

Prosecuting irresponsible media is not the remedy

By Peter G. Verniero

President Bush is right to be frustrated and maybe a bit angry at stories leaked to the New York Times about his administration's efforts at monitoring financial records of alleged terrorists or terrorist sympathizers. But administration defenders are wrong to advocate prosecuting the Times or other media outlets for publishing such stories.

To be sure, I don't condone or applaud the passing of classified information. The issue, however, is whether the government should invoke the criminal justice system to punish those in the media who have published such information. It shouldn't.

Throughout our history there has been a healthy tension between the press and government. The relationship is symbiotic. Candidates for public office need the news media to carry their messages to voters and, once elected, to constituents. (Media paid for by candidates would get them only so far.)

Similarly, the press would have far less to write about or broadcast without elected officials or their appointees doing their jobs at all levels of government.

An example of this relationship was the publication of the Federalist Papers, which were written by some of our founders, including James Madison and Alexander Hamilton, under an assumed name. These might have been the ultimate in anonymous, high-placed sources. Those papers, which consisted of lengthy essays published in certain newspapers, helped persuade fledgling Americans to replace the Articles of Confederation with the U.S. Constitution.

Some might have argued that the publication of the Federalist Papers posed a threat to the then-existing structure of government. They were published anyway.

Of course, the world is different now. The continuous news cycle, coupled with highly pervasive methods of communication, empower publishers to an extent unimaginable only a few decades ago. Their power to shape public opinion in an open society is a power to alter the course of an entire government.

Balancing that power within our constitutional framework requires self-restraint on both sides. Publishers must realize that the only effective check on their power is themselves. For its part, the government must appreciate that prosecuting

newspapers or other media for accurately reporting the news risks offending notions of free speech embedded in our democratic culture.

The stakes are highest in a time of war. During such times, the publication of classified information puts lives at risk. It also, however, allows members of the public to judge for themselves the effectiveness of security measures being implemented by their elected leaders on the country's behalf.

And therein lies the rub: When receiving information about its security in the name of being better informed, the public arguably becomes less secure.

There is no sure way out of this conundrum without authorizing the government to control the press, something the founders rejected long ago. In that respect, we are left largely to hope that publishers who acquire classified information will disseminate it responsibly, if at all.

As the U.S. Supreme Court once observed, the Constitution is not a suicide pact. I, for one, would not think less of editors or publishers for deciding not to publish a story now and then, to serve a larger purpose.

I will let others judge whether the New York Times has acted responsibly in this recent episode. If it hasn't, prosecuting it is not the remedy. That would chill the press in a manner inconsistent with our best American instincts.

Generally, the only practical recourse against a media organization for bad reporting is for the public to turn elsewhere for news and information. Reducing the market for irresponsible journalism would go a long way toward curbing that form of journalism itself.

If, on the other hand, the consuming public desires classified information or approves of its occasional release even at the risk of diminishing our national security, then there isn't much we can do about that. In an open society such as ours, where the people's views are paramount, that just might be a price of freedom we all must bear.

Peter G. Verniero, a former New Jersey Supreme Court justice and state attorney general, practices law at Sills Cummis Epstein & Gross P.C. in Newark.