

The Legal Balance between Freedom of the Press and National Security in the United States

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Abstract: *In the United States, the conflict between press freedom and national security can be attributed to the dispute over the press's claimed right and the government's claimed right. To be more specific, the press claims that it has the right to publish classified national security information freely and preserve the confidentiality of news sources. In response to claims which makes by the press, the government argues that it has the right to censor publication in advance and compel journalists to identify news sources who leak classified information. Based on the importance of freedom of the press and national security, the U.S. courts usually uses legal balance to deal with the above-mentioned conflict. According to the results, the United States emphasizes the importance of freedom of press in the legal balance between press freedom and national security, and regards the guarantee and maintenance of national security as an exception. This practice is worth of other countries' vigilance, because national security is a basic prerequisite for national survival and development. Only when the national security interests are guaranteed can a country realize the freedom of the press in a real sense.*

Keywords: *Freedom of press, National security, Classified national security information, Legal balance*

1. Introduction

Freedom of the press is an important foundation of constitutional democracy. Justice Benjamin Cardozo once described the expressive rights of the First Amendment as "the indispensable condition of nearly every other form of freedom".

However, it does not mean that press freedom has unshakable precedence in the law. In fact, national security has been often cited as the main legal reason for limiting it, which has led to a long-standing conflict between press freedom and national security. It has often been argued that national security interests are best served at the expense of freedom of expression[1].

So far, there is still no widely accepted conclusion to answer the question of how to deal with the conflict between press freedom and national security. Improper response to the conflict between national security and press freedom will seriously harm the national interests of modern countries. If national security is allowed to overwhelm the freedom of the press, the free release of news and access to classified information may face many obstacles. On the other hand, if the press is allowed to freely publish the classified national security information, the national security information secrecy system will exist in name only. In this context, the balance between press freedom and national security is indeed needed.

2. The Causes of the Conflict between Freedom of Press and National Security in the United States

Throughout American history, the main reason for the conflict between freedom of the press and national security lies in the different claims of the press and the American government. Specifically, when national security matters are involved, the press often claims that it has the right to publish classified national security information and the right to protect the confidentiality of news sources. In response, the government has also made two claims: one of them is that the government has the power to review publication about classified national security information in advance, the other is that the government has the right to prosecute its employees who leak classified national security information[2].

2.1. The Conflict between the Press's Claimed Right to Publish Classified National Security Information and the Government's Claimed Right to Review Publication beforehand

The case of *New York Times Co. v. United States* is a typical example of the conflict. In this judicial process, the *New York Times* claimed that the press had the right to freely publish classified national security information, while the US government claimed that the government had the right to review news reports concerning classified national security information before the press publish them.

From the perspective of legal theory, these two claims are reasonable to some extent. There has been a normative consensus in the American legal tradition to refuse to punish journalist or publishers for publishing classified information, or to use prior censorship to prevent publication. But meanwhile, the legitimacy of protecting national security is obvious and indisputable, and in order to maintain national security, confidentiality of information is essential. Mainstream legal theory generally holds that it is the natural duty for each citizen to protect confidential national security information. Justice Burger said, "I find it hard to believe that *The New York Times* has failed in its fundamental obligation to inform the appropriate government departments and officials when it discovers stolen property or secret government documents, rather than buying, selling and leaking them."

In addition, the two claims have some constitutional grounds. The press claimed that its right to publish classified national security information freely was derived from the First Amendment. Madison made historic claims that would become an important part of the First Amendment, and the claim is that the right to speak, write, and express opinions shall not be denied or restricted, and the freedom of the press, as one of the great bulwark of freedom, is inviolable. Similarly, the U.S. government's right to censor news reports published by the press on national security grounds also has clear constitutional grounds. In *New York Times Co. v. U.S.*, the Solicitor General has carefully and emphatically stated, "There are other parts of the Constitution that give powers and responsibilities to the executive branch, and the purpose of the First Amendment is not to prevent the executive branch from performing its functions or protecting the security of the United States."

Since the press's right to publish classified information and the government's right to review classified news in advance are both reasonable and legitimate to some extent, it is difficult for courts to make a clear judgment when the two conflicts. Therefore, although both jurists and judges have tried their best to explore the original intention of the legislators, it is still hard for them to reach a universal standard of judgment and an eternally correct conclusion[3].

2.2. The Conflict between the Press's Claimed Right to Protect the Confidentiality of News Sources and the Government's Claimed Right to Compel the Newsman to Disclose the Classified News Sources

The conflict is typically reflected in the case of *Branzburg v. Hayes*. In this case, Brantzburg, the *Louisville Courier-Dispatch* journalist, claimed that journalists had the privilege to refuse to disclose confidential sources of information, based on the hypothesis that mandatory disclosure of a journalist's confidential sources of information may lead to a deprivation of press freedom by imposing some restriction on the availability of news.

To some extent, Brantzburg's claim was plausible. Because in order to gather news, journalists often must promise to keep their sources confidential, and the First Amendment should support journalists keeping those sources confidential. This is not to protect journalists or those who leak information, but to ensure that news can be freely disseminated to the public. In fact, this privilege may play a more critical role in protecting press freedom when the source of the information contradicts the law or public opinion. When news sources express unpopular views, the privilege of safeguarding the confidentiality of news sources is crucial. Because he or she could be the target of criticism and retaliation. This kind of right can eliminate the inhibition of the expression of ideas and reduce the possibility of the despotism of public opinion.

Looking at the government's claims, we can also find some validity in them. The truth is that only in very rare cases do journalists need to keep their sources of information so secret that they cannot reveal their sources to a jury. Judge Tatel also agreed that disclosure of classified national security information is so damaging that it is unacceptable to always allow the newsman to keep news sources anonymous.

Therefore, the dispute over the two rights in the current period remains inconclusive. This is to say that if we take a position that the freedom of the press is paramount, disclosure of news sources for any reason will lead to undeserved restrictions on the freedom of the press. Similarly, if our preference is for the protection of national security, granting the newsman a privilege to refuse to disclosure of confidential

news sources is unacceptable[4-5].

3. Responding the Conflict between Press Freedom and National Security

The conflict between freedom of the press and national security essentially reflects the conflict between the multiple values of the law. In the history of the United States, the realization of the legal value of national security and the realization of the legal value of press freedom did not always go hand in hand. In response to these conflicts, courts have engaged in a long and deliberate process of legal balance.

3.1. Whether the Press Have the Right to Publish Classified National Security Information without a Prior Restraint

In *New York Times Co. v. United States*, the court predicatively struck down the government's claimed right to review publication concerning classified national security information beforehand. Justice Black said, "I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment."

In fact, although a majority of the justices firmly upheld *New York Times'* claim, they did not want to subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. For example, justice Brennan believed that the government should not have the right to censor the publication in advance, but he did not deny the important value of national security. To be more specific, Brennan insisted that many precedents explicitly recognized the importance of national security and permitted necessary restrictions on press freedom on national security grounds. But he also argued that the conditions for national security restrictions on press freedom should be severe. He said, "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result". Similarly, justice White also balanced the important values of press freedom and national security. He stressed, "I do not say that the First Amendment does not under any circumstances permit the government to issue an injunction prohibiting the news media from disclosing national security secrets. Members of Congress seem to have little doubt that newspapers will be subject to criminal prosecution if they insist on publishing information that Congress itself decides should not be disclosed. Senator Ashurst, for example, was quite certain that the editor of such a newspaper should be punished if he did publish information about fleets, troops, aircraft, powder factories, positions of fortifications."

To some extent, this suit has had a significant and far-reaching impact on the American legal profession, because it represented the government's first attempt to obtain a prior restraint of press publication on national security grounds. But the attempt failed, after that, such attempt have been seen as one of the sensitive grey areas of the constitution that successive governments have traditionally regarded as off-limits. That is to say, the U.S. court is wary of prior restraints on the press, while taking a relatively laissez-faire attitude toward the release of classified national security information. Furthermore, in the conflict between freedom of the press and avoiding the leakage of national security information, courts tend to recognize the priority value of freedom of press[6].

3.2. Whether the Journalists Have the Privilege to Refuse to Identify News Sources Who Leak Classified Information

Compelling the newsman to disclose information sources is an effective means to prevent national security information leakage. Because the criminal penalty of deprivation of personal liberty makes those who possess classified national security information are more likely to refuse to leak classified national security information to journalists.

A look at judicial precedents in recent decades reveals that the American legal profession is likely to endorse this claim. In *Branzburg v. Hayes* (1972), the Supreme Court formed a judicial precedent that would have a profound impact on the future practice of law. The court argued that the First Amendment did not give journalists a privilege to ensure the confidentiality of their sources, and that neither the First Amendment nor any other constitutional provision gives journalists the right to refuse to disclose information sources they know. Objectively, although this precedent did not involve the conflict between national security and press freedom, it strongly supported the claim that the government had the right to compel journalists to disclose the sources of classified national security information, which had a strong

influence on the case of Judith Miller in 2006. In that case, the U.S. Court of Appeals for the District of Columbia Circuit asked Judith Miller, a former New York Times reporter, to testify about whether Lewis Libby leaked the identity of an undercover C.I.A. agent[7].

In conclusion, although the judges recognized the value of press freedom and the importance of protecting the confidentiality of news sources, they were more inclined to prioritize the protection of national security interests. As a result, U.S. courts have limited the journalists' privilege of refusing to disclose confidential information sources to a very narrow range, meaning that the privilege can only be used to resist malicious investigations intended to block the journalists from gaining information.

4. Rethinking the Legal Balance between Freedom of the Press and National Security

In recent decades, U.S. courts have repeatedly tried to balance the conflict between freedom of press and national security, but these attempts have often been mixed. The court's decision to allow governments more leeway when restricting speech regardless of content was, and remains, controversial.

4.1. Gains and Losses in the Legal Balance of the Conflict between the Press's Claimed Right to Publish Classified National Security Information and the Government's Claimed Right to Review Publication Beforehand

Reviewing some representative judicial precedents, it can be found that some of them have gained recognition from the legal profession, because they dealt well with the dispute over the press's claimed right to publish classified information and the government's claimed right to review publication beforehand. To be specific, these recognized judgments have the following two advantages. Firstly, they have taken into account the important values of press freedom and national security. In *New York Times Co. v. United States*, the Supreme Court upheld The Times's claim, but it also recognized that the importance of national security to the United States was self-evident. Secondly, these courts' decisions have strongly ensured the realization of press freedom, an important foundation of constitutional democracy. In *U.S. v. Morison*, the court argued that freedom of the press was harmful to national security or the public interest only in rare cases, and that in most other cases, the value of freedom of the press was worthy of priority protection.

However, it should also be noted that there are many defects in the above-mentioned judgments, which are shown as overemphasizing the rights of journalists while ignoring their legal obligations as ordinary citizens, and overemphasizing the value of the freedom of press while ignoring the significance of national security to some extent. To be more specific, in *New York Times Co. v. United States*, the judges who upheld New York Times' claim failed to recognize that journalists, in addition to being employees of the press, were members of civil society and have the obligation to refuse to leak classified national security information. Moreover, although the U.S. courts have never lost sight of the importance of national security, they have conspicuously failed to place it at a proper height. For a long time, there has been a popular view in American legal circles that ordinary national security threats are trivial and the prior restraints on the freedom of the press are justified only when national security may suffer "direct, immediate, and irreparable damage". Objectively, this view is questionable. In *New York Times Co. v. U.S.*, justice Blackmun believed that there were a lot of real-world examples that, once classified documents revealing national security information were released, it was clear that great harm can be done to the country, which could point to the death of soldiers, the fragmentation of alliances, the much greater difficulty of negotiating with the enemy, and even the inability of diplomats to negotiate.

In fact, information leakage is completely different from the loss of property in the modern society, because the dissemination of information is uncontrollable and the loss caused by it is often irreversible. For example, the classified national security information that Manning and Snowden leaked to the press became known to internet users all around the world within a day, the U.S. government has few options to deal with the fallout from the leaks.

In conclusion, the legal balance aimed at harmonizing national security and press freedom in the United States has many commendable points, which are reflected in the fact that the legal balance takes into account the important values of press freedom and national security, and to some extent protects the press's right to publish information freely. But at the same time, we should also see that there are many defects in the above-mentioned legal balance, and these defects unduly belittle the adverse effects of the leakage of classified national security information and the critical role of the prior restraints in safeguarding national security[8-9].

4.2. Gains and Losses in the Legal Balance between Protecting the Confidentiality of News Information Sources and Compelling the Journalists to Identify News Sources Who Leak Classified Information

In *Branzburg v. Hayes*, *Judith Miller and New York Times Co. v. Gonzales*, the U.S. court has achieved success in the balance between protecting the confidentiality of news sources and compelling journalists to identify news sources who leak classified information. First, the court has adopted a position that considered the multiple values of the law. For example, in *Branzburg v. Hayes*, although the Supreme Court compelled Branzburg to disclose his news sources, it also recognized that if a journalist believed the grand jury investigation was not being conducted in good faith, he was not without remedies. Generally, he had the right to file a motion with the court to quash the action and may obtain an appropriate protective order. Second, the success of the aforementioned balance also lain in the fact that judges recognized that journalists also had obligations in the protection and maintenance of national security. In the *New York Times Co. v. Gonzales*, the court has rightly pointed out, most people and the government seemd to think that disclosure in this case was very important, and there was no need for courts to protect the identity of leakers because it had little value in maintaining the free flow of information.

In addition, there are still a few questionable points in these judicial precedents. For a long time, in the U.S., the legal profession has resented court decisions compelling journalists to disclose sources of classified national security information. Because many jurists believe that preserving the confidentiality of news sources is just as integral to the publication process as is a journalist's receipt and possession of information. Keith Werhan, a professor in Tulane University School of Law, said that government subpoenas to compel journalists to reveal their sources in grand jury proceedings should provoke rigorous judicial scrutiny, this is because they undermine the principle of press autonomy that underlies the Press Clause of the First Amendment. In his opinion, this principle should protect the press not only from acts of governmental coercion involving the editorial judgments about what to publish, but also from acts of governmental coercion regarding news reporting at all stages of the publishing process, including news gathering and investigation.

In fact, the argument mentioned above is probably untenable. This is because the privilege to preserve the confidentiality of news sources is limited. In *Jaffee v. Redmond*, the Supreme Court recognized a privilege between a psychotherapist and a patient and applied it to social workers and their patients, the district court concluded that a qualified reporter's privilege exists under Federal Rule of Evidence 501. After finding that such a privilege exists, the district court held that any such privilege would be qualified rather than absolute. That is to say, even if the journalists really have the privilege to preserve the confidentiality of news sources, it is unlikely for this privilege to fight against all public interest, and the government's claimed right to defend national security is essential to protecting such public interest.

And in fact, although American courts compelled journalists to identify news sources who leak classified information, the scope of this identification was considerable limited. The judges did not believe that journalists need to confess everything in order to protect national security, although more information disclosure can often help the government to better protect national security. As a result, it's hard for the government to effectively stop leakers from continuing to leak classified national security information to journalists. To some extent, the problem with the court decisions are not that they fail to perceive the full value of press freedom, but that it still do not pay enough attention to national security.

5. What Can Other Countries Learn from the Balance between Press Freedom and National Security in the United States?

In fact, the purpose of discussing the conflict and balance between press freedom and national security in the United States is by no means to describe the basic status quo of corresponding legal practice in the United States, but to find the gains and losses from the conflict and balance, and to explore the experience and lessons that can help optimize and improve the relevant legal practice in other countries.

5.1. Experience that Can Be Used for Reference

First, the balance between the press's right and the government's right should be regarded as the "crucial point" of the balance between press freedom and national security. The adverse impact of press freedom on national security is mainly reflected in the improper news reports of leaking classified national security information. Therefore, for the sake of national security, a country should impose

necessary restrictions on the press, especially to prevent the news media from publishing all kinds of classified national security information without any restrictions, which involves the conflict of the press's right to publish information freely and the government's right to review the publication beforehand. In addition, a country also needs to prevent unauthorized persons from obtaining and leaking classified national security information, which involves the conflict of the press's privilege to ensure the confidentiality of information sources and the government's right to compel the media to disclose information sources. From this point of view, the conflict between the freedom of the press and national security can be accurately and effectively resolved at the legal level by resolving the dispute over two pairs of rights.

Second, to resolve the conflict between press freedom and national security by the legal balance. In fact, the dispute over the press's claim and the government's claim is often lack of clear legal basis, or the relevant legal basis is ambiguous, and at the same time, this dispute is also embedded in the conflict of legal values of freedom and security. Therefore, it is extremely unrealistic to purely rely on legal texts to deal with the aforementioned rights disputes. We should also need legal balance, because it can remedy the deficiencies and omissions in laws and regulations, and is often used in judicial decisions where there are conflicts of values, principles and purposes.

Third, taking into account the legal values of press freedom and national security is the correct way of legal balance. As mentioned above, both press freedom and national security are legal values that a country needs to focus on protecting, which means that when these two legal values conflict, judges should not fully recognize one while completely rejecting the other. In the same way, judges should not make absolutist judgments when they are confronted with the dispute between the rights of the press and the rights of the government. They may favor one over the other, but they cannot ignore the important value of the other. For example, a judge may recognize that a journalist has a privilege, but this privilege is not permanent, and the legal balance will force it to give way to a country's national security when necessary.

5.2. Deficiencies that Arouse the Vigilance of Other Countries

Reconsidering on the defects in the relevant legal balance, we can also find some lessons worthy of vigilance of other countries, which are mainly reflected in the following three points:

First, we should guard against the "press freedom absolutism" in the creation and application of laws to ensure the basic balance of rights and obligations of the press. American judicial decisions often regard national security as an exception to the freedom of the press. As a result, in the United State, the classified national security information has never been perfectly protected, which can be seen from the frequent publication of the classified information by the press. Objectively, a country should not only protect journalists' right to publish information freely, but also realize that journalists, as members of civil society, also need to fulfill the obligation of ordinary citizens. In the conflict between press freedom and national security, this obligation should be manifested in informing the relevant authorities when the public discovers the leakage of confidential national security information, rather than publishing such information.

Second, giving full play to the role of prior restraint and subsequent punishment in dealing with the leakage of classified national security information by the press. In fact, after the leakage of national security information, it is naturally necessary to punish the leakers and publishers, because they violate the confidentiality rules and regulations about national security Information. However, the role of subsequent punishment in preventing the leakage of classified national security information is limited, because the information dissemination in modern society is extremely rapid and irrepressible, and once national security information is leaked, the damage caused by it is often irreparable. Unfortunately, the U.S. court has not recognized the importance of prior restraint, which is probably very wrong. In response, Admiral Turner, Director of the CIA, said, "Over the last six to nine months, we have had a number of sources discontinue work with us. We have had more sources tell us that they are very nervous about continuing work with us. We have had very strong complaints from a number of foreign intelligence services with whom we conduct liaison, who have questioned whether they should continue exchanging information with us, for fear it will not remain secret. I cannot estimate to you how many potential sources or liaison arrangements have never germinated because people were unwilling to enter into business with us."

Third, correctly understanding the significance of national security to the freedom of the press and the survival and development of a country. In many judicial decisions mentioned above, American courts

often only one-sidedly recognize the adverse impact of protecting national security on press freedom, but fail to realize that national security is an important prerequisite for the realization of press freedom. It is a fact that has been proved countless times in human history that freedom of the press is an illusion in countries where national security cannot be guaranteed. Actually, "national security is the basic premise of national survival and development, and an important cornerstone of a peaceful country". If a country wants to pursue press freedom and even more important national interests, it must first protect and defend its national security.

6. Conclusion

In the United States, lawmakers generally do not give journalists the right to access classified national security information without hindrance. Therefore, when the press wants to publish such classified national security information, it often claims that it has the right to publish classified national security information and the privilege of refusing to disclose news sources. In response to the adverse effects caused by the press on national security, the United States government has made two competing claims. It claims it has the right to censor news reports in advance and the right to compel journalists to disclose the sources of classified information. Generally, the conflict of rights mentioned above has become the main reason for the conflict between press freedom and national security in the United States.

Rethinking some representative judicial precedents, it can be found that in the balance between press freedom and national security, the United States is more inclined to emphasize the important value of press freedom and often regards national security as an exception to protect press freedom. To some extent, this recognition has contributed to the prosperity of American journalism, but it has more or less damaged the national security interests of the United States.

In fact, the realization of press freedom at the expense of national security is very wrong, which unilaterally emphasizes the adverse effects of protecting national security on press freedom and fails to reasonably realize the beneficial effects of protecting national security on press freedom.

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