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“National Security vs. Free Speech: An American Case Study”

Congratulations to you, Dean, and to you, Ambassador Bloch, and thank you very much for arranging this very special venue for the Chang Lectureship. I must say, Ambassador Bloch, I can't think of a better way to honor one's father than to do what you have done for Chang Fuyun by creating this program. You now have fifty people who carry his name, including Zhang Qi, as F.Y.Chang Scholars. It's as though he had fifty more children. What a wonderful tribute.

And thanks, too, to the people in the audience for being here on a Sunday. It is a privilege to follow in the steps of previous lecturers which have featured leading Chinese and American scholars and government leaders including, most recently, U. S. Supreme Court Justice Antonin Scalia in 2008, NPR Standing Committee Member Xin Chunying in 2009, and former U. S. Trade Representative Charlene Barshefsky in 2010. I think that the Dean has set the tone for our conversation perfectly by stressing the importance of the context of my remarks. I hope you will find something useful for China as you listen to my description of how we deal with the tension between free press and national security in the United States.

My wife and I first came to China in April of 1978. (My wife, Aileen Adams, who is here with me today, is now a Deputy Mayor in Los Angeles.) That first visit took place before most of the people in the room today were born – and, as you know better than we do, China was a very, very different country. Since we are both lawyers, Aileen and I wanted to meet with the Bar Association of Beijing. We met with most or all of the city's lawyers in a room much smaller than this one. We were told that there were fewer than a dozen lawyers in the entire city. How things have changed!

Aileen and I were in China for a month that year, as part of the first American entertainment industry delegation to visit China since 1949. Our group was headed by Norman Lear, the most famous producer of television shows in America at that time. It included several famous stars, writers and producers. And, for some reason, it also included us.

When our delegation landed in Hong Kong, the front page of one of the morning newspapers carried a picture of Mary Tyler Moore, one of the members of our group. The headline said: “Mary's Here!” At the time, Mary Tyler Moore was the star of one of the most popular programs in the world – named, appropriately, “The Mary Tyler Moore Show.” She was a celebrity in Hong Kong. But when we traveled into China, nobody recognized her or even knew her name.

Our visit took place in the period just following the Cultural Revolution and immediately preceding the rise of Deng Xiaoping. (I wrote about our tour and about issues of free speech and the arts in China in an article published in “The Nation” magazine in July of 1978 in a piece called “Peking Spring: The Pendulum of Chinese Art.”) At the time, there was a total disconnect between our cultures. But today, only 33 years later, our cultures have become intimately entwined. I am traveling in China this year with a group of talented actors who are performing a play that I wrote. None of them has the star power of Mary Tyler Moore, yet their work is known everywhere we go.

At the time of my visit in 1978, there were very few, if any, students from mainland China at American universities. Today, more than 125,000 students from China are studying in the United States. At the University of Southern California, where I am a member of the faculty, we have about 2,000 students from China. We have as many Chinese students at USC as you have at this great law school – which is quite a commentary on the growth of law and lawyers in China as well as on the incredible explosion in the connections between our countries. The 125,000 students from China who are studying in America, will return to China with an understanding of American culture, American law, and American society.

All of those themes have some relevance to my visit to China this year – and to the theme of my remarks today. I am here this month in connection with a play that I and a co-author wrote more than 20 years ago called “Top Secret: The Battle for the Pentagon Papers.” During the past 20 years, “Top Secret” has been broadcasted nationally on public radio and has been performed in 25 cities. In 2010, it enjoyed a five-week run in New York City. During the past two weeks, the play has been presented in Shanghai, Guangzhou, and now in Beijing. As the Dean explained in his introduction, it tells the story of the famous Pentagon Papers case, which was a seminal moment in American law and in the relations between the press and the government in the United States. The story revolves around the tension between national security and a free press.

As it happens, I first thought about writing a play on this topic while teaching law in an American classroom much like this one. For more than 30 years, I have taught courses in mass media law, communications law, and the First Amendment to the Constitution of the United States at two great American universities: first at the University of California at Los Angeles (UCLA), and, for the past fifteen years, at the University of Southern California (USC). I love to teach about the First Amendment and First Amendment cases, because they always pit two extremely important interests against each other.

At the core of every important First Amendment case is a practical and philosophical question as well as a human and legal drama. On the one hand, you have the First Amendment to the American Constitution, which, as the law students here know, says that “Congress shall make no law abridging freedom of speech or of the press.” That provision has been interpreted to mean that no part of any government at any level can make any law or take any action abridging – that is limiting – freedom of speech. The Congress can’t; the President can’t; a mayor can’t; a governor can’t; and the courts can’t. None of them can make a law or take an action abridging freedom of speech or of the press. In America, we regard free speech and free press as so valued, so important, that government can’t do anything to undermine it. To protect our fundamental freedoms, we give our courts the power to overrule government leaders and government actions.

And yet there are times when the courts allow some parts of the government to abridge speech and the press. How is that possible? It’s kind of a conundrum. The Constitution says Congress shall never do it, and yet there are times when it’s done.

Those tensions are always the interesting ones. For example, people have a right to give speeches supporting political candidates and issues; but they can’t do so when they use loud sound trucks or megaphones that would wake people up in residential neighborhoods at nighttime. To accommodate the competing interests of those who want to speak and those who want to sleep, the courts have created a series of rules that can be used to govern the time, place and manner of speech. To take another example, pornography and obscenity would seem to be speech; yet the courts have ruled that speech that is truly “obscene” isn’t the kind of speech that the authors of the First Amendment intended to protect. The courts have developed a test that is used to determine when material crosses the line and is no longer considered to be protected by

the First Amendment. In recent years, however, very little material in America has been deemed to be so vulgar that it's obscene.

Similarly, people in America are allowed to engage in the most offensive and even inflammatory political speech, including speech that is infuriating and outrageous. But there is a limit. People do not have the right to engage in speech that is intended to incite someone to commit murder, and is likely to do so, or that is intended and likely to create an immediate riot where people will be killed. The courts have concluded that the First Amendment in such cases is not absolute, even though the words of the First Amendment might seem to suggest that it is. The U. S. Supreme Court has held that speech that is intended to incite imminent lawless action, and that is likely to produce such lawlessness, is not protected by the First Amendment.

In these and other similar cases, the courts have found a way of balancing the First Amendment, and society's need to allow freedom of speech and the press, against some other important interests. Some of those court decisions are themselves hotly contested. Many have been adopted over strong dissents by some of the nine justices on the U. S. Supreme Court. Some have been refined over time. But because of the importance and independence of the courts in our country, the court's decisions have been accepted as the definitive interpretations of the Constitution.

Which brings us to the topic of my play - and of these remarks. While there are lots of fascinating and very important cases where the courts have balanced the First Amendment against other interests, in my view, none are as interesting as those that concern the competing interests of free press and national security.

Here's why. In the United States, we believe that in our particular form of democracy, the ultimate ruler is the citizen. Our government is selected in open elections where every citizen is entitled to vote. Every citizen has a right to vote, and every voter has an equal say in selecting the President and the members of Congress. Therefore, we need to have a knowledgeable electorate; we have to make sure that every citizen is informed – or has the chance to be informed – about the most important issues facing the country. If you're going to be a voter and you are going to pick the President and the members of the Senate and the House of Representatives; if you are going to decide who will run the country; then you have to be very well informed indeed.

And there is no more important issue to be informed about than issues of war and peace. If the United States is considering going to war, or is engaged in a war, the public needs to understand the reasons why and to form a judgment as to whether we should or should not be at war, whether our rulers have made the right choices, and whether the war is being fought for good or for bad reasons. The public has a right to know if our leaders or our troops are breaking the law; to know if we are engaged in torture in violation of rules of the Geneva Conventions; if the government is wasting or misusing funds. If we are engaging in a war illegally, American citizens have a need and a right to know it. Are our leaders engaged in corrupt practices during the war, engaging for example in war profiteering? Is the government purchasing military vehicles in a corrupt way; is our body armor defective? If so, our citizens have a right to know it.

For all of those reasons, and for many, many more, there is no more important time for the public to be informed than when the story involves issues of war and peace. Most of you follow American politics and know that there was a huge battle over the war in Iraq. President Obama ran for office, in part, on his claim that the United States should not have gone to war in Iraq. One of the reasons that he defeated Hillary Clinton in the battle for the Democratic Party's

nomination for president was his charge that she made a fundamental error in voting to allow President Bush to have the power to go to war in Iraq. To decide how to vote in 2008, American voters had to know as much as possible about the war in Iraq. To vote in the election of 2012, voters will need to be able to form an opinion about the country's war in Afghanistan. Similarly, in the 1960s and 70s, the American public had to know as much as it could about the Vietnam War, which was, at the time, the defining issue in our country's political debate. In a few minutes, you will see that the need to know about the war in Vietnam provided the context and background for my play.

So in a democracy, the public has a right and a need to be informed about the major issues facing the country, and it has a particularly profound need to be informed in areas involving national security.

And yet, there is another side to the story. The government's highest responsibility in any era is to ensure the survival of the country and to protect the people of the country. Today, the American government is deeply concerned about the threat of terrorism and of nuclear war. The government has a profound need to protect the people and the country, to prevent the United States from being overrun by another society and losing in wartime.

There are times when those two interests are in conflict. The public needs to be informed and the public needs to be protected. The government needs to allow the people to be informed and it has a need to keep them safe.

What should the press do, and what should the government – including the courts - do, when those two interests are in conflict? What should the press do, and what should the government and the courts do, when there is information that is important for the public to know, but when that information that could put American troops at risk or make it hard, or harder, for the government to win the war.

In cases involving national security and freedom of the press, those two interests are in conflict. On one side, there is the right of the public to be informed through its press; and on the other side, there is the need for the government to keep certain information secret in order to protect our troops, our secret sources, and, ultimately, the American public.

In teaching students about this topic in classrooms not unlike this one, I like to tell the story of the Pentagon Papers case, because it is the most important case in which the press was up against the government on these issues of national security and the First Amendment.

Here is some background about the Pentagon Papers case that will help to explain why it's so important and will provide to a context for the discussion today.

During the latter stages of the war in Vietnam, the U. S. Secretary of Defense, Robert McNamara, wanted to understand more about how and why we had entered into the war and made various strategic choices. He commissioned a major study going back more than 15 years in time, and he provided the authors with access to all of the secret documents in the government's possession.

The authors of the report put together a mammoth study. When printed, it was forty-seven volumes and 7,000 pages. It was filled with documents that had been labeled secret or top secret. As a result, it later became known as the Pentagon Papers. The entire report was

designated “Top Secret,” meaning that only a few people working for the government would be allowed to read it. It was so closely held that only 15 copies were printed.

One of the 15 copies went to the RAND Corporation in Santa Monica, California. RAND is what we call a “think tank,” a place where experts with clearance to work on secret materials come in and look at military issues. One of the experts who read the documents at RAND was a man named Daniel Ellsberg. Some of you may have heard of him. Ellsberg had worked for the Defense Department. At one time, he had been a strong supporter of the war, but he had become convinced that it was a tragic mistake.

Ellsberg became convinced that the papers proved that the government had lied to the press and the American public on a regular basis as the government took us into war. He believed that if they were made public they could change American public opinion about the war.

Ellsberg used various methods to try to make the papers public. Since he did not have a right to make them public himself, he arranged for William Fulbright, who was the chairman of the Senate Foreign Relations Committee, to ask for a copy of the papers. But the Defense Department – now run by new leadership - refused to give them to the Senate.

After a while, Ellsberg gave up on Congress and decided to give most of the volumes to a member of the press, to a journalist. As you may have seen in various movies, the press is sometimes the avenue of last resort in America where people can find an ally to expose government corruption.

To be clear, Daniel Ellsberg had no right to these papers. He had a security clearance that gave him the right to read top secret documents, but he knew that the law did not allow him to tell others about their contents or to give them to anybody who did not also have a clearance to read secret documents. Nevertheless, Ellsberg gave most of the papers to a reporter at *The New York Times*, America’s greatest newspaper, and asked him to write stories telling the public what the secret documents said.

The New York Times editors assembled a small group of experienced reporters and arranged for them to meet in secret in a New York City hotel room. They worked out of that hotel room for three months, examining the papers, making sure that there was no material that might be damaging to the nation, and deciding how to write the stories. They did not tell anybody about their work other than the paper’s publisher and lawyers. They met in the hotel room rather than at the Times headquarters because the project was so sensitive.

Meanwhile, a debate went on inside of *The New York Times* about whether those stories should be printed. The lawyers for the Times - and here you are lawyers, so you can identify with their role - the lawyers for the Times argued that there were several reasons not to print. For example, the papers could contain secrets that could damage the nation, secrets that were not obvious to the Times reporters. In any case, the lawyers said, the documents were classified “Top Secret” and it might be deemed illegal for the paper to have possession of them, or to print them. But the editors and reporters at the Times felt that the story was important enough to take a risk, especially since they showed that the government had deliberately lied to the press and the American public about the war. They were convinced that the story needed to be told so that the public would know the truth.

Finally after three months of preparation and debate, the Times' publisher and principal owner sided with the editors and decided to publish the Pentagon Papers. The Times decided to turn the vast document into a multi-part series.

The first story appeared on Sunday, June 21, 1971, under a banner headline as a huge front page report. It was a shock to the American public. The Nixon Administration was furious - including President Nixon himself and his National Security Advisor, Henry Kissinger, who later became Secretary of State. The administration immediately went into court to stop the Times from printing additional installments.

When I told this story in my lecture classes at UCLA and USC, and when I wrote my play about the case, I only dealt peripherally with the fact there was an element to the story that involved China. But since we are producing the play in China now, I decided to explore the China-related background in more depth – and to make it an important part of the story

Why was Nixon so opposed to the publication of the Pentagon Papers? The study had been completed before Nixon took office. Most of the documents concerned lying that took place while his predecessors, John F. Kennedy and Lyndon Johnson, were in office. Both Kennedy and Johnson were leaders of the Democrat Party. Nixon was a Republican. The stories tended to embarrass his political enemies. So there had to be other reasons for wanting to block publication of the stories.

For one thing, Nixon hated newspapers and particularly *The New York Times*. He also worried that publication of the papers would undermine support for the war – and support for the government - in many other ways. He was convinced that the Times was working with opponents of the war and that the stories were designed to help them push for anti-war legislation.

But one of Nixon's concerns involved China. For this play, I increased the focus on that aspect of the story.

Here is some background.

By 1971, President Nixon had decided that it was very important to open relations with China, partly to offset the power of the Soviet Union. But Nixon had always been a fervent anti-Communist and his own political constituency, which had always supported him in his campaigns for public office, included people who hated the government in mainland China – what Americans then called “Red China.” That anti- China faction in American politics, often referred to as “The China Lobby,” had many reasons for their views – some commercial, some ideological, some geopolitical – but whatever their motives, they were very powerful. In that era, Taiwan represented China in the United Nations and on the UN Security Council. Almost nobody from the United States – other than a few journalists and a few people who were dismissed as fringe radicals – had any connection with mainland China. Almost nobody from America had been to mainland China for more than 20 years.

Richard Nixon wanted to open relations with China, but he did not want his own constituency, including the “China Lobby,” to know about it.

Equally important, perhaps, he also feared that the leaders of China would not meet with him if they did not think that they could do so in secret.

For both of these reasons, Nixon didn't even tell his own Secretary of State or his own Secretary of Defense what he and Kissinger were doing. The events that I am about to describe were hidden from Nixon's own cabinet.

About the only line of communication between the United States and China in that era was through Pakistan where both the United States and China had representatives. Acting through that conduit, Nixon reached out to China. He had no idea how the Chinese leadership would respond.

On the evening of June 2, 1971, Henry Kissinger received a message from Zhou Enlai. It said, in essence: "You would be welcome to come to China."

Kissinger was so delighted by that confidential communique that he rushed over to the White House mansion where President Nixon was giving a state dinner for the President of Nicaragua. Kissinger asked a military aid at the entrance to the State Dining Room to find the President and tell him that Kissinger had an urgent message to discuss. A few minutes later, Nixon left the dinner and took Kissinger to the Lincoln Sitting Room. When Kissinger told him the news, Nixon found some brandy and two glasses. According to Nixon's memoirs, he made a toast to "Future generations who will have a better chance to live in peace because of what we have done."

That was on June 2. But it still was not completely clear that the meeting would take place.

Nine days later, on Friday, June 11, Kissinger received the final confirmation that he would be welcome in China on July 9, 1971. As of that date, as Kissinger later wrote, "we were now committed."

To understand the importance of the timing, note that this second note came on Friday, June 11, and remember that this was all so secret that Nixon and Kissinger had not even informed their own Secretary of State or their own Secretary of Defense.

The Pentagon Papers first appeared in *The New York Times* two days later, on Sunday, June 13.

In the play, as rewritten for this tour, I suggest that one of the reasons for President Nixon's effort to block publication of the Pentagon Papers was his concern that the Chinese would think that the leaders of the American government couldn't keep a secret and, as a result, would cancel the meeting. I also highlight his somewhat related fear that if word of the overture to China were to leak inside the United States, Nixon's own anti-communist political base – the people sometimes called "the China Lobby" – would stop him from meeting with the Chinese. This was a minor theme in earlier versions of the play, but I made it a more important one for the China tour.

At first, the Nixon administration asked *The New York Times* not to print additional installments. When the Times refused that request, the government went to court to block *The New York Times* from printing, and the district court judge issued an order blocking the Times from printing further installments until he could hold a full hearing on the issues.

At that point, Ellsberg gave the papers to a second great newspaper, *The Washington Post*, with the hope that it would pick up where the Times had been forced to leave off.

My play, which some of you have seen, focuses on the story of *The Washington Post* because that story was more compressed and, in some ways, even more dramatic. The Post's lawyers had several concerns: Did the papers contain secrets that could jeopardize the nation's security? Would the paper's finances be damaged if they were to publish? Most frightening, perhaps, might publication be considered espionage – and might a few editors or executives be sent to prison.

During a single tense day, the Post's lawyers and editors debated whether to give the government a chance to know that they had a copy of the papers and give them a chance to identify any true secrets.

Ultimately the Post's principal owner, Katharine Graham, sided with her editors and not with her lawyers and she decided to publish. In a sense, it's a woman's story, since Mrs. Graham, who was the first and only woman in America to control a paper as important as the Post, had to choose between her editors and her financial and legal advisors. She took a risk that, in the end, helped to make the Post an even more important publication.

In the United States, we have three levels of federal courts – district courts, courts of appeals, and the United States Supreme Court. After a series of decisions by district courts and appeals courts, the government's cases against both *The New York Times* and *The Washington Post* went to the United States Supreme Court.

There are nine United States Supreme Court Justices. In a very unusual decision, every one of the justices wrote an opinion. The lawyers and law students among you have read various U. S. Supreme Court decisions and you know that there is usually a majority opinion and sometimes a dissent and perhaps a concurring opinion and a second dissent. But in this case, each justice wrote an opinion setting forth his views. So there were nine different opinions. Since six of the nine justices said that the papers should be allowed to resume publication, the Pentagon Papers case was clearly a victory for the press. With nine opinions, there was no clearly articulated rule. But most experts agree that the opinions, when taken as a whole, stand for the position that the government can only stop a newspaper from printing if the nation is at war, or in a situation similar to war, and if the government's lawyers can prove that stories contain information that will inevitably, immediately, and directly put lives at risk.

That is a very high standard. In the Pentagon Papers case, the government could not meet that standard. So finally, the government allowed *The New York Times* and *The Washington Post* to resume publication. Importantly, some of the decisions favoring the newspapers over the Nixon administration were written by judges appointed by the ruling political party, and named during the years when Nixon was either the Vice President or the President of the United States. Our courts are an independent branch of government. They have the responsibility to follow the law and the power to rule for the press, even when the President who named them to office is against the press. And so my play, and this talk, is, in part, about an independent judiciary. Without an independent judiciary, and a nation that will respect its decisions, it is probably impossible to have a truly free press.

But the importance of a free press and an independent judiciary isn't the end of the story. The play – and this talk – is not just about the role and power of the government and the courts. They are also about the role and responsibility of the press.

In my classroom and in my play, I try to explore the responsibility of reporters if they have the freedom to publish. In my view, our First Amendment gives the press great freedom but that freedom should be accompanied by great responsibility by those who enjoy it.

In the play, the person who makes the argument that the reporters have to be responsible is the lawyer. He becomes an ethical advisor – or maybe an ethical critic. At the end of the play, after he and the newspapers have won the court case, he poses a question that I think is very important to keep in mind. He says, “You proved you got the courage to say ‘yes’ [that is, to print], but have you got the courage to say ‘no’ [that is, not to print]?” Reporters and editors should ask themselves that question, even when they know about a story that could make a lot of money for the paper, or that could win a prize for that paper.

On a related note, in the play I try to show that there are such things as real secrets. Not all Americans understand this point. But it’s very important to understand. There are real secrets. There are secrets that would meet the court’s standard, that, if published, would clearly, inevitably put the nation at risk or lead directly to the death of American troops or citizens. There may be some other real secrets, ones that don’t meet that high standard, that a paper shouldn’t responsibly tell. Importantly, the press in our country has generally proved responsible and doesn’t print real secrets.

Over the years, I have made kind of a hobby out of collecting real secrets that the press has not told. Some such stories can be discussed, but others can’t – or won’t be known for a very long time.

One real secret that I use to make this point in the play concerns the Battle of Midway in World War II. In June, 1942, just six months after the destruction of much of the American Pacific Fleet at Pearl Harbor, America won the Battle of Midway against Japan, even though our Navy had been decimated. One leading military historian called it “The most stunning and decisive blow in the history of naval warfare.” We won that important battle because we had cracked the Japanese code and knew exactly what they were going to be doing.

The Chicago Tribune, an important newspaper in the American Midwest, published the fact that we had broken the Japanese code. If the Japanese had read that article that we had broken their code, America would’ve lost the Battle of Midway. That is an example of a news story where the direct result of publication could have been loss of American lives. The breaking of codes is one category where secrets really matter.

Another example of a story where reporters kept an important secret took place thirty years ago, during the Iran hostage crisis. In 1979, the American Embassy in Iran was taken over by radical students about your age who kept the employees of the Embassy as hostages for months. For much of the next year, it was the biggest story in the United States and, to some extent, in the world. The American press knew that some of the people being held hostage in the American Embassy were CIA agents. They knew which ones they were. But they didn’t print that information because they were convinced that those CIA agents would probably be killed if their captors knew who they were.

Here is a third example from my collection. My play was first performed in the summer of 1991, just after what is sometimes called the First Gulf War. To remind you of the context (and about a war that took place when most of you were very young), in August of 1990, troops from Iraq invaded the sovereign nation of Kuwait. After negotiations failed, a large international force led by the United States fought back against Iraq in a war that started in January 1991 and ended

less than two months later. The coalition forces led by the United States won the first Gulf War relatively easily. One of their key tools was what might be called deception. Like the creation and breaking of codes, deception is another important instrument of warfare.

Some of you may remember reading that the Greeks won the battle of Troy thanks to a huge wooden horse, later called the Trojan horse. According to legend, the people of Troy, also known as the Trojans, thought that the Greeks had abandoned the horse when the Greeks appeared to sail away from Troy after an indecisive ten-year war. The Trojans took the horse inside their walled city as a trophy of victory. But unknown to the Trojans, the horse was filled with Greek troops who crept out of the horse that night and opened the gates of the city so that the Greeks could enter. The success of the Greeks depended on deception – and secrecy.

In the First Gulf War, the coalition forces made use of deception, too. Iraq had no capacity to know what America's military plans were. They had no satellites that they could use to see what was going on, they had no planes in the air because the coalition's air force was able to keep all of their planes out of the air. So the only way that Saddam Hussein and the other leaders of Iraq could know what was happening was by reading the news media or watching television, and especially, in those days, *CNN*.

The coalition troops were led by an American General named Norman Schwarzkopf. He led reporters to believe that the coalition forces were planning an amphibious landing in the northern part of the country. But in fact, he planned to put most of his resources into a land invasion from the south.

Believing what he was reading and hearing on the news, Hussein amassed his men in the north, at the water, rather than in the south. The coalition won the war relatively quickly and easily because Hussein had been deceived.

Did any American reporters know that they were being used? Did they know that Schwarzkopf was planning to invade from the south? If so, they did not print what they knew. I believe that it is very likely that some publications, quite possibly including *The Washington Post*, knew the actual battle plans but decided to keep them secret.

The most important current illustration of the importance of secrecy in national security situations involves President Obama and Osama Bin Laden. As you know, Americans are convinced that Bin Laden was responsible for killing more than 3,000 people on September 11, 2001, when two hijacked planes destroyed the World Trade Center and a third hijacked plane flew into the Pentagon. The United States Military has been determined to capture or kill Bin Laden ever since.

On May 1 of this year, as you all know, a team of U. S. Navy Seals, in a top secret and very dangerous night raid, found Bin Laden living in a compound in Abbottabad, Pakistan. If that operation had been made public in advance, the Navy Seals would probably have been killed and Bin Laden would never have been captured or killed.

If an American newspaper had known that story in advance, would they have printed it? I doubt it.

So there are real secrets. There is information that could put lives and national security at risk. In a society that treasures freedom of the press from government interference, the real issue is this: how should the press deal with cases that pose a conflict between national security and the

First Amendment? In our country, we believe in the right to publish except in very narrow circumstances. But we also think it is essential that the press be responsible and treat that information with great care.

In that respect, there have been some important changes since the Pentagon Papers case. Now that the courts have made it clear that it is almost impossible for the government to stop a newspaper from printing information that it deems important, the press often goes to the government in advance to ask if a story contains information that could put lives or our national security at risk.

There have been several such cases in the last couple of years. For example, in 2004, *The New York Times* learned that the National Security Agency was improperly, and probably illegally, working with American telephone companies to engage in electronic surveillance of American citizens. At the request of the government, the Times did not print the story for more than a year. When the Times did start to print stories about the NSA's program, some commentators called it treasonous, but others called the decision an act of great journalism. There was a genuine debate, but the government did not try to penalize the papers. The Times earned the Pulitzer Prize for the NSA piece, which is the highest possible honor a publication can achieve in our country.

A second example is involves WikiLeaks. In late 2009, when it gained possession of thousands of American diplomatic cables marked secret (not "top secret"), WikiLeaks allowed three great international news organizations to develop the story – *The Guardian* in England, *Der Spiegel* in Germany, and *The New York Times* in the United States. Before going to print with their reports, *The New York Times* checked with the government to see if their stories contained any information that would be truly dangerous to American interests. The paper's editor, Bill Keller, later wrote a long essay describing his contact with the government.

So when there are stories that involve what truly might be deemed real secrets, the press generally tries to be careful not to endanger the nation in any way.

On the other hand, the government often claims that stories are secret and tries to block or censor them for a very different – and much less noble - reason. Officials often want to kill stories that would undermine their decisions; or make them look foolish; or that would show that they or their colleagues or their employees are engaged in illegal conduct. Some government officials would rather not see accounts that show that they or their colleagues behaved badly. Or that portray an internal debate that makes them look ignorant – or wrong. Or that show corruption inside of the government. Some government officials would like to block reports that show that American troops have been engaged in torture, or that American military leaders have been responsible for improperly and perhaps illegally targeting civilians.

Those are all stories that the press should tell in a democracy. They are painful but important. They can and often do lead to reforms that improve our system. Sometimes they result in changes in policy and in our appointed or elected leadership. When the government tries to block such stories, the press has to rely on an independent judiciary that can protect the press when the government wants to censor stories that the public has a need or a right to know.

In some important respects, the relationship between the press and the government in national security cases has been changed by the Internet. Daniel Ellsberg, the man who gave the Pentagon Papers to *The New York Times* and then to *The Washington Post*, has said that if the

Internet had existed in 1971, he would have given the Pentagon Papers to Wikileaks or simply published them on the Internet by himself.

In fact, Daniel Ellsberg only gave 4,000 pages of the 7,000 page Vietnam report to reporters at the Times and the Post because he wanted to protect the secrecy of those documents that could have interfered with diplomatic efforts to end the war. So I guess that he means that he would have put 4,000 pages of the 7,000 page report on the Internet.

Technology has changed the equation. Reporters and newspapers – or what we sometimes call the mainstream press in America – are no longer essential. The Internet has changed that. Twitter has changed that. And in China, Weibo has brought about some changes. There are new ways of distributing, disseminating, and publishing information. We all need to give some thought to the implications of those changes – and of others to come – that have been made possible by technology.

But there are some enduring lessons in all of this. First, in a democracy there is always going to be a need for the public to be informed. The public needs to know about corruption, about bad decisions that send people to war, to be informed about internal debates, to be informed about illegal activity, to be informed about things that are embarrassing. But there always are going to be times when the government has a legitimate, important reason to try to keep information out of the public view.

And there will always be times when there are overzealous government lawyers, when leaders at the Department of Justice, which brings prosecutions on behalf of the executive branch of the government, prosecutes cases that it shouldn't. And that's going to happen no matter who the President is, whether you love the President or you hate him, whether he is a Democrat or a Republican.

I'm a Democrat. I voted for Obama for President. But, in this area, Obama has been no hero. In some respects, that should not be a surprise. He's the President.

Dana Priest, who is arguably the most important national security reporter in *The Washington Post* today, just wrote a book called Top Secret America. And in the book she says that Obama "has taken a more aggressive tact against the unauthorized disclosure of classified information [to the press] than the Bush administration." But it's not because he's a bad guy. It is because he's the President. And therefore the press has to be a check on the President whether they like him or not.

In America, there is always going to be a need for an independent press. And there is always going to be a need for an independent judiciary that has the power to protect the press when the executive branch is doing the wrong thing. And I'm just going to mention two examples of the importance of an independent judiciary.

One involved a man named Wen Ho Lee. Wen Ho Lee was an American scientist who was accused of spreading nuclear secrets. He was kept in jail, in shackles, for years. The charges were false. They were unfair. He was released by a federal court, by a judge, who criticized the administration in the most strenuous terms, and then he sued the government and the press and was awarded \$1.6 million. His ultimate vindication and victory was made possible because he had access to an independent judiciary, because people like those of you in this room could become judges and have the courage to say, "There are times when the government is wrong."

The most recent case of this kind involved the Obama Administration. Thomas Drake, a military veteran who worked for the National Security Agency, believed that the NSA was wasting billions of dollars on one of its computer programs. He tried to get the agency and Congress to pay attention, but when that failed he took the story to *The Baltimore Sun*. The Bush Administration charged him with espionage and the Obama Administration continued to pursue the case when he came into office. The case came to trial in June of this year. A federal judge who had been appointed by George W. Bush was furious with the government's lawyers and said, "You have no business prosecuting this man." It was another case of the importance of an independent judiciary in our country.

I want to leave you with a final thought before the commentary and our discussion. My hometown newspaper, *The Los Angeles Times*, has a story tomorrow about my play. It closes with a short interview with a government official.

Last night as this government official was leaving the play, the reporter asked, "What do you think of the play?" And the government official said that "The play shows the difference between a developed country and a still developing country."

"It's not just a matter of super highways," he said, "The play gives us food for thought."

From my perspective it's been a fascinating 10 days in China with this play, with conversations with journalists and journalism schools, with lawyers and law schools. I hope that some of the things discussed in the play do indeed provide some food for thought.