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Today, some sun, a shower or thunderstorm, high 82. Tonight, cloudy, a thunderstorm south, low 66. Tomorrow, breezy, showers north, high 78. Weather map, Page A1

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NEWS ANALYSIS

In Rulings, Spy vs. Leaker

Traditional View of the First Amendment Is Being Revised as Cases Are Prosecuted

By ADAM LIPTAK

WASHINGTON — The federal government is prosecuting leakers at a brisk clip and on novel theories. It is collecting information from and about journalists, calling one a criminal and threatening another with jail. In its failed effort to persuade Russia to return another leaker, Edward J. Snowden, it felt compelled to say that he would not be tortured or executed.

These developments are rapidly revising the conventional view of the role of the First Amendment in national security cases. The scale of disclosures made possible by digital media, the government's vast surveillance apparatus and the rise of unorthodox publishers like WikiLeaks have unsettled time-honored understandings of the role of mass media in American democracy.

This is so even where the government was the nominal loser. Consider the case of Pfc. Bradley

Manning, who dodged a legal bullet on Tuesday, winning an acquittal on the most serious charge against him: that releasing government secrets to the public amounted to "aiding the enemy."

But a dodged bullet is still a bullet.

The military judge in Private Manning's case ruled last year that there was no First Amendment problem with the government's legal theory. Providing classified information for mass distribution, she said, is a sort of treason if the government can prove the defendant knew "he was giving intelligence to the enemy" by "indirect means."

The verdict thus means only that military prosecutors did not prove their case. The legal theory stands, and it troubles even usual critics of unauthorized disclosures of government secrets.

"It blurs the distinction be-

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tween leakers and spies," said Gabriel Schoenfeld, the author of "Necessary Secrets: National Security, the Media, and the Rule of Law." He said the government might have lost a battle but made headway in a larger war by "raising the charge and making it seem plausible."

Something similar happened in 1971, when President Richard M. Nixon failed to stop the publication of the Pentagon Papers, a secret history of the Vietnam War. The Supreme Court's ruling allowing The New York Times and The Washington Post to publish the papers is often said to be a high-water mark in the annals of press freedom.

But like the Manning verdict, the decision represented a shift in the understanding of the First Amendment.

"The American press was freer before it won its battle with the government," Alexander Bickel, the Yale law professor who represented The Times in the case, wrote in his classic 1975 book, "The Morality of Consent."

"Through the troubles of 1798, through one civil and two world wars and other wars, there had never been an effort by the federal government to censor a newspaper by attempting to impose a prior restraint," Professor Bickel wrote. "That spell was broken, and in a sense, freedom was thus diminished."

Worse, from the perspective of the news media, the victory in the Pentagon Papers case was distinctly limited and helped shape the Manning prosecution.

"A majority of the Supreme Court not only left open the possibility of prior restraints in other cases but of criminal sanctions being imposed on the press following publication of the Pentagon Papers themselves," Floyd Abrams, who also represented The Times in the case, wrote in a new book, "Friend of the Court."

According to a 1975 memoir by Whitney North Seymour Jr., who was the United States attorney in Manhattan in the early 1970s, Richard G. Kleindienst, a deputy attorney general, suggested convening a grand jury in New York to that end. Mr. Seymour said he refused. A grand jury was then convened in Boston, but it did not issue an indictment.

The "aiding the enemy" charge in the Manning case was based on military law, and it is not directly applicable to leakers in

other parts of the government or to reporters and publishers. But the theory on which it was based has echoes in the more general espionage laws.

Until recently, its leading proponent was Nixon, who mused on the matter in a meeting in the Oval Office the day after The Times published the first installment of its reports on the Pentagon Papers.

"That's treasonable," he said to an aide, "due to the fact that it's aid to the enemy and it's a re-

Understandings of mass media's role in American democracy are unsettled.

lease of classified documents."

In "Fighting for the Press," a new book about the case, James C. Goodale, who was general counsel of The New York Times Company at the time, said President Obama has followed in Nixon's footsteps.

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Court Rulings Blur Line Between Spy and Leaker

"Obama apparently cannot distinguish between communicating information to the enemy and communicating information to the press," Mr. Goodale wrote. "The former is espionage, the latter is not."

But John Yoo, a law professor at the University of California, Berkeley, and a former Bush administration lawyer, said that distinction broke down in the Manning case because he did not make his disclosures directly to the establishment press.

"Manning's defenders will say that Manning only leaked information to the 21st-century equivalent of a newspaper, and that he could not have known that Al Qaeda would read it," Professor Yoo wrote in National Review Online.

"But WikiLeaks is not The New York Times or The Wall Street Journal, and it does not have First Amendment rights," he added. "Manning communicated regularly with WikiLeaks' founder and would have known about the group's anarchic, anti-U.S. mission."

In June, David Gregory asked Glenn Greenwald a question in a similar vein on NBC's "Meet the Press." Mr. Greenwald had written articles on government surveillance programs for The

Guardian based on materials from Mr. Snowden, a former National Security Agency contractor.

"To the extent that you have aided and abetted Snowden, even in his current movements, why shouldn't you, Mr. Greenwald, be charged with a crime?" Mr. Gregory asked.

Mr. Greenwald responded, "If you want to embrace that theory, it means that every investigative journalist in the United States who works with their sources, who receives classified information, is a criminal."

The Obama administration seemed to adopt that view in seeking a court order to examine the e-mails of James Rosen of Fox News. The administration's lawyers said there was "probable cause to believe" that Mr. Rosen was "at the very least" an "aider and abettor and/or co-conspirator" in violations of the espionage laws.

New Justice Department guidelines, partly a reaction to the furor over the Rosen matter, say the department will not treat "ordinary news-gathering activities" as criminal conduct. But the guidelines do not define those activities.

Last month, a federal appeals court agreed with the Justice Department that James Risen, an author and New York Times reporter, must testify in a prosecu-

tion under the espionage laws or face contempt charges.

To date, there have been no prosecutions of journalists in the United States for seeking or publishing classified information. But two lobbyists with the American Israel Public Affairs Committee, Steven J. Rosen and Keith Weissman, were charged in 2005 with violating the espionage laws for conduct they said was functionally equivalent to journalism: they had learned government secrets and passed them along to others.

As in the Manning case, the firewall turned out not to be the First Amendment but the difficulty of proving intent. After Judge T. S. Ellis of Federal District Court in Alexandria, Va., ruled that the government had to show the defendants knew their conduct would hurt the United States, prosecutors dropped the charges.

But Judge Ellis had a larger message, too. He said the case "exposes the inherent tension between the government transparency so essential to a democratic society and the government's equally compelling need to protect from disclosure information that could be used by those who wish this nation harm."

"The rights protected by the First Amendment," he added, "must at times yield to the need for national security."