



Sharing & Protecting Homeland Security Information

Avoiding Conflict Between the Media & the Government

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Background

The White House, the National Security Council and its component government agencies, and the new Department of Homeland Security are keenly aware of two challenges, each partly contradictory to the other. On one hand, they must present a more accessible and credible picture to the public through the media than they have been able to do regarding threats to homeland security. On the other, they must protect vital “Homeland Security Information” that could be exploited by terrorists.

Since 9/11, three major pieces of legislation have passed that regulate the manner in which the federal government will control "Homeland Security Information." These laws require that state and local governments as well as certain private corporations and public utilities adopt new controls over information. They are:

- The USA Patriot Act, which provides four different definitions of “Homeland Security Information.”
- The Intelligence Authorization Act for Fiscal Year 2002, which contains a section called the Homeland Security Information Sharing Act. This law governs the creation and sharing of certain types of information among federal, state, and local agencies.
- The Homeland Security Act, which expands on the definition of Homeland Security Information and limits the application of the Freedom of Information Act to certain narrow areas.

There is a great deal of confusion among the media and state, local, and federal officials on what these new laws mean for the sharing of information. These laws have specific, and sometimes contradictory, requirements for sharing information related to 'terrorism.' The requirements have implications for the kinds of information officials believe they can share with reporters, and may create limitations for journalists' reporting. The media is concerned that they will not be able to get important information such as environmental reports on chemical plants, safety reports on bridges, staffing patterns and budgets for state and local governments, public hazards such as pollution runoffs from factories, and so forth because of restrictions on homeland security information.

The Annenberg Public Policy Center (APPC) of the University of Pennsylvania, with funding from The Robert Wood Johnson Foundation, commissioned an analysis of the new laws related to homeland security information. Scott Armstrong, former reporter for *The Washington Post*, and Jeffery Smith, former General Counsel to the CIA and a partner at the Washington law firm Arnold & Porter, drafted the analysis. The information they compiled examines the federal government's approach to restricting access to information and the limitations it puts on state and local governments regarding their ability to disseminate information.

Following the drafting of the analysis, APPC hosted two discussions (one on background and one on the record) with top media representatives and government officials about the problems these new laws may pose. The transcript of the on-the-record discussion, which took place the morning of June 11, 2003 at the National Press Club in Washington, DC and includes a summary of the Smith and Armstrong analysis, follows.

PARTICIPANTS:

Scott Armstrong, Former *Washington Post* Reporter and Director, Information Trusts

Tom Bettag, Producer, Nightline

Barbara Cochran, President, Radio-Television News Directors Association

Tom Gjelten, Correspondent, National Public Radio

Kathleen Hall Jamieson, Director, The Annenberg Public Policy Center

Bill Leonard, Director, Information Security Oversight Office

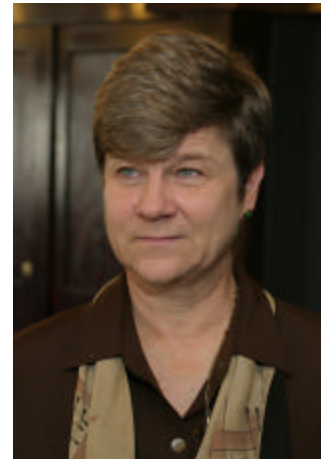
Jack Nelson, Former DC Bureau Chief, *The Los Angeles Times*

Jeffrey Smith, Former General Counsel, CIA and Partner, Arnold & Porter

Terence Smith, Media Correspondent and Senior Producer, The NewsHour with Jim Lehrer

Kathleen Hall Jamieson, Director, Annenberg Public Policy Center: It's a pleasure to welcome you to today's discussion on homeland security information: avoiding conflict between media and government. Today's conference continues a dialogue begun with support from The Robert Wood Johnson Foundation and initiated by The Annenberg Public Policy Center shortly after September 11th.

In September of 2002, with funding from The Robert Wood Johnson Foundation, the Policy Center partnered with the National Association of Newspaper Editors and the Radio and Television News Directors Foundation to conduct a day-long closed-door discussion with national and local editors and producers of print, broadcast, and web news about the complexities of covering terrorism and preparedness. The participants recommended that the Policy Center produce a guide that would help people in the newsroom discuss the concerns that were raised at the meeting. We did that, and the guide is in your packet.



We distributed that guide to newsrooms around the country with the hope that the questions raised would be the kinds of questions that reporters would find a responsible way to answer as they continue to cover terrorism. We asked, for example, what level of specific detail about threats is helpful to readers and necessary to hold government accountable while protecting the country? We asked when is the use of hypotheticals responsible? How do you raise the level of public awareness of a threat without causing a panic? Should reporters try to determine how likely it is that the story contains information useful to terrorists, or isn't that their responsibility? And how should visuals be used in conjunction with a story?

We also have been looking at media coverage of terrorist threats and have found that there's a great deal of coverage of speculative accounts of possible alternative forms of terrorist attack. These stories and the continued threat of terrorism raise a number of questions, the most central of which is, how does the news media hold government accountable for preparedness without increasing the risk that we're vulnerable? How do you balance the public's right to know with media accounts that have, in graphic detail, painted scenarios of events for which there may not be a reasonable existing protection?

Do news reports magnify fears by increasing the perception that the unlikely will in fact occur, [and] at the same time do nothing to reduce those fears because there are no specific actions readers or viewers can take to protect themselves, or is that just good journalism, saying to government, we have a need here and you need to find a way to respond to that need? What are the responsibilities of government officials when reporters have questions about hypothetical terrorist threats, or active terrorist threats, and what are or should be the limitations on officials in sharing information with reporters, and what are or should be the limitations on reporters in sharing information they've gotten access to with the public? It's this last question that we examine this morning.

As journalists grapple with how to cover important homeland security stories, the government is trying to balance the need to present important information to the public while at the same time protecting information that could be of use to terrorists.

Kathleen Hall Jamieson,
Director,
Annenberg Public Policy Center

As journalists grapple with how to cover important homeland security stories, the government is trying to balance the need to present important information to the public while at the same time protecting information that could be of use to terrorists. With the passage of new laws about information sharing, the administration is in the process of considering what the regulations concerning homeland security information should look like. We hope this discussion will help inform that process.

To begin that process this morning I'd like to introduce Jeffrey Smith. Jeffrey Smith has been a partner at Arnold & Porter in Washington since 1996. From May 1995 to September 1996 he served as general counsel to the Central Intelligence Agency. In May of 1993, Secretary of Defense Perry appointed Mr. Smith to the congressionally mandated commission to review the roles and missions of the armed forces. Previously he chaired the Joint Security Commission established by Secretary of Defense Aspin and Director of Central Intelligence Woolsey to review security policy and practices in the defense and intelligence community. He also served as the general counsel of the Senate Armed Services committee. He was also Senator Sam Nunn's designate to the Iran Contra Committee and the Senate Select Committee on Intelligence. He has lectured and written on national security and international law and is a member of the Council on Foreign Relations.

Working with Scott Armstrong, to whom we are greatly indebted for putting together the program this morning, he has drafted an analysis of the new laws related to homeland security information and will now highlight the issues the new legislation raises. It's my pleasure to introduce Jeff.



Jeffrey Smith, Former General Counsel, CIA and Partner, Arnold &

Porter: Thank you, Kathleen. It's a privilege to be here this morning to talk about one of my favorite subjects, which is the intersection of national security and the press and access to information. And I will talk for about 15 to 20 minutes here to summarize the paper that you have. The paper that you have is still very much a work in progress. We've labeled it a discussion draft, and we did so because we are still learning things, still digging into some of the issues, and so it's not intended as a final – as lawyers would say, final work product, but it's still very much in discussion. And my guess is that even we'll change it as a result of our discussion here this morning, and in that respect I invite you to interrupt me as I proceed if you have a question or comment or a catcall, because I think these things are always most interesting if people have particular

comments that they want to make.

I also want to thank the Annenberg Center and the Robert Wood Johnson Foundation for sponsoring this. I think it reflects their wisdom in spotting the importance of this issue and devoting some time to it. I also want to thank – special thanks to Scott for his efforts, and to my colleague, at least for the summer, Ashley Hibbet, who is a summer associate at Arnold & Porter from Harvard Law School. Ashley, you've done yeoman's work on this, and so thank you very much.

Let me walk through rather quickly the issues here as we see them. The issues are still being formed, and that's in part because of the manner in which this came about. This issue was originally recognized over the past several years as we began to prepare for terrorism attacks. Then when 9/11 occurred it brought the issue into very sharp focus: how does the secret community of the intelligence world get information out to others in government, at the state and local government level, and to the American people with respect to what they know about terrorism? The flip side of that is how does the United States prepare for attacks and how do we reconstitute ourselves after an attack? And key to that is the flow of information up and down the line, and this has been a problem for quite some time.

When I chaired the Joint Security Commission, one of the things we found was we were quite good at stealing secrets but the U.S. government was just terrible about telling anybody that we had stolen them and what they said. There was a certain pride that all of us had that we were good at stealing secrets, but it doesn't do much good to steal a secret and put it in a drawer. We have seen lately the need to correctly analyze the secrets that we've stolen, but that's a different discussion.

In the wake of 9/11 a number of things were passed, of course the Patriot Act, and the Homeland Security Act. And as part of that, members of Congress began to hear complaints from their constituents that information was not being shared at the state and local level. A number of congressmen complained about that quite a bit. In response, Saxby Chambliss, a Republican member of the House from Georgia, now the junior senator from Georgia, and Jane Harmon, a Democrat from California, were put in charge of a special House committee to look at terrorism and what could be done about it. One of the things that they hit upon was the need to have a manner for the federal government to share its information with state and local government.

There also needs to be a way for state and local government, and industry, to feed information back into the federal government in some systematic way so that it could be identified, analyzed and processed. And so they hit upon the idea of creating a new category of information, which has come to be called “sensitive homeland security information” or SHSI.

As part of the Homeland Security Act, Jane Harmon and Saxby Chambliss crafted something, which they dubbed the Homeland Security Information Sharing Act, which got incorporated in the Homeland Security Act and is now law.

The administration did not request this amendment, nor did they oppose it. In fact, in conversation with the administration, the White House has said that they thought this was marginally a good idea; they didn’t really need it particularly, but they thought if two powerful members of Congress wanted it, it might add something, so why not?

It was adopted with no hearings. The absence of hearings, the absence of really deliberate consideration, often happens in Congress when there is a desire to try to fix the problem and to fix it quickly. But the hearing process is a good one because it lets the public and interested members have an opportunity to look at issues and think them through and hopefully, if there are corrections that need to be made, make them now rather than later.

The Act calls for regulations to be adopted by the president. Those regulations have not yet been drafted, and there is some issue even as to whether they will be made available for public comment or whether they will be issued under the provisions that empower the president to issue regulations affecting national security without public comment. My hope is that the administration will put them out for public comment. There seems to me no reason not to do so, particularly given some of the issues we’ll talk about this morning. **[On July 29, the president issued an executive order placing responsibility for drafting of the regulations at the Department of Homeland Security.]**

The Act does not define the term sensitive homeland security information. Instead what they have done is develop a concept that had evolved over the last number of years called sensitive but unclassified. Sensitive but unclassified was developed when the government began to recognize that there was information in its files that, as the title suggests, was sensitive, needed protection from general distribution, but did not rise to the level of classified information, the criteria of which is that its disclosure could reasonably be expected to cause harm to the national security. It wasn’t classified but it was nevertheless sensitive.

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Jeffrey Smith,
Former General Counsel, CIA

An example is medical records of servicemen. That's clearly sensitive and if an enemy of the United States were to get access, either directly or remotely through electronic means, to the medical records of American servicemen and women, you can imagine harm that might be done. So it's the sort of thing that has been deemed sensitive but unclassified.

And how does one protect that? If you classify it, the government then has to protect it through all of the means associated with that; nobody can see it that doesn't have a clearance and so on. It gets very hard for the government to move it around, and it becomes a sort of an over-classification.

Over time, different agencies began to evolve sensitive but unclassified. Every agency had their own definition of what it meant, how it was to be handled and so on. There is a lot of concern that this new category was becoming a new form of classification which was unregulated and was inconsistent. The Patriot Act then adopted the term of sensitive but unclassified and has created, in effect, a compartment within that term that is designated as sensitive homeland security information but is not defined with much clarity. Indeed, one of the things we worry about is the sheer breadth of the definition, because one can imagine virtually anything being swept within it.

The Act also requires that anybody who has access to sensitive homeland security information must execute a non-disclosure agreement. This means that if you release the information, you have violated your pledge under the agreement. Of course this depends on what the text of the regulations ultimately say -- but if the government follows the existing non-disclosure agreements -- you may cede to the government the right to any proceeds that might result and any harm that might result as a result of your disclosure. You could be financially liable for it. We're not sure that that's what the government is going to do, but as Scott [Armstrong] puts it, it's the you-bet-your-house provision.

The opportunity for mischief here, however, is that if state and local officials or if local industry officials want to use this to protect their information, a course open to them will now be to feed it into the federal government - or have it commingled with other federal information - and have it characterized as sensitive homeland security information. So now it's not available to the press or perhaps even to state legislators.

Jeffrey Smith,
Former General Counsel, CIA

Let me talk a little bit about some of the concerns that we have and let me also state that one should not, it seems to me, overreact at this point. I am in sympathy with what Jane Harmon and Saxby Chambliss were trying to do. I'm attracted to the idea that we have some system -- that is controlled -- for moving information in and out of government and up and down from state and local government to the federal government. I think it makes great sense -- because if it were to fall into unfriendly hands . . . The question is, how broad is it and can it be used to hide information that otherwise has been available and ought to be available?

For example – and this is a real example – a major metropolitan newspaper decided that they would worry about chemical plants in a metropolitan area. EPA had collected a variety of information on chemical plants for reasons of environmental protection and it was available on the EPA website. There were also a lot of other public sources that dealt with these chemical plants. The newspaper put a couple of enterprising reporters on the story, talked to some experts in the academic world and in the weather world and recognized that, well, if a particular chemical plant were attacked with a truck bomb or some other simple act of terrorism and if the winds were in the right direction, millions of people in the metropolitan area would be killed. They had maps and they identified this chemical plant here, if the winds are coming in this direction, why, we'll all die. And the U.S. government was just furious about that, saying, well, this is essentially a roadmap for terrorism. So this is an example of a situation where the press has an interest in this; at the same time there is governmental interest in not having this made available to terrorists or giving them a roadmap.

So the question is, now, in a nutshell, there is good reason why the local populace and the local government ought to have detailed information about those chemical plants – for reasons of planning or to keep an eye on them. Because business does not always – and I represent many clients – business does not always have the interest of their immediate neighbors closest to their hearts. So an eye needs to be kept on industries like this.

And let's say that the owners of these chemical plants were truly worried about people finding out that they were polluting the rivers and doing other dangerous things. In the new scheme, could these owners somehow characterize the information about their plants as 'sensitive homeland security information,' cooperate with state and local government officials to get it so characterized, and require that their employees execute non-disclosure agreements to have access to this information so that it's protected and the press could not have access to it?

In addition, there's a provision in the law – a preemption provision. The provision says if information is put into this category by the federal government, that information remains the property of the federal government. Any state or local law that would call for its disclosure, that is to say any local FOIA statute, is overridden by the federal statute and it cannot be released. That makes great sense for federal information that's fed down to the state and local authorities that comes from intelligence information; for example, when some of the sensitive information is removed but it's then disseminated to the state and local authorities.

The opportunity for mischief here, however, is that if state and local officials or if local industry officials want to use this to protect their information, a course open to them will now be to feed it into the federal government – or have it commingled with other federal information – and have it characterized as sensitive homeland security information. So now it's not available to the press or perhaps even to state legislators.

The key here, as the regulations are being drafted, is to pay close attention to what they say and to try to strike the right balance. We should give some thought to mechanisms that might be adopted in the regulations, not dissimilar from regulations in the executive order on classified information, permitting challenges to it. There clearly will be FOIA (Freedom of Information Act) challenges to it. But the relationship between this information and FOIA isn't clear.

By the way, this is not a new exemption to the FOIA, but one could imagine the federal government arguing that, well, it's not a new exemption but pre-decisional information that's part of the decision-making process and it [is] therefore protected under (b)(5) of the FOIA act. The attorney general, as many of you know, has issued a memorandum which repeals a memorandum of the Clinton administration and suggests a much more aggressive policy with respect to defending FOIA acts, so we are likely to see some litigation in the next few years that begins to shape some of this. With that, let me stop for a minute and invite questions from the audience.

Steve Aftergood, Federation of American Scientists: I have one point of clarification that differs with your presentation that I think is important. This did not emerge out of nowhere into this new legislation. There has been controversy over sensitive but unclassified throughout much of the past two years. And meetings were held at OMB [Office of Management and Budget] last summer, last August, with Mr. Dan Chenok, who is a staffer there. He held public meetings with scientific groups, with access groups and with others, and one of the commitments that he made at that time is that the regulations that he was in charge of drafting would in fact be published in a Federal Register for public comment.

And that is a crucial commitment that I think the administration needs to be held to because otherwise it will be very difficult for us to anticipate in advance all of the problems that could occur in a poorly drafted set of regulations.

He also said that his thinking at the time was that sensitive but unclassified would not encompass more information than is previously being withheld. In other words, he did not envision it expanding into new areas of public information. And as you said, he did not anticipate statutory changes such as a new (b)(3) exemption to a FOIA.

So anyway, the commitment to publication for comment is something that is on the record and I think it's something we need to hold them to.

Jeffrey Smith: Good. Scott and I have had some conversations with more senior White House officials who may not be aware of that commitment, but they will be soon. Scott, is that a fair –

Scott Armstrong, former reporter, Washington Post and director, Information Trust: I think it's fair to say that they're aware of it, and OMB will not be drafting the regulations.

Joe Davis, The Society of Environmental Journalists: You didn't mention any of the laws that are already on the books. You were looking at this mostly in a FOIA context, but taking your example, the chemical plants, there have been laws on the books for more than a decade requiring disclosure of this information. And the government interest in that is simply that, well, terrorists are the least of our worries here. Those million people downwind could be – that plant could leak because of operator error, rusty valves, leaky pipes, operators who didn't take their medication that morning, and a hurricane, a tornado, you name it. So the public has an interest in knowing about these threats regardless of terrorism, and the industry has had an agenda of getting this stuff undisclosed for more than a decade.

Jeffrey Smith: Well, I think this gives a new tool in the kit bag of those who want to protect information, and we'll just have to see how it is employed.

Rick Blum, OMB Watch: I appreciate your chemical security example. There's a second half of the story which is that after disclosure and after 9/11, the plant actually, within a couple of weeks – if you're thinking about the same plant that I'm thinking about – actually changed to a safer alternative chemical.

And I think the assumption with this provision is that secrecy is making it safer. In hearing you talk it sounds like there might be some duplication with existing privacy laws already on the books. I'm wondering, are there specific provisions in there and hooks so that we can discuss ways of getting to inherent safety and sort of turning things around so that if we were going to step away from disclosing information that we're actually addressing the question of how do [we] make our communities safer?



Jeffrey Smith: The very narrow question of has this been reconciled with other laws, are there hooks in there, what the interplay is between this statute and other statutes including environmental statutes, and our paper hasn't really dealt with that, and I think that's a whole other range of issues.

Your fundamental point about whether secrecy makes us safe or not, the answer is yes and no. I don't know what more I can say about that, sorry. Thank you.

Patrice McDermott, American Library Association: Scott, you just threw out that it won't be OMB writing the regs. Do we know who will be writing the regs? Will it be DHS? Or it directs the president, the legislation does?



Scott Armstrong: As I understand it, the president has an executive order that's been prepared from him designating the secretary of Homeland Security to issue the regs. There's a conceptual thing here that I want to put in because I think it will help frame it for people that have a variety of views on the environmental issues and whatnot. We're in an era -- because of 9/11 we're moving toward more secrecy. And there are ways this could be done as classified information. We could share classified information what we deal with in the federal government could be shared at other levels. But here we're talking about a vast universe of people, including people that run hospitals, people who are emergency responders, people who are involved in other private agencies, people who run critical infrastructure.

In a background briefing the other day, with an impish delight one of the senior officials said, well, critical infrastructure could be CNN because if CNN went off the air that would cause all kinds of problems. So it's a very intrusive system. But the assumption is that in the beginning we were talking about information which is classified, and that the classified portion would be removed and the remainder would be 'sensitive but unclassified,' which is why there's a reason to believe that it will trump other laws the same way classification trumps virtually every other law.

On the other hand there is a lot of other information that's sensitive homeland security information that deals with just the details, everyday details you can see outside your window, and it's the position of the Department of Homeland Security that we're interested in vulnerabilities, hypothetical vulnerabilities. So you have unclassified information which, for lack of a better term, I would say is being wicked up, it's being sucked up into this sensitive but unclassified area. So you have to view it as coming together into this central area.

This law is in effect. There are no regulations but there are some assumptions, and non-disclosure agreements are by far, I think, the most serious from the standpoint of the media because it puts the criminal and civil penalties on people who now do not have them. They are more severe – if it's drafted the way I anticipate it would be drafted – more severe than the non-disclosure agreements for classified information, and more preemptory because you're signing away an agreement. You're basically signing it saying that you won't object if certain things happen in order to get it.

And lastly, as Jeff pointed out, it's reflexive because once the federal government creates information in this category, and once there's a non-disclosure agreement, it allows the opportunity for people from the field, the local officials, to put information inside the compartment, which is something we've never had before. We've never had such a loose notion of how something can get inside a controlled category.

So there are lots of new things here, but I just wanted to kind of flesh those out in particular because I think a lot of your questions seem to revolve around ambiguities of that, and some of these they have gone through, and I don't think it's necessarily the way that we would hope it would come down – those of us in the media would hope.

Josh Meyer, *Los Angeles Times*: I cover terrorism and national security issues, and I can speak for many reporters when I say it's extremely troubling what's happening, what Scott just said about the wicking up into sort of the classified realm information that was not classified before. I didn't even know about these non-disclosure agreements. But I guess my question is on two levels: one, on the broader level, if you have any thoughts on what reporters can do to try to address this, either as a group or sort of petition or something like that, but also, on a more selfish and personal level, what you can do as a reporter to try to even ask questions to get this information. Can you try to prevail upon people by saying that if it's sensitive but not classified and it's doesn't harm the national security of the country, that they have to tell you the information or not? I mean, because most of the people that we deal with these days seem to be about 22 years old and they work at agencies where they don't really know what they're doing, like at Homeland Security, and so they err on the side of caution for them and basically don't tell us anything. So it's pretty hard to operate in that environment.

Jeffrey Smith: Well, I will leave to others on the panel what reporters as a group can do about it, and that might be appropriate to discuss in the next session. With respect to what an individual reporter can do, and will people be less willing to talk to you, I think the answer is yes, especially if they have to execute non-disclosure agreements, and depending how draconian they are – I have not had Scott’s discussions with the administration so I don’t know. I do hope that the administration does not overreach with respect to the non-disclosure agreements and what the terms of those agreements are. And you could have a non-disclosure agreement that has some teeth in it but isn’t “Jaws,” and maybe that’s the way to think of it.

But I think people are -- having been in the classified world for most of my life where things leak like sieves, one could be cynical about this and say, well, it’ll take us a little while to settle down but it won’t be very long before people start leaking this just like they leak everything else, and so why do we really worry about it? That may happen, but on the other hand you may get -- the example Scott used when he first started talking about this was the sheriff in Denver who has his mistress on the payroll and manages to have the payroll and his personnel records declared sensitive homeland security information because he may have to respond to a terrorist attack in Denver and so therefore the local press can’t even get his payroll records to find out what he’s doing.

Once the federal government creates information in this category and once there’s a non-disclosure agreement, it allows the opportunity for people from the field, the local officials, to put information inside the compartment, which is something we’ve never had before. We’ve never had such a loose notion of how something can get inside a controlled category.

Scott Armstrong, Former Reporter,
Washington Post

I do think there’s a real risk of that, and only time will tell where this balance is struck, but I would be remiss by not saying that there is merit in what Harmon and Chambliss were trying to do, so we shouldn’t lose sight of that because I do know that state and local officials have complained that the federal government is not sharing information with them, and that really is key. So, finding a way to do that in a way that still protects the information that doesn’t become abusive or doesn’t become an opportunity for mischief is the challenge here.

Kathleen Hall Jamieson: Thank you, Jeff. Now to moderate our panel I’d like to introduce Terrence Smith, who joined “The NewsHour with Jim Lehrer” in August 1998 to establish and lead the media unit as a senior producer and correspondent. His work quickly drew sustained praise. Smith and his unit are three-time winners of the Arthur Rowse Award for Media Criticism, given by the National Press Club, as well as the recipients of the 2002 Bronze World Medal and New York Festivals, 2002 CINE Golden Eagle Award, and the 2000 Bart Richards Award for Media Criticism. In addition, the unit’s work has earned two Emmys in 2001 and 2000.

Smith came to the NewsHour as the next step in a career that has included major positions in print and broadcast journalism. He spent 20 years as a national and foreign correspondent and editor with *The New York Times*, and 13 with CBS News. Smith served as senior correspondent for CBS News Sunday Morning from 1990 to 1998. He contributed cover stories and special features to the Sunday morning broadcast, as well as the CBS Evening News and other CBS news broadcasts. It’s my pleasure to introduce Terry Smith to moderate our panel.

Terence Smith, Media Correspondent and Senior Producer, The NewsHour

with Jim Lehrer: Thank you, Kathleen. I'm pleased to be here. It seems to me we're dealing here in an informational way with the collision of two important rights, that of protecting homeland security and that of the flow of information that is necessary in a democracy. And there certainly are occasions when they do conflict, and this is one of them. I have to compliment Jeff Smith and Scott Armstrong to take the time to think through some of these consequences at a time when regulations are to be written and definitions reached, and where some of these considerations can be taken up at a meaningful level.



The idea here is very simple, which is to allow, after maybe an opening statement from Bill Leonard, allow some questions from the journalistic tag team on my left here to Bill and Jeff and Scott . . . to try to give examples and illustrate how this may work and what some of the problems may be and then to get your input and ideas as well, and questions directed to anybody on the panel.

Bill Leonard, if he's not been introduced before I arrived, is director of Information Security Oversight Office, and would like to say a few things to open the proceedings and then we'll go to questions.



Bill Leonard, Director, Information Security Oversight Office: I guess I'm the token government representative up here, so as such I think it's appropriate to help put in context in terms of what my role is and what it is not. As the director of the Information Security Oversight Office, my organization is responsible for exercising oversight from an executive branch perspective of the national security information classification process, the confidential, secret, and top secret information, military information, intelligence information, and things along those lines.

As such, I have a responsibility for just a sliver of the vast universe of information that has some sort of impact with respect to homeland security issues. One thing I'd like to make perfectly clear upfront, so as not to have to repeat myself through the proceedings is, with respect to the specifics in terms of regulations implementing sensitive homeland security information, that responsibility is not under the purview of my organization. Those regulations have not, in fact, been drafted, so a lot of this is hypothetical and speculative. And in fact, it has not even been finally decided in terms of who will have the responsibility to draft them.

In any event, the bottom line is this: when you talk about information sharing, probably the ultimate impediment to information sharing is classification. And that is why there were quite a few people – including myself – who quite actively resisted efforts to expand the universe of information that would be included in the classification system. As a matter of fact, the recent amendment to the current executive order governing classification goes even further and makes it perfectly clear that there is classified information that relates to homeland security issues, especially with respect to imminent threats, which can be shared with state and local

officials who do not have security clearances. As such, we've actually gotten to the point of saying that the absence of security clearances will not serve as a bar and impediment to the sharing information with the people required to take action. Thank you.

Terence Smith: Okay, why don't we begin on my physical if not ideological left here with Jack Nelson, a long-time bureau chief, Washington editor for *The Los Angeles Times*. And, Jack, when you had in effect this sort of law and the non-disclosure agreements being signed.



Jack Nelson, Former Bureau Chief and Washington Editor, *Los Angeles Times*: I think there's no question about the fact that government officials at the local level, state level, and federal level are going to be much more reluctant to talk to reporters on many of their stories. Somebody suggested a hypothetical case. Rather than come up with a hypothetical case, let me tell you about a case involving the reporter for the Washington bureau of *The Los Angeles Times*, Gaylord Shaw. He wrote a series of articles about the really dangerous dams and bridges in this country – terrible deterioration of some of them, a violation of safety regulations and so forth, and had access to all sorts of records. He had a tip from a government employee, of course, and had access to interviews with people. I can almost guarantee you he would not have had access to those records if you had in effect this sort of law and the non-disclosure agreements being signed.

Terence Smith: When was this series produced?

Jack Nelson: It was some time ago, 25 years ago, but Gaylord won a Pulitzer Prize on it. It was a tremendous series of articles, but I'm sure it would not have been possible to run it if you had this law and non-disclosure agreements as it's outlined here.

One of the things that I wanted to ask, though, of Bill Leonard – and I asked Jeff Smith this yesterday and he didn't have an answer for it, and I don't have an answer for it. I find it almost astonishing that the press pays so little attention to the whole problem of government secrecy. Now, Josh Meyer is a tremendous reporter who covers terrorism for *The Los Angeles Times* Washington bureau. He didn't know about the non-disclosure agreements. Well, one of the reasons he didn't know was it has gotten relatively little attention. And I don't understand that and I don't [know] whether anybody who's not with the press has an answer to that or not.

I don't think journalists are out there looking for ways to identify targets. I think what they are interested in doing, though, is trying to find conditions that need to be improved, and corruption.

Jack Nelson, Former Bureau Chief, *Los Angeles Times*

Bill Leonard: That's an interesting observation, Jack, and no, I don't. In many regards I'm the public face, at least of the classification process, and quite frankly I think there is quite a bit of misunderstanding in terms of what is and is not included in this universe. It's almost the proverbial inside-the-beltway story.

Jack Nelson: If you want to read about government secrecy, go online. Read Steven Aftergood's Federation of American Scientists. He puts out two or three bulletins every week on secrecy in government. And by the way, he's also made the comment, which I think a lot of journalists agree with, and that is that we're not out trying to identify targets for terrorists. Steve said that until 9/11 he sort of thought it was a game for the government to make as many secrets as it could and for him to find as many as he could and put them on the line, but he said since 9/11 he's looked at it carefully and if he sees the possibility of something that might go online that would be a target for a terrorist, he takes it off. I don't think journalists are out there looking for ways to identify targets. I think what they are interested in doing, though, is trying to find conditions that need to be improved, and corruption.

Terence Smith: Jack, you've raised a question there that really should be directed to some of the journalists on the panel, why does the issue of government secrecy receive as little attention as it does? Tom Bettag?

Tom Bettag, Producer, Nightline: I think in the same way that 9/11 has changed the environment on all kinds of things, when it is the press saying we want to be able to say this, and the government saying I am telling you you're going to jeopardize national security, we are scared to death that we are going to lose every time in that round. And the truth of the matter is we've hurt our credibility enough with some dumb moves. I think we will lose on most of those, and we've lost our nerve and lost some of our credibility in the course of that, and that that climate has changed.

And my big concern in all of this is that you will keep losing it, that when you were talking about the chemical plant, honestly when the press says, no, no, we ought to tell you about the chemical plant and the people at the chemical plant say, listen, I am telling you this is going to give a roadmap to terrorists, they will win.

Terence Smith: In terms of a public opinion debate.

Tom Bettag: Well, and that's all we've got going for us.

Terence Smith: But what about Jack's broader question, which is there's a subject here, a subject matter that could be legitimate fodder for "Nightline." It could be something on National Public Radio.

When it is the press saying we want to be able to say this, and the government saying I am telling you you're going to jeopardize national security, we are scared to death that we are going to lose every time in that round.

Tom Bettag,
Producer, Nightline

Tom Bettag: I'll give you an example of this pre-9/11 – and post-9/11 it would be dead. I went to a conference in New York that was called by the Pentagon and by civil defense people, who were saying, look, we know that there are terror cells out there who could do real damage to New York. We know that it can happen. We are preparing for it. But you in the press are not preparing for it in any way and the public isn't prepared for this. If this happens we need to establish some kind of tie between us and the press because we're going to start off by saying we don't know, and the ability of the tab[loid]s in New York to blow this immediately into – hypothetical – anthrax attack, for example, killer virus, everybody should clear out of the city, what the

government won't tell you and they're saying they don't know yet, they know but they won't tell you. The ability to blow that into just great headlines in every local [paper]— and really exacerbating the situation extraordinarily, unless you realize that, hey, this is not small stuff; there's something very big here and there needs to be some level of cooperation.

In the wake of that, we decided that we would do a full week on “Nightline” of a hypothetical – how would an anthrax attack, put in the Washington subway system, play out? The problem with all this is truly it takes days before it starts exhibiting itself and then it exhibits itself as a flu. It is a very complicated process in trying to play out. In trying to do that, we tried to get government officials, Pentagon people, civil defense people to come on the program and say, yeah, this is a real problem. The Pentagon person who led the thing said we can't touch it; it's too hot. And the number of people who denounce “Nightline” for, you guys are giving a roadmap to terrorists and being vulnerable to that attack -- so that my favorite email to “Nightline” was simply a guy who wrote and said, “Way to go, you morons.”

Terence Smith: Let's hear from Tom Gjelten. Is there any impediment or resistance to covering this issue that might explain the relatively scant coverage?



Tom Gjelten, Correspondent, National Public Radio: No, I agree very much with Tom. I think that we've had stories ourselves from time to time that expose vulnerabilities in our homeland security at our ports, at nuclear stations, and on the airways. And as Tom says, every time we do a story like that we get besieged with emails saying, what are you doing exposing this?

I just think there has been a tremendous shift in the political culture in the last 30 years. In the aftermath of Watergate there was such a swing across the entire country in favor of openness, in favor of the disclosure of information. It was in the context of that time that we got all this very important legislation that has been so important to us journalists, freedom of legislation information -- but not only legislation at the federal level. I mean on the local level: sunshine laws and whistleblower laws. For example, I just checked on the Internet this morning; there are now 39 states that have whistleblower laws, laws that will protect employees from persecution or dismissal if they divulge information that in their judgment is important to the public good.

Reporters, we depend on legislation like that in order to give protection to the people that we talk to, and it would just seem to me that to the extent these are all state and local laws, and whistleblower laws are primarily state laws, they're all, at a sweep, in danger of being preempted by this act. It seems to me a non-disclosure agreement amounts to a waiver of a First Amendment right, and the First Amendment is basically all that we have in the news business to protect us.

But I'm dodging your question, Terry, because it's a really awkward question: why haven't we paid more attention to this? I'm afraid that just in our business we are sort of market driven in the sense that we highlight issues that our audience seems to care about, and if there's an issue that the broader culture has really relegated to a much secondary place, the chances of it getting coverage are just much less.

Terence Smith: Barbara Cochran is president of the Radio and Television News Directors Association since April of 1997. Your thoughts?



Barbara Cochran, President, Radio-Television News Directors Association: I think that one of the things that has happened is that we in the press have not done a very good job of making the connection between why we want to know something and why the public should also want to know this. That often when we make our case we talk about the First Amendment, we talk about freedom of the press, but we don't take that extra step and say, here's why you and the public should know this.

Yesterday I was in Tuscaloosa, Alabama for reasons that I won't go into right now, very near Anniston, Alabama, and there has been a huge ongoing story in Anniston about a military chemical weapons storage dump that has been leaking and poisoning the community, and that's a story that has been told and told, first of all by courageous people at the local level and then it has become a national story as well. But that was one where it was very easy for the people of Anniston to see why they had a stake in getting this information.

And we have an example before us right now of what can happen if we in the news media don't speak out loudly and clearly. First of all, thank you to Scott and to Jeff and to Kathleen Hall Jamieson for leading the way in making sure that we're informed, and for sleuthing around the government and finding out what is actually going on. But the example right now that we're dealing with are the HIPAA, the Health Information Portability and Accountability Act, where we fought and fought, perhaps not loudly enough, to say that these rules would keep important public information – important information out of the hands of the public. The rules went into effect April 14th and we now find that not only are hospitals and health care providers and emergency medical technicians not giving out the simplest kind of information that was readily available before, but that others – police departments and fire departments are adopting these rules and saying they can't tell you anything.

You have a hospital that has a SARS case in Connecticut and they won't give out any information about it, leading the public to be more terrified rather than less terrified. And I think the exact same thing can happen if we in the press don't argue very strongly and find the right places in government to negotiate some rules that will keep the public interest in the forefront.

Terence Smith: That sort of calls for two responses: one from you, Jeff, and one from you, Bill. And, Bill, you do not have a large target drawn on your chest here as the government representative, but I'd like to hear your comment on the point that Barbara just made as – take the SARS example in Connecticut, the hospital in Connecticut. Deal with that.

Bill Leonard: Well, I think one of the things to be clear about with respect to the whole debate around this topic is that it's intended to try to facilitate the sharing of information, not to serve as an impediment. And the intent is solely to take information that's already within the federal system. So that -- Barbara's example -- does not necessarily relate to information in the federal system. But the intent is to take information that's already in the federal system, already subject to some sort of protection either by existing laws or by FOIA exemption . . . and to share it with officials who otherwise would not get that information.

We in the press have not done a very good job of making the connection between why we want to know something and why the public should also want to know this.

Barbara Cochran, President,
Radio-Television News
Directors Association

So, in some regards it's a very, very, very narrow application, and as such its emphasis is on sharing information that's already somehow, some way in the federal system, and protect it, while also sharing it selectively. I'm not too sure that, in Barbara's example, that this situation would apply.

Jeffrey Smith: It may not be a perfect illustration, but as you say, it's a narrow application but with potentially broad ramifications.

Let me ask Jeff Smith to comment on what Tom Gjelten was saying when he was saying there was a period of law and legislation in which many of the First Amendment privileges and specific opportunities for access to information were incorporated into law and adopted over a period of years. Are we now in a trend in the opposite direction?

Jeffrey Smith: Yes. I mean, all of history is cyclical in some respects. And we all remember Watergate. Watergate was the sea change, and we are now seeing, if not a sea change, certainly a slide in the opposite direction. And my own sense is that the government will be the government, whether it be Republican or Democrat, will do something stupid and the tide may shift back the other way. But I think it will take time for these tides to shift, but in the meantime, those who worry about these issues have an obligation not to lose sight of them and to continue to focus on them and to not give up the first principles that made this country great.

Terence Smith: What is the protection, Scott, against the ramifications of what Bill Leonard describes as the narrow application, the sharing of federal government information with state and local governments? What is the protection, or what could be the protection against that shutting down the flow of otherwise important information to the public?



Scott Armstrong: Before I do that let me just make one apology that we do not have what is an apparent greater balance with more government folks here. This panel was discussed before the Department of Homeland Security was formed. We had a discussion about having something – for two months we’ve been having it, and we’ve been promised for a month, as late as 8:00 p.m. last night, that there would be certain people here from the White House, the NSC, and a person of stature from the Department of Homeland Security. They may be operating on Greenwich Mean Time and come much earlier and we weren’t here when they were here. I apologize to Bill – he’s not the point man for the administration, certainly, on these issues. They have, on the other hand, been responsive to other things. And I don’t think there’s a conspiracy; I think this is just protocols, but I wanted to make it clear because I know Terry and all of us are interested in the balance of positions.

Let me say something in answer to this question from the context of the media. And I don’t think that Jeff would disagree with it, but I’m taking it as a media person. Our protections here are the First Amendment. There’s no right to classified information under the First Amendment the way the courts have come down. But there is a right to operate, to inquire and to publish information, to broadcast or publish information that is protected by the First Amendment. When a doctrine begins to interfere with that – and it’s particularly the non-disclosure agreement that worries me the most – once something’s put in a category -- sensitive homeland security information is, by definition, unclassified. And so it would have been something – because we’re talking about vulnerabilities – [they are] in plain view. It’s something you look out the window to see.

So, what protects us from having that swept off and then put under a non-disclosure agreement is the notion that we have the right to go after it and to continue to go after it. And if in fact the government passes a law that interferes with the normal operation of daily journalism, it seems to me that’s a fundamental violation of First Amendment. Now, there may be others -- constitutional scholars would disagree with that – but I can’t think of anything plainer than that proposition.

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Scott Armstrong, Former Reporter, Washington Post

And so, ultimately we have to exercise our First Amendment rights. We’re doing them responsibly, and we’ve talked about what that involves in an era where terrorism is so prevalent. But if sensitive homeland security information is defined as it is – we had a government official tell us recently that the sensitive but unclassified characterization is exactly the definition of what every federal employee is barred from speaking to any reporter at any time. To us in the press that sounds ludicrous. I mean, that’s what we talk with people about all the time. We’re talking about unclassified information here.

We talk about classified information with them all the time. And it's a harder argument to make that we have a right to have that conversation with them, but when you're talking about unclassified, clearly we do. And now there's going to be an intrusion into that as a result of – well, the federal law exists, but as a result of an application of a regulation.

And I think we're going to proceed by continuing to do it, and we're going to have to raise some questions in our own circles about whether or not we've reached the point where there's a First Amendment intrusion that really changes the way we do our daily operations.

Tom Gjelton: I will respond very briefly on the First Amendment point. I have never understood the First Amendment to give the press a right to government information. The First Amendment protects your right to publish it; it doesn't necessarily say that you have an entitlement, in a constitutional sense, to information. But having said that, these statutes – and there's a collection of them – certainly chill the freedom of government officials to speak to you, and that may be a more important consequence.

It also – as Bill mentions, it's designed to facilitate the flow of information up and back. It was initially designed to find a way for the federal government to ship information down to the state and local level where it can be used. It also does chill the discussions with the press, and it may make it more difficult to share information around for the purpose for which it was intended in the first place. If one could imagine the city of Chicago deciding, well, it really needs to protect information that the suburbs need, but there's nobody in the suburbs that signed the non-disclosure agreement, and so they're not going to give it to the suburbs; whereas, in the past, they would have just given it to them. So it's not clear in my mind how all of this is going to work, and it may be one of these things of a hastily enacted good intention that winds up with bad consequences.

Bill Leonard: I wonder if I could say something – in defense of non-disclosure agreements. But let me, as a purveyor of probably the most prolific non-disclosure agreement in the government today, at least the one dealing with classification, let me tell you about some of the value of non-disclosure agreements, and let me also tell you a little bit about my background.

Those are some of the advantages . . . it's [non-disclosure agreement] a means by which to educate people in terms of what's already covered by laws and existing regulations, in terms of protecting, making them aware, and making them abide the law.

Bill Leonard, Director,
Information Security
Oversight Office

Most of my experience has been with the Department of Defense, in fact, 30 years' experience with DOD. One of the things I did while I was at DOD several years ago was to oversee a review of what the Department of Defense was putting on its publicly available websites. I came to the very early conclusion that a lot of people within DOD forgot what the first two Ws in WWW stood for worldwide. And, in essence, what we found was a lot of information being posted to public websites that was prohibited by law from being disclosed.

And so for example, just the most basic kind of information, promotion lists for officers and things along those lines that go up to the Hill. Unfortunately, they also include Social Security numbers. As you know, Social Security numbers are required by law to be protected, pursuant to the Privacy Act, and in this day of identity theft, I know I would not want my Social Security number posted on the World Wide Web for anyone to look at. I use that as just one minor example of how there was a total lack of recognition in many corners, in terms of this universe of information, unclassified information that existed within the federal government, that, pursuant to dozens and dozens of laws and other things, required protection.

Now, the value with non-disclosure agreements is that there's a very strong educational aspect to it. It helps put people on notice as to what's included in the system that's covered by the protection regime. But it also, then, lets people know what's excluded; and so non-disclosure agreements can serve as a benefit, in terms of helping to educate people so as to fight that natural bureaucratic impulse that we all have to say less is better. And if we truly make people aware of exactly what are the boundaries of what's included and what's not, that can actually be good.

And the last thing about non-disclosure agreements -- and again, nothing has been worked out in this particular instance -- but it doesn't necessarily have to be an agreement with an individual, on a person by person basis. What the challenge is, with respect to federal government information -- as a federal employee, I'm automatically obliged to abide by agency rules and regulations, I'm expected to follow and properly handle all sorts of information that comes into my possession: information with respect to public citizens, information with respect to whatever. And if I violate those rules and regulations pursuant to the employer-employee relationship, something can be done about that. I'm accountable. In this new instance, we're talking about a universe of people where there is not an employer-employee relationship with the federal government. And so how can we take that existing set of rules and regulations that already protect this information, and how can we make it applicable to a universe of people that actually need that information as well?

Those are some of the advantages that such an agreement -- and again, it doesn't have to be a person-by-person type of situation, but at least it's a means by which to educate people in terms of what's already covered by laws and existing regulations, in terms of protecting, making them aware, and making them abide the law.

Terence Smith: A universe of people that, according to Jeff and Scott's papers, we're talking about four million people in sensitive positions. But, Bill Leonard, I have got to ask you on behalf of the audience: what did you do about the sensitive and classified information that you found freely and publicly posted on the website? . . . Did you take things down?

Bill Leonard: It became a command emphasis item and commanders were responsible to review their sites and determine the appropriateness of what was posted. And, in fact, a lot of material was, in fact, removed from websites.



Terence Smith: Okay. Tom Bettag?

Tom Bettag: I would kind of like to throw in that Bill has greatly stopped, thereby chaining, the other way, the impregnable immunity of the press. I think the wrong approach here is the First Amendment. What Barbara talked about, about this being a negotiation, is critical here. And my greatest fear is that we will say 'First Amendment, you can't do this to us.' And the other side will say 'the hell we can't.' And we'll say, 'well, just try.' And they will say, 'well, okay, we will throw in you jail.' And that is the most dangerous thing that can happen in this particular situation.

Our job is to get accurate information to the public; and if, indeed, we get ourselves locked in that, I think there's nothing more dangerous than the know-it-all national press feeling scorned and saying 'they're all lying to you, watch out, they're not telling you the truth.' And in this situation, that spreads fear and panic and fear is the worst thing, that is, the worst possible outcome; and it's real easy to get there. And the fact that Bill is the only person here is a kind of warning sign that, hey, we're not talking to each other as well as we should.

Tom Gjelten: I'm sorry, I just wanted to throw in, this is a relevant First Amendment issue. Not our First Amendment rights, but the First Amendment rights of the people we talk to.

Scott Armstrong: I hope, Tom, you won't mind if I don't put on the clothes of the straw man that you just attributed all those things to. My point was more narrowly drawn because it is a First Amendment issue. I think this is an important framing concept for the discussion that Jeff and I have had about this, and that we have had with the government about it -- is that during the period when there was what I termed to be an official secrets act -- it was an attempt to pass a piece of legislation that would have put restraints on people that we thought were very severe, similar to the British Official Secrets Act in its current incarnation. And it was vetoed by President Clinton.

In the vice president and others in the administration. We got -- instead of it, trying to push something through -- we had a report that was done by the attorney general. And during the period the attorney general was preparing his report, there was a dialogue between the media and the intelligence community. And we had what amounted to off-the-record -- actually, to be technical, background conversations, not attributable to any individual -- with senior media people and the general counsels of most of the intelligence agencies, representatives of the directors, and so forth.

And the point that we made was, we can try and see if you have an argument about a law and our First Amendment rights and go down that path, or we can try and have a practical discussion. What is it that you find most disturbing, most critical, and most possibly damaging to the national security? Are there ways that we can still inform the public and still not create that kind of concern? And that was done, we did it.

In the course of it, the attorney general then reported back that they felt that there was an absolute right of the executive to control information and there was an absolute right of the press to publish it. But they also took cognizance of the other aspects of the First Amendment, and there were things locked up around the issue of how you control it. And that report, which many of us missed while we breathed a sigh of relief -- there was no Official Secrets Act, pointed to the notion that non-disclosure agreements were a good way to control information getting out. And the extension of those non-disclosure agreements to other people -- I haven't heard of one that would apply to a whole department because they are, in fact, contracts between an individual and the government -- is what I think we are concerned with here, and how the mechanics of that would work..

Terence Smith: Jack Nelson.

Jack Nelson: And to show you how little the press pays attention to these things, that has never been reported in any of the daily press, the fact that Scott Armstrong and a bunch of other journalists met with a whole group of government officials and agreed on how they should proceed on this particular matter. And I don't disagree with what Tom says at all, Barbara made this same point, that we shouldn't be always invoking the First Amendment as part of the argument, we should be talking about the public's right to know. It was old Arthur Krock, the editor many years ago of *The New York Times*, who used to say that reporters had no more First Amendment rights than the average person, but they had the time and the expertise to go out and find out things that the average person would do for themselves if they had the time to do it. And I think that's accurate.

Terence Smith: Tom Gjelten is a person on this panel who is at the Pentagon and covers defense issues. How do some of these points apply, and are there illustrations or examples that you can offer that could be problematic?

Tom Gjelten: I think it's primarily a different context because what we are covering the Pentagon -- at the Pentagon so much is classified information -- the barrier to information gathering at the Pentagon is dealing with people who have access to classified information. So this is a challenge that obviously preexists this legislation and the problems associated with it.

We often find out information at the Pentagon about military operations, for example, that are pending. There is a great deal of pressure on us not to report operational details, and some of our best allies at the Pentagon are those officers and officials who say that, to the best of their knowledge, no reporter that they work with has ever jeopardized a military operation -- sensitive military operation -- by reporting on it beforehand. So, to the extent that there is an attitude there that favors cooperation with the press, it's based on this premise that, up to now, we have performed responsibly. And that, of course, is a very subtle way of making sure that we continue to perform responsibly.

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In the end, it does become a personal and a news organization decision whether to report a story or not. And as long as I have been there – I have only been at the Pentagon since January 2001, but I have been reporting on national security issues before that – as long as I have been doing this, I have found that the instinct or the tendency on the part of news organizations is actually to err on the side of deferring to military authorities, to not publish that kind of information.

Terence Smith: Bill Leonard, comment on that, and whether or not that has changed since 9/11, and how it might be affected by this current issue that brings us here today.

Bill Leonard: Well, I think Tom's point is well taken, even in a heavily classified environment such as the Pentagon, there is a lot to be said in terms of relationships that are built upon proven trust. Sometimes we mistake secrecy as an end in and of itself, and it's not. The whole intent behind secrecy, whether it's classification or what have you, is to ensure that somehow, some way, our nation's enemies – people who wish us harm – will not be given the means by which to inflict harm. And so, secrecy is but a tool, it's not an end in and of itself. And as long as we keep that in mind, I think, that makes a firm basis for the types of relationships that to which Tom refers.

Terence Smith: Jeff Smith?

Jeffrey Smith: I want to depart a little bit and say that I have had direct experience with leaks coming out of the intelligence community. Not out of the DOD operational community, but out of the intelligence community, that have been enormously harmful.

One, when I was at CIA, a newspaper printed details about a technical collection operation mounted by the United States that took a huge amount of time to design, build, and install – at the risk of lives, by two Americans who did it – and it was in an area where we were operationally involved with U.S. forces. And that particular technical collection system was providing extraordinarily valuable information. It directly affected the operations and the lives of the American soldiers conducting the operation. It was published casually, with great detail; and a day or two later, obviously, the source dried up. There was no effort made to talk to us about the leak before it appeared, and I still get angry about it. One of the things the dialogue tried to do, that Scott's ascribing to do, is sensitize reporters to those kinds of issues.

There are a lot of, as Scott accurately characterized them, gratuitous leaks: people who, for one reason or another, decide that they want to talk to the press. And oftentimes, particularly in the Clinton administration, there were people that – most of them seemed to be in the Defense Department – who so detested the president and who so detested his policy, particularly with respect to China and other parts of the world, that there were large numbers of leaks coming out of the Pentagon that some folks just published. There were people in town getting detailed intelligence reports they just published, and we couldn't stop it. And that just still makes me angry.

I think it's better now, in part because the Pentagon has tried to tighten up on some of that. And secondly, I think the press for a variety of reasons, 9/11 being one of them, hopefully the dialogue being another – have gotten much more aware of the consequences of publishing unnecessary detail. So, hopefully, there's some progress being made.

Terence Smith: What are the obligations of news organizations in a situation like that? Barbara?

Barbara Cochran: In my experience, if – first of all, if you have had a very experienced reporter, as we certainly did at CBS News in David Martin, that person was checking with all of his sources. And if we – and no one hesitated to pick up the phone and appeal, and say, please don't broadcast this or air this for whatever reason. But it seems to me that's a very high responsibility that a news organization has, and to my knowledge, as Tom said, these are matters that are taken very, very seriously.

Tom Bettag: I think it is instinctive for most organizations. I think one of the dangerous problems in this is when we get to the local level -- and a lot of these terrorism issues are local issues -- and we're not talking about people who deal with the Pentagon, who are familiar with that. And so the ability of one local channel to just say, what a great story, let's go with it, is much more likely. And once one goes with it, everybody goes with it; and I think that becomes more dangerous.

I think the other part of it is, in this climate and kind of pounding on the press and with managements that are kind of struggling on the financial side, that if we go and ask for permission, that they're going to scream bloody murder and our managements are going to cave, so let's not approach them, this could only make trouble -- is a bit more jeopardized than at one time it would have been.

Terence Smith: Forgive me, Jeff Smith, but when you lawyer a story, it frequently disappears altogether. Jack Nelson.

Jack Nelson: I can't imagine *The Los Angeles Times*, for example, going with a sensitive story like that without contacting the government. As a matter of fact, I can give you a couple of examples, one only a couple years ago. And the *LA Times* had a story ready to run, or almost ready to run, about Iranian businessmen who lived in LA, were going back and forth to Iran on business trips, and the CIA was using them to bring information back. We called and asked for comments from them; and they said, well, you can't run that, it's an ongoing operation.

So the reporter who wrote the story said, well, you should call out and talk to our editor. And so, indeed, they called out and talked to the managing editor, Dean Baquet. And he said, well, make your case; and he made his case, but he made it – as a general proposition, you should never do a story on any ongoing operation, not as to this specific case. And Dean Baquet checked with the other editors, they all thought that the Iranian-American business community knew all about this story anyway; there was nothing that was very secretive about it. And they ran with the story. Of course, it upset the CIA no end. So it doesn't mean always that we will go with what the government says.

On the other hand, I can give you another example of about 20-something years ago, when the government – the CIA was operating the Glomar Explorer, which was a ship that would go down undersea and try to bring up a Russian submarine. Now, this was another very sensitive operation, and I happen to have gotten a very good tip on it from somebody and began to look into it, and found out there was no question about it being true. And the CIA director came down to talk to me at the bureau, and said you really shouldn't run this, it's an ongoing operation. And I said, well – it was William Colby – and I said, well, I think I have got to write it, it will be up to the editors whether they want to run it or not. So he went out to LA and he convinced our editor that he should hold that story. And, as a matter of fact, I was told he put the story in a safe.

Meanwhile, Bill Colby went around and talked to *The Washington Post* and *The New York Times*, *Newsweek* and *Time* magazine, ABC, CBS, and NBC, and I think CBS was working on a story, 60 Minutes, on how they were covering the whole thing up. And I was over in a bar called The Class Reunion having a drink one night, sort of drowning my sorrows on my story not being run – and I got a call from Bill Colby, the CIA director. And he said, Jack, you can run that story because Jack Anderson broke it on radio tonight. So that's what happens sometimes when we would hold stories.

And, by the way, it was always my opinion that Bill Colby knew this wasn't a real sensitive secret. He went around and told all these different organizations about the story even though they didn't know about it. And so, when the story broke, the Glomar had glowing things to say about this great CIA project. And I think that was his intent.



Terence Smith: Jeff Smith, that calls for a comment from you.

Jeffrey Smith: The Glomar case occurred when I was at the Department of State, and I worked on it from that end. The Russians, the Soviets, did not know what we were doing until the stories broke in the press. Bill Colby was trying to do what he thought was the right thing to keep the story from leaking, and once the story broke, the Glomar had to then leave, and the Soviets

continued to patrol that area, and wouldn't let it back in because they didn't know where the ship was.

Now, the tragedy, of course, is, as many of you know, the idea was to get the Soviet submarine, to get the nuclear warheads, and to get the code machines. Had we been able to do that, it was an extraordinarily valuable thing because the Soviet submarine patrol off coast – nuclear weapons can reach us in minutes. That's an extremely valuable thing to have gotten. We got up half of the sub: as it was on its way up, it broke in half. Unfortunately, the half that had the code machines and the warheads went back down to the bottom. That's when the story broke; we couldn't go back down and get the second half. We have survived all these years without that, but it would have been nice to have had it.

Jack Nelson: How do you explain Colby going around and telling all the other news organizations?

Jeffrey Smith: I can only assume, Jack, that he thought they might also have the story.

Jack Nelson: But they didn't.

Jeffrey Smith: He was trying to quash it. Well, I mean, I don't know. I knew he was doing that and I knew we were terrified it was going to leak. I also know, as you may know, that we found a – this is quite an interesting footnote to the Cold War – when we got it up, there were the remains of Soviet sailors on board. We had prepared for this by replicating as best we could the Soviet naval ceremony for burial at sea. We did as best we could to bury the sailors with full military honors, full – the Glomar Explorer out there, providing a Russian naval service to these guys, burying them at sea, filming the whole thing. Eventually, when Bob Gates was director of Central Intelligence, when we could talk about it, we gave the Russians a videotape of the ceremony and all of the information we had about the identity of the sailors.

Jack Nelson: Was this ever published at the time?

Jeffrey Smith: There was a small piece in – this is public information – there was a small piece about it, I don't remember where. But it was covered modestly, not as much as, I think, some of us would have liked to have seen.

Terence Smith: So, an incredible tale. I wonder, Bill Leonard, if this is making the hair on the clock, let's go to some questions from the floor. And please keep in mind particularly the focus, as it is affected by the Homeland Security Act and what we were talking about at the outset.

Bill Leonard: Obviously, when it comes to issues with respect to leaks, especially with respect to sources and methods, those are really the hardest leaks to have to endure, primarily because many times what the leaker focuses on is the substance of the information. In fact, the leaker, also the reporter, may be totally unaware in terms of how that information was obtained, how it was collected. And so, whereas the substance of information might appear to be innocuous, which oftentimes it does, unbeknownst to the leaker, unbeknownst to the reporter, it will put at risk – at significant risk – a source and method that was used to collect that information. And more often than not, the leak can result in the loss of that source or method for future use. And then, of course, it's Jeff Smith's analogy with respect to the nuclear missile codes; who will then know whether or not that lost source or method could have been the key that would give us the indicator of the next potential terrorist event? It's the history that you never know, and that's the challenge in these types of situations.

Terence Smith: Okay. With an eye on the clock, let's go to some questions from the floor. And please keep in mind particularly the focus, as it is affected by the Homeland Security Act and what we were talking about at the outset.

Paul McMasters, First Amendment Center: This has been fascinating and very, very helpful to us trying to understand all the issues coming together here. And if Bill will excuse me, I would like to turn an intelligence community term on its head and say that, in all of this disclosure that we're talking about, or this attempt to get information, there is a mosaic effect. Barbara Cochran's comment about HIPAA is quite germane because it, as Jeff pointed out, it isn't federal information until somebody at the local level says a SARS outbreak in Texas or a monkey pox outbreak in the Midwest could have been terrorist-connected, and suddenly it is federalized and it is sensitive information; and very vital information that should be going to the public might not get to the public.

My question is, if we could explicate just a little bit more about the potential choke point on information that we're talking about. How do we manage these millions of non-disclosure agreements? How do we keep them from proliferating? How do we keep the expansion of all the material that can be called SHSI from just totally overloading the intelligence community? We saw that problem -- we think, since the congressional report is still classified, that we saw that kind of problem before 9/11. To me, we're talking about putting out of reach exponentially greater amount of information. How does the intelligence community protect us, and how do journalists get to information if so much of it is put beyond our reach, and if so many people are subject to NDAs that they can't even talk to their own families about getting out of the reach of a plume from a chemical plant?

Terence Smith: Bill, I think that was directed to you.

Bill Leonard: Again, in terms of my earlier comments about non-disclosure agreements that can actually serve a beneficial purpose in terms of helping clarify for people what information is already in and what is not included in the system of control. But let me pick up on a point that you made, though, and let me just share with you my personal view, this is Bill Leonard talking, not the director of ISOO talking. But I really think that, in both the classified and the unclassified arena, we have to fundamentally rethink some long-held principles. For example, we have in the classified world the principle of need-to-know; that is, we will not give you information unless I, as some omniscient authority, determine that you have some use for this information. I think that concept has long outlived its usefulness in the information age, and we have to fundamentally rethink that concept.

Back when I was in DOD -- let me use the DOD analogy as an example, and maybe it has some application here -- the whole idea behind revolution of military affairs in large part, is the rapid leveraging and dissemination of information. In years gone, the intelligence folks would collect information, it would go somewhere, it would be centrally processed, and then somebody would make a determination that, hey, maybe this person needs it, maybe that person needs it; and maybe days, weeks, who knows how long later, that information would be filtered down. The whole idea behind revolution of military affairs is rather than some omniscient authority centralized in Washington making a determination as to what some 2nd lieutenant platoon leader in Iraq or Afghanistan needs, in terms of information; that the information is instead made available in a near-real-time basis as possible, to include information garnered from intelligence sources to those who need it the most, when they need it.

That's part of the concept behind the revolution of military affairs, to force us to start turning on its head the concept of need-to-know and how information is disseminated. We still have a long ways to go. But I think that also has an application in the homeland security environment as well. To give an analogy, an anomaly at a waterworks facility occurs somewhere, and that anomaly is reported up and it goes to a certain point. Let's say then, some public health official somewhere may be having their own anomaly that they are dealing with. And, whereas that information reported by a waterworks official may be innocuous on its surface, it may be the key that is needed by that public health official to unravel whatever it is that they're dealing with. As such, we have to fundamentally rethink in this information age this concept of need-to-know, how we manage information, how we leverage it, and how we disseminate it; and yet, at the same time, if it requires protection, how do we protect it.

Terence Smith: One of the early controversies that arose in the sharing of information at state and local level was the sharing of information with the governor of California about a possible threat to the Golden Gate Bridge and others, and he immediately went on television. So what's the consequence of that?

Tom Bettag: Well, clearly once the governor does it, I mean, it's all there. And, at that point, I think that's where you have to have some kind of a relationship where the press feels like it can get decent information. And the odds are that, once that happens and you turn and say, what are we supposed to make out of it, you get one of these blank things coming back, and you're not helping the public at all. And you would really like to have somebody be able to say, listen, trust me, there's not much here, and be able to guide people. But I would guess that there was absolutely no way to get good information on what should we make of this.

Terence Smith: Because, in fact, that is exactly what subsequently the Justice Department, or the Department of Homeland Security said, that the information was far more tentative than expressed by the governor in his public comments. We have a question here, and direct it, if you will.

Sabrina Eaton, *Cleveland Plain Dealer*: Well, first a quick comment and then a quick question. You guys opened the discussion of the second panel by discussing how the press hasn't really been covering these issues of the Freedom of Information Act restrictions imposed by the Patriot Act and Homeland Security Act. I believe that it has been covered a certain amount. I know our paper has written a fair amount about it because of our editor's role in the American Society of Newspaper Editors panel on this question. I think that journalism publications have also written about it.

But it hasn't been picked up more widely because I think that, within the journalistic community, people regard this as kind of inside baseball: stuff that affects us and how we do our jobs, but isn't necessarily of interest to the broader public. And I think that that's a bit of a mistake because I can say that when I have written articles like that, I have gotten a bunch of e-mails from people who are not within the journalist community, expressing concerns about that kind of thing. My question is for Bill. Not to put you on the spot here. You had mentioned that this is going to be – that something is supposed to be coming out in the Federal Register, a new regulation on how this stuff is going to be implemented.

My question for you: what's the time frame that those of us who are following this issue can be expecting that to come out at? I mean, will the status quo that we have all relied on – being able to get stuff from EPA and things like that – will we still be allowed to get that until these regulations come out?

Bill Leonard: Sure. I'm not too sure how easy that question is. First and foremost the regulation is not under my purview. But basically, as we all know, there is a statute; the statute assigns a responsibility to the president. The first thing that needs to be done is that responsibility needs to be delegated to the actual worker bees within the government, that has yet to be done; and once that's done, I think we could look forward to seeing work on implementing regulations rather quickly.

And as to the status quo . . . that's a very good point because, the bottom line is this, having once been what I call an operator in the field myself -- as the great policy formulators and regulation writers do their things in Washington, life goes on in the real world. And there is, on a day-to-day basis, information of all sorts being shared, to include even classified information, being shared with state and local officials.

So information sharing has been in place and what we owe to the people who have been assigned this responsibility at all levels of government and who are doing their darnedest in terms of carrying out their day-to-day responsibilities, is to start to build a framework where they can feel comfortable in terms of knowing with precision exactly how this information should, in fact, be handled. As opposed to multiple agencies coming up with their own processes and procedures, which I know has got to be very frustrating for state and locals in terms of, well, gee, when I deal with this agency you deal with it this way, when I deal with this other agency, you do it another way – we need to come up with a uniform way.

So, bottom line is this, the absence of a regulation is not serving as a block to information sharing, but we can probably do it a whole lot better and a whole lot cleaner; and that's what the regulations is intended to do.

Terence Smith: Scott Armstrong has a clarification; then we have a couple of questions.

Scott Armstrong: I just want to be clear: we're not talking about the critical information infrastructure (CII) exemption to the FOIA; that's not what this is about. That is a speck in an ocean of what we're talking about. That is something that is excepted from the FOIA, that part of the FOIA, by virtue of the Department of Homeland Security Act. This is a separate section of the act, which, because of the way it came into it, we didn't focus on and give the kind of attention that we did to the CII issue, which is a very narrow issue. This is a much broader issue: this affects everyone who is in the homeland security business. It affects, potentially, everyone who is going to get involved in homeland security information coming down from the federal side. Things have already changed; the law is in effect, and, although the regulation isn't written, it's being used.

There are three ways to do it: classified – Governor Davis, by the way, leaked classified information, and his purpose supposedly was to tell you if you wanted to drive to work on the Golden Gate Bridge it might be blown up, and you should decide whether you wanted to go the long way into San Francisco. But secondly, there's sensitive homeland security information, which is what we're talking about here. And then there are the task force and workgroups. I don't know how you refer them generically, they are organizations that have been created, which pass classified information to certain people who are in the homeland security business at the local level; but they also pass sensitive and unclassified information. The difference is that those people sign a 312, the classic non-disclosure agreement for classified information, and we're talking about a whole new genre, here, of those.

Josh Meyer: Well, I was hoping to ask this question to the two people from Homeland Security, and also to make a plea to Jane Harman, when she was here. But none of them are here, so you all catch the spear on this one. But it's sort of an observation and a request, too. You were talking about how you need to do a better job with the specificity and the uniformity in releasing information, especially sensitive homeland security information.



And I have to go back to the other question. Covering terrorism, when they raised the level from yellow to orange, there's a sort of pandemonium among the primary objectives of the whole approach to find out why they did that. And everybody gets a different answer, we don't all get the same people, and, therefore, we present to the public a very jumbled picture of why that happened and whether there's a real threat out there, which is really annoying on our end: we all have to work until midnight trying to figure it out, we all come up with something different. I think the *Post* said that -- the last time, that the intel was specific and credible, and *The New York Times* said it wasn't. I was told it wasn't, and I think that later was born out to be true.

But whatever the case, isn't there any effort to have somebody, maybe have somebody within Homeland Security and hopefully at the other agencies, at least sort of launder the information or put it all together into a way that you can give it out to us, so we all get the same picture? Because they keep saying that the government is supposed to work with the media to use us to help educate the public. But it's just confusing the hell out of us, and by extension the public. Is there any effort underway to designate people within Homeland Security and the other agencies to try to get something out to us that makes any sense?

Bill Leonard: But again I have to go back to the other question, in terms of the primary objectives of the whole approach to looking at the issue of information sharing is to provide some sort of consistency, especially with the folks in the state and local and private sector that information is being shared with. So there can be consistency in terms of what they get, who they get it from, how they're told to handle it, and so forth.

Josh Meyer: But what about with the media? And you guys, since you have been working on this for a while, do you get any sense of are any release points along the way, and if people are arguing for those? I tell you, there's a lot of reporters that are ready to overrun the barricades and start demanding that something be done about this.

Terence Smith: Barbara Cochran has a comment.

Barbara Cochran: We had the chief communications official from the Department of Homeland Security speak at our convention. Lucy [Daglish], who is at the microphone, was on the same panel, and when she was asked the definition, what are the criteria for code red, she said, and I quote, ‘there are none.’ We found that a little frightening, but there are beginning to be the signs of some dialogue between media and the Department of Homeland Security, and I think this is a great opportunity for the press to take advantage of the interest that the Department of Homeland Security has in enlisting media cooperation in planning for crises and using that platform to talk about the importance of having access to information on a day-to-day basis.

Next week, on June 20th, the Washington Board of Trade and the Department of Homeland Security are having a daylong conference, and they have invited people from -- both public information officers from the government and representatives of the news media. They have all the acceptances from the PIOs and they haven’t heard a word from anybody in the news media about attending this, which I think is probably par for the course. But this is an opportunity where there will be a scenario played out, and what their hope is, that they could create out of this a module that would be taken around the country and that would be used at the local level to try to get the people – the government officials who will have to be reacting to an incident together with key media decision makers, and have them talk about the what-ifs. While that dialogue is going on, there also has to be a dialogue about how the information flow is kept going.

Lucy Daglish from the Reporters Committee: There are a number of us in the room here who were at a conference sponsored by ASME last week. And I was sitting, at the time, next to an old friend who happens to be the editor of my hometown newspaper, Mike Jacobs from the Grand Forks Herald; and he’s a very plainspoken guy. And he was sitting there, getting more and more frustrated, and finally, at the end, he just kind of threw his hands up in the air and kind of went off on us and said, where I come from, when there’s a prairie fire, you throw a bucket of water at it. And, he said, you people in Washington, you’re just talking to each other all the time; tell me what I’m supposed to do.

Well, I’m here to report that, in his Sunday column, Mike announced that he was creating a new beat. He was going to assign someone to the position, full-time, of covering the public’s right to know; and I’m confident he will do it. But, at the same time he was listening to Scott speak, and then he was listening to Dan Metcalf from the Justice Department speak and everything, and he kept writing down this one word on his notebook. And we have all been talking about safeguarding sensitive homeland security information, or safeguarding sensitive but unclassified information and everything. He kept underlining the word safeguarding, and he kept asking me, what the hell does that mean.

So my question is, to anyone who wants to take a shot at it, what does this mean? When somebody says safeguarding, does that mean, as when I heard Dan Metcalf describe it, that they’re going to put it in a special room and kind of look at it? Or does it mean they’re going to stop us from seeing it? What does it mean?

Terence Smith: Jeff Smith, you want to comment on that? Sounds like the lockbox of the last campaign. People speak – it’s a term people use to describe protecting it from unauthorized disclosure, and I think it’s sort of shorthand for a way of saying keeping it secret and within government channels. And you can safeguard this nation in many ways; but I don’t ascribe a whole lot more to it than that, I guess.

Bill Leonard: Actually, Lucy, you point out I think a real big problem here, and that is just with the lexicon. And there is, even within the federal bureaucracy, there is a lack of understanding and agreement in terms of the lexicon. Just the term “sensitive but unclassified information,” just to give you an example. It has its origins in the Computer Security Act of 1987, and the irony of it is that the Computer Security Act of 1987 is very explicit in what it says, specifically – designation as sensitive but unclassified is not grounds upon which to withhold information; it just is to distinguish information that, if you have it in a computer system, we really want you to be serious about with respect to your computer security. And the irony of it is – this is back in 1987, and the irony of it is, is that as a defining factor in terms of what we’re interested in securing in our computer systems today, it is totally irrelevant because anyone who owns a home PC knows that, I don’t care what you have in your home computer, you have to protect it.

Let me give you a perfect example: the Public Affairs Office site of the Department of Defense. Publicly available information, do we have to protect it, safeguard it? You had better believe it, because what happens if some adversary gets in there and suddenly starts changing the information that you all rely on upon in your reports; so it has got to be protected, if only from an integrity point of view and an availability point of view.

So we have a lack of consistency in terms of how we use these terms and I think, fundamentally, in these types of contexts, what we are primarily talking about is the authorization to disclose information. How to restrict the dissemination of the information as opposed to the classification system, where we know we not only restrict the dissemination, but then we also have the locks and the alarms and the guards and all the sort of good to protect it.

Terence Smith: If I can – your reference, Lucy, to the *Grand Forks Herald* – on September 11, Ann Davenport, who is the producer of the media unit, and I were with a crew in Grand Forks that morning to do a story on the *Grand Forks Herald*, to interview Mike Jacobs. And this huge event occurred in New York and Washington and Pennsylvania; and we felt, in some ways, spectacularly out of position. And yet, to show you the way this reaches down through what is now the homeland security apparatus, the road in front of the Holiday Inn where we were staying was immediately shut down. Why? Because of the SAC base that was just down the road. And so, the ramifications of this go down tremendously, and are only more extensive, I think, today than they were on September 11th.

Jeffrey Smith: In my favorite story, that many of you have heard about, the dilemma is not unlike something I encountered as a young army officer, on how you deal with these things. Where, on the bulletin board of an Army aviation detachment in Europe was a sign that said, 'due to complaints from the local nationals, there will be absolutely no low-level flying over the nudist camp, which is located at --' and it gave the coordinates and, of course, big arrows drawn to it and so on. But the government has a dilemma here; you have to tell people not to fly there, and in order to tell them not to fly there, you have to tell them where it is, so that's where everybody goes.

Steve Aftergood: Thank you, Jeff; thanks to Annenberg and all of you, I think it has been very interesting. I would like to propose an answer to Jack Nelson's question about why there has been relatively little press coverage of secrecy policy. I think, in a nutshell, the interests of the press are not identical with those of the public at large. In particular, the press values not broad access, but preferred access. Scoops, exclusivity, it seems to me, are valued even above accuracy or insight or clarity. And so, there isn't the value assigned to broad, general access.

Also, it seems to me that the press inculcates a model of citizenship that is very narrow. The ideal reader is a consumer, preferably a consumer of the newspaper; and there's no vision of a citizen who would have a desire for access to government information. If you want government information, you're probably an activist or someone with an agenda; you're not a normal person. And because of that, I think the issue is hard to cover.

The other thing I wanted to mention is that there are flickers of opposition to the trends that we have been discussing this morning that are intrinsically interesting and also, I would say, newsworthy. And one that I just discovered this morning – it's not in the morning papers, I stumbled on it in the Congressional Record – it's a new bill that was introduced in the Senate yesterday to expand, enhance the protection of whistleblowers. Tom Gjelten mentioned the importance of whistleblowers. There has been an erosion – a steady erosion – in whistleblower rights over the past several years. Senators Akaka, Levin, and Leahy introduced S.1229, it's the Federal Employee Disclosure Protection Act; and I think it would at least incrementally help to overcome some of the difficulties we have been talking about this morning. Thanks.

Deborah Murphy, graduate student at American University: My first comment is, not to usurp the power of the press, but I think the purpose of the First Amendment is also to allow the people to criticize the government. So I'm wondering how you criticize government if you don't know what's going on.

My second question is, in terms of the Homeland Security Act, the Patriot Act, the critical infrastructure information, and the sensitive but not classified, are these all FOI exemptions, and do you think the press is likely to fight this in court, and are you aware of any court cases now? Thank you.

Scott Armstrong: Without being in the latter category, to possibly be exhaustive about what's happening these days, but – the category sensitive but unclassified is, by definition – we're told by the representative of the government recently – an indication that something should not be released under the Freedom of Information Act; it is, by definition, B-2 and B-4 exempted. I'm not sure how that's going to play out in FOIA law, but that's the assumption. The assumption is that if something has been put into that safeguard – which, by the way, sensitive but unclassified needs to be held differently than unclassified information, otherwise it has to be in a place where the public does not have access or people who don't--aren't supposed to have access don't have access. So it's one more admonition that it shouldn't be released under the FOIA and it should go out the door.

Deborah Murphy: Well, I was just curious, and I know that Bill was almost fielding all the questions here. But I'm wondering, on a broader sense or on a pure level, how do you criticize government and how do people – and we're talking about the press and back stuff here, when the purpose of the press is to also inform the citizenry, and –

Tom Gjelten: This allows me to make an admonition that might have allowed me to escape the straw man which will chase me down the block afterwards, now that Tom Bettag has breathed life into it. The right to petition for redress of grievances and the other associated First Amendment rights that effectively amount to the rights of association, as the Supreme Court has recognized them, are the rights – there really is no right to know, we have never done well with that in any of the court cases.

But there are associational rights, and what we forget – and I think this is a response to exactly what Steve Aftergood was talking about – the press doesn't do that much investigating. That's the real shame of it. The press goes out and makes certain kinds of inquiries and gets a certain kind of leaks. The people that do the investigating, that set it up, are the public interest organizations, the 501(c)(3)s, the other organizations that aggregate information, analyze it, and put it out. And if we were actually to tell the complete story of the *New York Post's* publication of that information about the chemical plants, that was done for them, effectively, by such an organization. And the press has to remember that – where it gets its information.

And the whistleblower laws – the press and particularly publishers don't like to be involved with advocates, they don't want to be side by side with advocates. But we have to remember that one person's source, the next day, after they have lost their security clearance and they're being – particularly under a non-disclosure agreement that would attach your house – they're being pursued. That whistleblower -- under the whistleblower laws that are being proposed now and being expanded and already exist, that whistleblower needs protection. And the press has the choice -- as an institution, I'm talking about, not in our daily reporting but as an institution -- to either support such laws so that a whistleblower has the right to defend themselves, or we have to start writing a story the day after, saying, well, our source now is being punished for this or that. And I hope that would be written about.

But it becomes a different type of proposition because we don't want to take all the responsibility for the whistleblower. We're not saying the whistleblower is absolutely true, we're saying, as best we can determine, they have got something to say that needs to be told to the public. And if we don't want to confuse our role in having to defend him, we have to acknowledge where that information came from and allow him to defend himself. And we have to allow 501(c)(3) organizations, public interest groups – the environmental community, which has been so extraordinary about organizing itself; people like OMB Watch, that went out and pulled everybody together. Environmental journalists take great advantage of that, and actually they're able to be more aggressive because they start with something very concrete. And I think we sometimes forget that obligation.

Bill Leonard: Then let's also not forget that part of a compact that says the government will provide for the common defense and general welfare. And that is a fundamental concern of the public in terms of can I send my loved one to work in the morning and are they going to come home at night. And I don't think we can overlook that very, very compelling expectation on the part of the public. It's very real; unfortunately, today, it's very real.

Terence Smith: In closing, I thank the Annenberg Center for sponsoring this sort of thing, for increasing the level of discussion, and in that and through that perhaps the level of understanding and knowledge. So thanks, Kathleen, and, Scott, do you have a closing bit of housekeeping to do?

Scott Armstrong: I have one thing. Unfortunately the summer intern from Arnold & Porter, Ashley, left, because we probably made changes in the draft while we were sitting here and she has to go back and change it again. But she wrote something I thought Jeff had written, and I said, Jeff, who wrote this, was it you or Ashley, because there were a couple of times when I just got the impression that Ashley had written them, I wasn't sure. And he said she did. And it's the kind of last statement in our report, on page 23. It's a little more poetic than Jeff or I might write something, so you probably would have figured out that somebody else had written it anyway.

It says, "The tragedy of September 11, 2001 generated considerable fear in the United States and the world. In light of such circumstances, our protection is certainly the paramount concern. Terrorist acts are designed to tear through the fabric of a nation. In our haste to safeguard our lives, we cannot allow such threats to succeed in their mission to destroy the very freedoms for which this country has stood. Protection of fundamental rights is every bit as important as the protection of our mortal lives, because without basic freedoms, America has no soul." And I think that pretty much says it.

Now, that's a slightly more aggressive statement than some of the other analysis that's in there but I think we all agree because I think it's perfectly compatible with what Bill was saying. There is a balancing. If terrorism succeeds, it succeeds because we allow ourselves to be shut up and we fundamentally changed our country. And that's what this discussion is about. Fortunately, we're having it before it is all set in concrete. Thank you.