com/geoffrey-r-stone/we-need-a-federal-shield-_b_4265.html.

50. Press Release, ACLU, ACLU Says NY Times Reporter Subpoena Is Assault On Free Press (Feb. 1, 2008), *available at* http://www.aclu.org/freespeech/gen/33887prs20080201.html; TUCKER & KNAACK, *supra* note 14, at 17; Press Release, ACLU, FBI Targeted Journalist Covering Free Trade Meetings in Miami (May 4, 2006), *available at* http://www.aclu.org/safefree/spying/25493prs20060504.html.

51. H.R. 2012, 110th Cong. (2007).

52. *Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability: Hearing Before the Senate Comm. on the Judiciary*, 110th Cong. (2008) (statement of Louis Fisher, specialist on Constitutional Law), *available at* http://www.loc.gov/law/help/usconlaw/pdf/ssp_senatejudiciary.pdf.

53. Press Release, Senator Edward M. Kennedy, Kennedy Introduces States Secrets Protection Act (Jan. 22, 2008), *available at* http://kennedy.senate.gov/newsroom/press_release.cfm?id=C56BD1D0-7AD3-46EA-9D30-A77317F28B70.

This bill would restore the common law state secrets privilege to being just what its name suggests: an evidentiary rule that lets government "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security."[54] Instead, since 9/11, that privilege has mutated into an immunity doctrine that is increasingly shielding the government from any judicial review of systematic constitutional violations including under the First Amendment. Government lawyers have been asserting this privilege at the outset of litigation, even before any evidence is sought. Moreover, courts have been accepting government claims that the national security is at risk on their face, without independently reviewing any evidence and without giving plaintiffs a chance to prove their cases through non-privileged information.[55]

In the past several years, the ACLU has three times asked the Supreme Court to review cases raising important constitutional claims, including First Amendment claims summarily dismissed based on the government's mere assertion that "state secrets" would be at risk.[56] However, the Supreme Court declined to review all three cases.[57] Therefore, the pending legislation is the best hope for restoring the state secrets privilege to its appropriate role and removing it as an impediment to appropriate judicial review of essential issues including First Amendment issues.

I would like to end where I started, by stressing the enduring nature of the issues we are discussing. They are not new or unique to our present "digital terrorist age" nor will they alter in light of future events, including, I should stress, the 2008 presidential election.

These issues have less to do with shifts in technology, or with security threats, or with politics than they do with fundamental aspects of human nature and our governments. On that note, I would like to close by quoting comments that were made back in 1984 at a conference with a strikingly similar theme to this one that had been organized by the ACLU and leading free speech experts.

The comments I will quote were made by Hodding Carter III, a respected journalist who had been an Assistant Secretary of State in the Administration of Jimmy Carter—no relation. He said:

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54. Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C. Cir. 1983); *see also* United States v. Reynolds, 345 U.S. 1, 10 (1953); Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004).

55. *See* Adam Liptak, *U.S. Appeals Court Upholds Dismissal of Abuse Suit Against C.I.A., Saying Secrets Are at Risk*, N.Y. TIMES, Mar. 3, 2007, at A6.

56. ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008); El-Masri v. United States, 479 F.3d 296 (4th Cir.), *cert. denied*, 128 S. Ct. 373 (2007); Edmonds v. Dep't of Justice, 161 F. App'x 6 (D.C. Cir.), *cert. denied*, 546 U.S. 1031 (2005).

57. *See supra* note 60.

> For those who believe that information about public policy—and dissent from it—properly belongs to the people, there is no such thing as a benevolent government. Some are better than others, but all are obsessed with the urge to shield the public from a full understanding of what is being done in its name. . . .
>
> [I]deology has little to do with most government attempts to fine-tune the First Amendment or subvert the Freedom of Information Act or classify every piece of paper. . . . The reasons are far more banal than sinister, more expedient than ideological. Ask the former government official, like me, who argued passionately for some form of statist control 10 or 5 years ago to repeat his justifications today, and more than likely he will sheepishly admit they do not hold up.
>
> What is actually involved is not national security but power, which in most societies is inextricably linked to information. The bureaucrat who can classify information has power. The government official who can set the time and terms for the release of information has power. The politician who knows the truth about the workings of a government program at home or a policy abroad is more powerful than one who does not. The American people, adequately informed about what their government is doing and what others think of it, are more powerful than when they are not adequately informed. And as the security state grows ever larger, it sees danger to its power at home and abroad in every story and every opinion that calls into question what it is doing.[58]

Hodding Carter then concludes with a wake-up call for the rest of us, who are not in government; this message is aptly aimed at all of us here, in our capacities as academics and advocates. He said, "Government will do what governments [always] do. The real question is what those who know better will do in response."[59]

58. Transcript of *Free Trade in Ideas*, at 16, 20–21, ACLU Conference, Sept. 17, 1984.
59. *Id.*