

Testimony of

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Examining DOJ's Investigation of Journalists Who Publish Classified Information:

Lessons from the Jack Anderson Case:

Written Testimony of Prof. Mark Feldstein
Senate Judiciary Committee
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Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify and for the important oversight role you play keeping the government accountable to the people.

My name is Mark Feldstein. I am an associate professor of media and public affairs and director of the journalism program at George Washington University.

I am here today wearing two hats: First, as someone with first-hand experience who was recently visited at home by two FBI agents seeking access to archival records donated to my university by the late columnist Jack Anderson. Second, as a scholar who can offer some perspective on the larger issues raised by this case--as a journalism historian not an attorney or spokesman for George Washington University.

Jack Anderson Case

First, my own personal experience here:

I am writing a book titled *Poisoning the Press: Richard Nixon, Jack Anderson and the Rise of Washington's Scandal Culture* that will be published next year by Farrar, Straus & Giroux. In the course of my research for this book, I persuaded Anderson to donate his archives to George Washington University, which took custody of his papers in the summer of 2005. In December, Anderson died. His papers are not yet catalogued--the university is still trying to raise the money to do that--and as such these archives have not yet been made available to the public.

Approximately ten weeks after Anderson's death, I received a phone call from FBI Special Agent Leslie Martell. On March 2 of this year, after trading phone messages, Agent Martell told me she needed to talk to me about the Anderson papers but that the subject was too sensitive to discuss on an "open line." She suggested interviewing me at my home--she already knew the address--the next morning. I agreed.

At 9:15 a.m. on March 3, Agent Martell and a colleague, Special Agent Marcelle A. Bebbe, came to my house and showed me their FBI badges. Agent Martell informed me that the FBI needed to go through the Anderson papers in search of documents more than a quarter of a century old, going back to the early 1980s. I was surprised by the FBI's sudden interest in journalism history. I asked what crimes the agents were investigating. "Violations of the Espionage

Act," Agent Martell replied. She assured me that this was not part of the federal government's controversial re-classification program but rather a separate criminal probe involving lobbyists for AIPAC, the American Israel Public Affairs Committee.

I told the FBI agents that the Anderson papers in our collection were "ancient history," literally covered in dust. That didn't matter, Agent Martell replied. Even though she acknowledged that the statute of limitations had expired on any possible crimes committed that long ago, she said the FBI still wanted to root through our archives because even such old documents might demonstrate a "pattern and practice" of leaking.

As bizarre as it sounded, I could only conclude that the Justice Department had decided that it wanted to prosecute people who might have whispered national security secrets decades ago to a reporter who is now dead.

The FBI agents asked me if I had seen any classified government documents in the nearly 200 boxes of materials the Anderson family had donated to my university. I replied that I had seen some government documents--reports, audits, memos--but didn't know what their classification status was. "Just because the documents aren't marked 'classified' doesn't mean they're not," Agent Leslie Martell suggested helpfully. But I was unable to give her the answer that she wanted: that our collection housed classified records.

Later, after I thought about it, I could recall seeing only one set of papers that might once have been classified: the FBI's own documents on Jack Anderson. But our version of those papers was heavily censored, unlike the original FBI file already in their own office.

Ironically, for the past five years the FBI and other federal agencies have refused to turn over such documents to me under the Freedom of Information Act, even though almost all the people named in them are now dead. The government claims it would violate their privacy, jeopardize national security or -- in the most absurd argument of all - - compromise "ongoing law enforcement investigations."

The FBI agents also wanted the names of graduate students who had worked with me on my book to discover if any had seen classified government documents. They hadn't, but the FBI agents didn't seem to believe our denials and wanted to know where the Anderson archives are housed and who controlled custody of the papers.

In addition, the federal agents requested that I inform them of the names of former Jack Anderson reporters who were pro-Israel in their views or who had pro-Israeli sources. I told them I felt uncomfortable passing on what would be secondhand rumors. If I didn't want to name names, Agent Martell said, she could mention initials and I could nod yes or no. That was a trick Robert Redford and Dustin Hoffman used in the movie "All the President's Men." I didn't name any initials, either.

Agent Martell told me that Olivia Anderson, the ailing 79-year-old widow of the columnist, had signed a consent form giving the FBI permission to search through her late husband's papers. I expressed surprise because I had not heard that before and felt certain that would not have been what Anderson himself would have wanted. But Agent Martell explained to me that she was able to persuade Mrs. Anderson to sign the consent form because she had bonded with her based on their common family roots in West Virginia--to the point that she and Mrs. Anderson called each other "cousin." Mrs. Anderson later said she felt the FBI agent tricked her into signing the document.

I felt a bit tricked myself since it turned out that Kevin Anderson, a lawyer who is the columnist's son and executor of his papers, had already told the FBI it could not have permission to go through the archives--which is evidently why they subsequently approached the Anderson widow to get a more congenial answer.

So Agent Martell's suggestion to me that the Anderson family had agreed to let the FBI go through the archives was misleading. I suspect that was deliberate and designed to get me into turning the papers over to the FBI.

In fairness to Agent Martell, she was unfailingly courteous at all times during her interview with me. So was her partner. She was probably only doing what she was told to do by her supervisors.

I should point out that despite my concerns about this case, I am acutely aware that the FBI is filled with thousands of brave men and women who do their jobs superbly and often risk their lives on behalf of their country. I have known a number of fine FBI agents and supervisors and have lectured at the FBI training academy in Quantico, Virginia.

In any case, I tried to explain to the FBI agents who visited me at home why it was extremely unlikely there could be anything in our files relevant to their criminal case: Jack Anderson had been sick with Parkinson's disease since 1986 and had done very little original investigative reporting after that.

If the agents had done even rudimentary research, they would have known that. The fact that they didn't was disquieting, because it suggested that the Bureau viewed reporters' notes as the first stop in a criminal investigation rather than as a last step reluctantly taken only after all other avenues have failed. That's the standard the FBI is supposed to use under Justice Department guidelines designed to protect media freedom. These guidelines were first drawn up under the Nixon administration and have worked well for the past generation.

I reminded the FBI agents about my background as a journalist. "We're not after the reporters," Agent Martell replied. "Just their sources." I didn't find that a comforting response.

I am also not comforted by the contradictory and in some cases apparently false information the FBI has provided to the public. For example, FBI spokespersons have claimed that they were informed that the Anderson papers contain classified documents by (variously) myself, by graduate students working for me, by Anderson family members, and/or by Dr. Timothy Chambless, a political science professor at the University of Utah who has perused some of the Anderson papers. Yet all of these parties emphatically deny any such knowledge, let alone passing on such misinformation to the FBI. In my own case, I very clearly told FBI agents that I had no knowledge of any classified documents in the Anderson archives, despite the agents' efforts to push me to say the opposite. I wonder what FBI records (302 reports and the agents' original handwritten notes) indicate. Perhaps this Committee--or the Justice Department Inspector General--can find out.

Also, while the two FBI agents who visited my home told me this is all part of the AIPAC case and was not part of the government's larger reclassification program, FBI spokesman John Miller publicly suggested the opposite. Miller claimed that the real reason the FBI wants the Anderson papers is to prevent classified documents from getting into the hands of enemies hostile to the U.S. Which explanation is the truth?

In the same remarks, FBI spokesman Miller also asserted that universities have less First Amendment rights than the press. Is this the view of the Justice Department as a whole? Is DOJ creating a new free speech hierarchy where academics or lobbyists are entitled to less free speech than others?

Why did the FBI wait until now--decades after Jack Anderson supposedly received these secret documents but just weeks after his death--to try to obtain them? The two FBI agents who visited me at home did not tell me what triggered their investigation of Anderson's papers. But they named a former Anderson reporter and implied that he was their informant in the case--a man who was imprisoned for sodomizing a boy under 13 and admitted having a history of mental illness and fabricating stories. When the agents asked me about this man, I cautioned them about his past and explicitly warned them that this prior history made him a source of questionable credibility. Was the FBI's rationale for conducting such a fishing expedition into the Anderson archives based on the word of this former prison inmate? What do FBI records and notes indicate? Again, perhaps staff for the Committee or the Justice Department's Inspector General can find out.

There are other questions the Anderson case raises:

? Who authorized the FBI's attempt to pour through the Anderson archives? Were Justice Department prosecutors, intelligence agencies or other branches of the government involved? What program or policy guidelines--with what parameters and objectives--were FBI agents executing when they sought these records?

? What other papers of living or deceased journalists have similarly been sought by the federal government? Have congressional archives been targeted? What is the underlying program and rationale for these efforts?

? During the Nixon administration, the Justice Department issued guidelines to prevent harassment of journalists by government fishing expeditions. These guidelines, which are still on the books today, require "the express authorization of the Attorney General" before the Justice Department can subpoena reporters, and only then if the information is "essential to a successful investigation" where "a crime has occurred" and the government cannot first obtain information "from non-media sources." Do these guidelines apply to the papers of dead journalists like Anderson? Should the reporter-source privilege extend past the grave the same way that privileges for attorneys and their clients, psychiatrists and their patients, and spouses do? Perhaps Justice Department guideline and media shield laws should be amended accordingly.

Despite FBI director Robert Mueller's pledge to this Committee last month to provide information about this case, to date many of the questions raised above remain unanswered. Perhaps the Committee--or the Justice Department's Inspector General--can make further inquiry to resolve these issues.

Larger Issues Raised

The Anderson case also raises some larger and more important First Amendment issues involving academic and press freedom.

For academics, at the most mundane level, archival records may be lost or destroyed if police paw through them before they can be catalogued for posterity. Universities like my own may find it more difficult to persuade officials to preserve or donate their papers because of concern about government fishing expeditions. Freedom of inquiry and the public's ability to know the truth about its history could be weakened.

For journalists, whistle-blowing sources--the kind of idealistic truth-tellers that Senator Grassley and other Committee members have championed--may be scared off from confiding in reporters about abuses of power if they have reason to fear that the government will find out about it by rifling through journalistic files even past the grave. At a minimum, targeting dead reporters could serve as a back door approach to chipping away at the legal concept of journalistic privilege that has been afforded the press for decades.

And the public understandably won't trust the press if it's turned into an arm of law enforcement.

I am not alone in these concerns. Editorials in dozens of newspapers--USA Today, The Chicago Tribune, The Times-Tribune (Scranton, Pennsylvania), The Kansas City Star, The Miami Herald, The Baltimore Sun, The New York Times, The Washington Post, The New Jersey Star Ledger, The Seattle Post-Intelligencer, The Salt Lake Tribune, and The Deseret News, among others--and remarks by such television pundits as Joe Scarborough and Tucker Carlson have also been critical of the FBI in this case. In an age of terrorism with genuine and immediate national security threats, many wonder why the FBI is wasting its time trying to go through old archives of a dead reporter. More ominously, The New York Times warned that the Anderson case "sounds as though some in the administration are trying to turn the old and ambiguous Espionage Act into something approaching an official secrets act."

By itself, what happened with the Anderson papers is a small and I think extreme case. But it is troubling because it appears to be part of a larger effort by the government to crack down on the media and the public's right to know: from firing suspected whistleblowers to withdrawing old historical records from archives to barring the press from photographing returning caskets of U.S. soldiers for fear of undermining wartime morale.

The international watchdog group Reporters Without Borders now rates the United States behind 43 other countries around the world when it comes to press freedom--just ahead of Bolivia and just behind Macedonia. I do not think that Thomas Jefferson and the other constitutional framers who enshrined press freedom in our First Amendment would be proud.

I recognize, of course, that media censorship always increases in wartime, in the U.S. and everywhere else. As Senator Hiram Johnson famously said, war's first casualty is truth. While we are now at war just as surely as we were in these earlier struggles, our current (virtually invisible) enemy makes a clampdown on the media more dangerous than in the past.

America's battle against terrorism could well last decades and has no obvious end in sight. How much of our freedom must we suspend until all potential threats can be stamped out?

To be sure, there is always a tension between liberty and order, and our society needs both. Liberty without order is anarchy. Order without liberty is dictatorship. Freedom of the press is not absolute and must be carefully weighed against genuine threats to national security. A delicate balance is required.

But now we are hearing proposals to criminalize such leaks and imprison reporters by dusting off the Espionage Act of 1917, which was passed in the midst of the hysteria of World War I and used to imprison dissidents--and then strengthened in 1950, when Senator Joseph McCarthy began his witch hunt.

Prosecuting the press for espionage reeks of McCarthyite madness--the kind of tactics used in dictatorships not democracies. Indeed, authoritarian regimes are already using America's crackdown on the media to justify their own repression. Reporters are not spies. They are patriotic Americans just like everybody else. Around the globe, dozens of them die every year, giving their lives to document the truth.

Journalists are imperfect, to be sure. They make mistakes, can be arrogant, give too much attention to trivia and sensation. But if you study the history of journalism, the instances of true harm to national security caused by reporters have been miniscule to non-existent.

Indeed, I would argue that far more damage to national security has been caused over the years by government secrecy and deceit than by media reporting of classified information.

History shows that government often exaggerates the damage to national security from news reporting. During the Vietnam War, Presidents Lyndon Johnson and Richard Nixon railed against classified information that came out in the press. Now it's President Bush's turn.

If anything, the problem isn't that the press is too aggressive in national security reporting, it is that it is too timid. To cite but one example: At President Kennedy's request, the New York Times held back reporting about the pending Bay of Pigs invasion--and JFK later admitted it would have been better for the country if the newspaper had revealed it.

All too often, administrations blame the messenger for the message. In the national security arena as in all areas, leaks increase when governmental abuses increase because whistleblowers turn to the press to get the truth out. This is a healthy and self-correcting mechanism in a democracy.

In fact, national security leaks to the media are as old as the Republic itself. In 1796, a newspaper called Aurora published verbatim excerpts of President George Washington's confidential communications to his Cabinet involving secret negotiations with Britain. The disclosure created a furor in international relations and was viewed by some as damaging the national security. Who leaked this national security secret? Thomas Jefferson, the secretary of state, was the number-one suspect.

Similarly, in the 1840s, the press published President James Polk's secret diplomatic plans during the Mexican War. Historians suspect the secret national security information was leaked by then-Secretary of State James Buchanan.

That's the way the system works. And it does work: we had the freest press in the world during our first two centuries. Our democracy survived two world wars and a war between the states. Our open society thrived because the framers of our Constitution guaranteed press freedom as an independent check on government wrongdoing.

But if you start prosecuting reporters for revealing secrets, all of that could be jeopardized. If the Espionage Act is turned into a veritable sword of Damocles hanging over the head of journalists, many would inevitably shy away from informing the public about important national security issues--and abuses. Public discourse would be constricted as journalists err on the side of self-censorship instead of on the side of freedom.

Either that, or Congress is going to have to spend a lot more money for prisons because you're going to have a lot of journalists going to jail. Neither choice is palatable in a democracy.

History has shown that all too often, when the government complains about the release of classified information, it is really concerned about political embarrassment not national security. Over the past half-century, the federal

government has over-classified so many records that journalists are justifiably suspicious when national security is invoked to restrict information--especially when government officials themselves are so willing to leak classified information when it is in their own interests to do so. Indeed, if the government was as careful protecting classified information as journalists are protecting their confidential sources, we might not have this problem in the first place.

The solution to this is not to prosecute journalists under the Espionage Act but to have a more sane system so that only truly legitimate national security secrets are classified. Otherwise, the burden is effectively placed on reporters to figure out which information is legitimately classified and which is not. This is not the job of journalists and it is a recipe for trouble.

Even merely threatening to jail journalists--under the Espionage Act or any other law twisted in such a fashion--sends a chilling message. Allow me to quote from what one journalist said about such a possibility:

So what if the case is ultimately thrown out of court? In the meantime, they have arrested a troublesome reporter, clapped him in jail, threatened him with ten years in prison, flushed out some of his sources, and in doing so, reminded other troublesome reporters that the same thing could happen to them. [The administration has] already won...a victory that will bear fruit every day, whenever any reporter holds back for fear of getting into trouble, whenever a source fears to come forward lest he be exposed, whenever an editor "goes easy" for fear of government retaliation . . . whenever a citizen anywhere can be influenced to think of reporters as lawbreakers, the kind of people who have to be arrested.

That journalist was Jack Anderson, writing about the Nixon administration's abuses during Watergate. Unfortunately, his words appear to be equally relevant today.

I commend the Committee for your inquiry, recognizing that you have a full plate with many other important subjects. I hope that you and the Justice Department's Inspector General will continue to follow up on the serious oversight issues raised here today.

Thank you.