

Stopping the Presses:
Evaluating the Effectiveness of the 2013 Justice Department's New
Protections for Journalists

Jasleen Shokar

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Rosental Alves
Department of Journalism
Supervising Professor

Stephen Slick
LBJ School of Public Affairs
Second Reader

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ABSTRACT

Jasleen Shokar

Title: Stopping the Presses: Evaluating the Effectiveness of the 2013 Justice Department's New Protections for Journalists

Supervising Professors: Rosental Alves, Stephen Slick

The Obama Administration ushered in a new era of accountability and communication between the government and those it governs. With the rise of social media and the creation of White House accounts on various platforms it seemed as if the Obama administration was taking his pledge to have the most transparent presidency of all time to serious heights.

However, during the first term of the Obama administration, the justice department under Attorney General Eric Holder set some dangerous precedents. The justice department pursued several prosecutions of people who had leaked government secrets and developed a successful formula for these cases by way of the Espionage Act. Out of this behavior, a new landscape for the relationship between the government and the media was formed.

After backlash, they conducted a review and used experts from outside the Whitehouse in the media, and academia to provide feedback. They then released a list of protections and new policies to protect journalists to undo the precedents they may have set and encourage future due diligence in the prosecutorial process regarding the role of media in leaks. I am evaluating how effective those protections are and whether they accomplish the goals they set out to meet.

Chapter 1:

Foundations of the Relationship Between the Press and the Government

The relationship of the independent press to our government was established right at the founding of our democracy. One of the founding principles and prevailing ideologies of our society, is the idea that journalists and the news media as a whole are tasked with holding the government accountable and looking out for the general public.

In order to meet this expectation, they often work to expose and comment on the inner workings of private government operations that may go unnoticed to the untrained eye, but are

nonetheless important aspects of a government's functionality. To do this, journalists need information that isn't publicly available.

Traditionally, this hole was filled by individual people leaking government secrets to the press. If an employee comes across information they think the public ought to know there are a couple of more systematic approaches for them, but many have opted to forego the official processes and provide the information directly to the press.

The outcome of leaks such as the Pentagon Papers or the Nixon/Watergate scandal have affected our national consciousness, public trust, influenced how we conduct policy and generally approach the actions and purpose of our intelligence community.

The freedom of the press as stipulated in one of the clauses of the first amendment to the US Constitution is rather vague, but legal interpretation of the clause has been expanded over time. It was originally addressed to the legislative branch of the federal government, "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Despite the use of the word "Congress," the Supreme Court has upheld the idea that these protections will apply against any government agency or official including: federal, state, local, and legislative, executive, or judicial.¹ This means the government may not jail, fine, or impose civil liability on people or organizations based on what they say or write, except in unique circumstances.

Cases heard at the Supreme Court that have pitted national security concerns against the duty of journalists to inform the public, have caused this provision to come into play. In *New*

¹ "Interactive Constitution: The Meaning of Free Speech." *National Constitution Center – Constitutioncenter.org*, National Constitution Center, constitutioncenter.org/blog/interactive-constitution-the-meaning-of-free-speech.

York Times Co. v. United States, the Supreme Court delivered a landmark ruling in favor of the media regarding government censorship in the name of national security².

The *New York Times* had received copies of an internal report detailing U.S. Indochina Policies that led to the Vietnam war that were kept secret from the public. Former military analyst Daniel Ellsberg sought to release the truth to the American people³.

The Nixon Administration sought to bar the release of further information from the Pentagon Papers they had obtained. The main issue at hand was if the government's right to retain certain information from the public was greater than the first amendment clause designating freedom of the press. The 6-3 decision guaranteed the right of newspapers to publish⁴. It also set precedent for the use and dismissal of prior restraint in publishing materials.

The release of these papers began a new era of relations and a more contentious relationship between the press and the government, as new announcements and programs were put under extra scrutiny⁵. The government, in turn, began new practices regarding the protection of national security interests.

² "New York Times Co. v. United States." *LII / Legal Information Institute*, www.law.cornell.edu/supremecourt/text/403/713.

³ Chokshi, Niraj. "Behind the Race to Publish the Top-Secret Pentagon Papers." *The New York Times*, The New York Times, 20 Dec. 2017, www.nytimes.com/2017/12/20/us/pentagon-papers-post.html.

⁴ Special To the New York Times. "Texts of the Supreme Court Decision, Opinions and Dissents in Times-Post Case." *The New York Times*, The New York Times, 1 July 1971, www.nytimes.com/1971/07/01/archives/texts-of-the-supreme-court-decision-opinions-and-dissents-in.html.

⁵ The New York Times, The New York Times, archive.nytimes.com/www.nytimes.com/books/97/04/13/reviews/papers-lessons.html?_r=1.

The relationship between journalists and the intelligence and national security apparatus has been strained since the 1970's⁶ when the first modern era wave of revelations unfolded in the public eye. The past actions of the intelligence community under previous presidential administrations caused alarm and pushed Congress to enact several measures including congressional oversight committees for intelligence organizations.

The public accountability pledge has always been countered by the government's argument that the release of sensitive intelligence information jeopardizes our national security. As a result, administrations have discouraged the publication of some information and presidents have even made personal appeals directly to the publisher about possible effects.

The other end of the stick is newspapers cannot publish anything if they are not given information. There are often legal and procedural protocols in place for government employees who encounter a practice or other evidence that they think is a breach of privacy or they otherwise take issue within the organizational structure of the government agency they worked for. They are called whistleblowers. There is an important distinction between whistleblowers and leakers, and the outcome of each case differ greatly based on the classification.

Whistleblower is applied only when a person has followed a set of 'strict, explicit reporting procedures.'⁷ These rules are designed to allow employees to 'expose improper or illegal government activity.'⁸ These avenues for reporting aren't always well set up or supported in the workplace, but the rules are clear and accessible.⁹

⁶ Slick, Stephen B., Inboden, William C. (2016) *Intelligence and National Security in American Society*. Policy Research Project Report. Lyndon B. Johnson School of Public Affairs, Austin, Texas.

⁷ Et al

⁸ Et al

⁹ Schoenfeld, Gabriel. "Necessary Secrets: National Security, the Media, and the Rule of Law." W.W. Norton & Co., 2011.

A leaker, on the other hand, is someone who discloses information without using the established ways. There are no protections for these people or accountability within the organization for the outcome.¹⁰ This thesis will only deal with leakers and their subsequent prosecutions.

The government employees who leak the information are also scrutinized and are often the sole target of government action. The Espionage Act has been used a total of 12 times in such cases, typically against the government employee who breached an oath or contract to disclose sensitive information. Originally enacted in 1917, The Espionage Act was designed to make it possible to prosecute citizens for gathering secret information without express permission of the holder.

¹⁰ Et al

Chapter 2:

National Security and Espionage in American Presidencies

Other administrations before Obama's had charged leakers with espionage, and a majority succeeded.¹¹ The Reagan Administration's Justice Department convicted Samuel Morison on four counts of espionage and theft of government property for providing confidential satellite pictures of Soviet military vehicles to a publication. For this case, the government didn't

¹¹ <https://www.pbs.org/newshour/spc/multimedia/espionage/>

even try to prove that Morison caused national security concerns, just that similar behavior may in the future. He served two years in prison and was eventually pardoned by President Bill Clinton against the advice of the CIA.

During George W. Bush's second term, Lawrence Franklin leaked classified documents detailing U.S. policy towards Iran to a lobbying group with the intention to influence a stricter U.S. policy towards Iran. He pled guilty to the two charges of espionage. The most recognizable case is that of Daniel Ellsberg, who leaked a 7,000-page internal report about U.S. decision-making in Vietnam.

The New York Times and the Washington Post published a series of stories as a result of this leak that became known as the Pentagon Papers. The Richard Nixon Administration pursued a case against him, but the charges were dismissed due to evidence of government misconduct such as illegal wiretapping.

Obama pledged on his first day in office that transparency and the rule of law will be the touchstones of his administration¹². During his presidency, the very functionality of the White House and its relationship to the press and the people also changed. Rapidly developing technology was becoming commonplace in our lives.

iPhones, and the rise of social media apps like Twitter and Snapchat, flash drives, and search engines like Google revolutionized how we communicated with the world¹³. The Whitehouse had Twitter, Facebook and Instagram accounts and was communicating with constituents more regularly through nontraditional means.

¹² <http://edition.cnn.com/2009/POLITICS/01/21/obama.business/index.html>

¹³ <https://www.cnn.com/2011/10/07/opinion/jobs-social-media/index.html>

All of these advancements have provided direct and intimate contact between people that was previously impossible, and has allowed information to be shared faster and almost instantaneously.¹⁴ However, this also means it is easier to trace these interactions and provide evidence of leaking.

Emails and phone records offer a digital footprint that can be traced back to the person easily. This has made it more difficult for journalists to protect the anonymity of their sources and discouraged people from leaking secrets in the first place.

President Obama reiterated his claim yet again in a 2013 Google+ Hangout that his presidency presided over the “most transparent administration in history¹⁵.” Many critics argued he did not live up to this promise.¹⁶

The administration promised accountability for drone strikes in the form of a report that would detail the number of people killed, including civilian numbers. This report didn’t surface until years later, past the point a review or public discourse could influence Obama’s drone policy.¹⁷

The Washington Post also claims the president hadn’t agreed to a sit down with reporters since his first year on the job. One of the nation’s leading papers for governmental affairs and politics was repeatedly refused interviews with the president.

¹⁴ <https://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php>

¹⁵ Vandehei, Jim, et al. “Obama, the Puppet Master.” About Us, POLITICO, 19 Feb. 2013, www.politico.com/story/2013/02/obama-the-puppet-master-087764.

¹⁶ Sullivan, Margaret. “Obama Promised Transparency. But His Administration Is One of the Most Secretive.” The Washington Post, WP Company, 24 May 2016, www.washingtonpost.com/lifestyle/style/obama-promised-transparency-but-his-administration-is-one-of-the-most-secretive/2016/05/24/5a46caba-21c1-11e6-9e7f-57890b612299_story.html?utm_term=.4d9dab89fc30.

¹⁷ Et al

The Obama administration has also refused Freedom of Information Act requests, and threatened a journalist with jail time for protecting his sources. The administration's balancing act between their tight hold on secrecy and accountability would be tested early on in his presidency.

Chapter 3:

The Obama Administration's Prosecution of Leakers

The first case the Obama Justice Department presided over was a holdover from the Bush administration. Thomas Drake was a senior executive of the National Security Agency (NSA), and gave unclassified information to a reporter. The published articles detailed waste and fraud at the NSA. He pled guilty to a misdemeanor, but the government dropped the espionage charges against him.

The first indictment and prosecution that happened entirely under the Obama Administration was that of Shamai Leibowitz. He was sentenced to 20 months in prison in 2010 for revealing sensitive intel on Israel and its efforts to sway American opinion¹⁸. At the time of sentencing, not even the U.S. District Judge who presided over the case knew exactly what had been leaked, nor if there was a threat to national security other than the reaction of the federal authorities¹⁹.

The largest leak of classified information in American history came in 2010 by way of Chelsea Manning²⁰. She leaked the documents to Wikileaks who posted them en masse online²¹. Nine of the 22 offenses that she was charged with were related to Espionage and she was sentenced to 35 years in prison²².

Stephen Jin-Woo Kim, an intelligence advisor in the State Department, was charged for revealing information to Fox News reporter James Rosen that North Korea may be testing nuclear bombs²³. He pled guilty and was sentenced to 13 months in prison.

¹⁸ Shane, Scott. "Leak Offers Look at Efforts by U.S. to Spy on Israel." The New York Times, The New York Times, 6 Sept. 2011, www.nytimes.com/2011/09/06/us/06leak.html.

¹⁹ "Former FBI Employee Sentenced for Leaking Classified Papers." The Washington Post, WP Company, 25 May 2010,

²⁰ Shaer, Matthew. "The Long, Lonely Road of Chelsea Manning." The New York Times, The New York Times, 12 June 2017, www.nytimes.com/2017/06/12/magazine/the-long-lonely-road-of-chelsea-manning.html.

²¹ Somashekhar, Sandhya. "Chelsea Manning, Who Gave Trove of U.S. Secrets to WikiLeaks, Leaves Prison." The Washington Post, WP Company, 17 May 2017, www.washingtonpost.com/national/chelsea-manning-who-gave-trove-of-us-secrets-to-wikileaks-

²² McGraw, Meredith, and Adam Kelsey. "Everything You Need to Know about Chelsea Manning." ABC News, ABC News Network, 16 May 2017, abcnews.go.com/US/chelsea-manning/story?id=44809970.

²³ Phelps, Timothy M. "Former State Department Official Pleads Guilty in Leak to Fox News." Los Angeles Times, Los Angeles Times, 7 Feb. 2014, articles.latimes.com/2014/feb/07/nation/la-na-rosen-plea-20140208.

In an affidavit aimed at securing a search warrant for Rosen's personal emails, investigators labelled him a co-conspirator²⁴. This irritated journalists because it equated normal newsgathering practices to criminal activity.

Former CIA officer Jeffrey Sterling was charged for leaking information about a covert operation to a New York Times journalist James Risen. The intel was about an attempt to delay the Iranian nuclear weapons program from developing by providing incorrect plans. He was sentenced to three and a half years in prison.²⁵

Former CIA officer John Kiriakou was charged for leaking information about waterboarding and other enhanced interrogation programs to a reporter. He was found guilty and sentenced to 30 months in prison, but not for any of the espionage charges²⁶.

Ex-Navy linguist James Hitselberger pled guilty to knowingly attempting to remove classified documents from a secure location without authority. He was sentenced to one year in prison, and had already served a couple months of that after his arrest²⁷.

In April of 2013, the Deputy Attorney General approved the seizure of phone records for 20 Associated Press (AP) phone lines²⁸ in connection to the leaking of information about a

²⁴ Marimow, Ann E. "Justice Department's Scrutiny of Fox News Reporter James Rosen in Leak Case Draws Fire." The Washington Post, WP Company, 20 May 2013, [www.washingtonpost.com/local/justice-departments-scrutiny-of-fox-news-reporter-james-rosen-](http://www.washingtonpost.com/local/justice-departments-scrutiny-of-fox-news-reporter-james-rosen-2013-05-20/)

²⁵ "Ex-C.I.A. Officer Sentenced in Leak Case Tied to Times Reporter." The New York Times, The New York Times, 21 Dec. 2017, www.nytimes.com/2015/05/12/us/ex-cia-officer-sentenced-in-leak-case-tied-to-times-reporter.html.

²⁶ "Former C.I.A. Officer Released After Nearly Two Years in Prison for Leak Case." The New York Times, The New York Times, 21 Dec. 2017, www.nytimes.com/2015/02/10/us/former-cia-officer-released-after-nearly-two-years-in-prison-for-leak-case.html.

²⁷ Gerstein, Josh. "Ex-Navy Linguist Pleads Guilty in Secret Documents Case." About Us, POLITICO, 25 Apr. 2014, www.politico.com/blogs/under-the-radar/2014/04/ex-navy-lingust-pleads-guilty-in-secret-documents-case-187436.

²⁸ Pincus, Walter. "AP Leak Case Has Many Lessons." The Washington Post, WP Company, 25 Sept. 2013, www.washingtonpost.com/world/national-security/ap-leak-case-has-many-

Yemeni terrorist's bomb that was now in U.S. custody. John Sachtleben was the FBI bomb technician who leaked this information, but no information was disclosed to the AP until after the seizure had occurred.²⁹

After his first term, pressure had mounted for more accountability with experts arguing President Obama did not meet his own claims to transparency.³⁰ Journalism watchdog groups also agree that his attitude towards leakers has even made the chance of whistleblowing harder for people, and that the system inherently does not protect journalists.³¹ makes whistleblowing harder and doesn't protect journalists.

Revelations about the NSA also do not bode well for journalists as well as reports that some employees are subjected to polygraph tests, forcing reporters to interview intermediaries so their sources can answer their polygraph tests truthfully.³² Efforts such as these undermine the media's ability to keep an accountable government, according to the Committee for the Protection of Journalist's 2013 report.³³

²⁹ "The Obama Administration and the Press." Committee to Protect Journalists, The Committee to Protect Journalists, cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php.

³⁰ "Obama's Transparency Record: Lots of Data, Not as Much Sunlight." @Politifact, www.politifact.com/truth-o-meter/article/2012/jul/16/obama-report-card-transparency-sunlight/.

³¹ Cjr. "Barack Obama's Press Freedom Legacy." Columbia Journalism Review, www.cjr.org/criticism/barack_obamas_press_freedom_legacy.php.

³² "Obama's Broken Promises on Transparency." Columbia Journalism Review, archives.cjr.org/behind_the_news/cjp_report_on_us_press_freedom.php.

³³ Et al

Chapter 4:

Justice Department Review of Policies Protecting Journalists

After he was elected to a second term, President Obama directed Attorney General Eric Holder to review the Justice Department's policies toward journalists, and specifically the use of subpoenas in cases against leakers³⁴. The Justice Department states in their report they sought to accomplish the following:

“...strengthen protections for members of the news media by, among other things, requiring more robust oversight by senior Department officials and by clarifying and

³⁴ Horwitz, Sari. “Obama Calls for Review of Rules on Subpoenas to the Media.” The Washington Post, WP Company, 23 May 2013, www.washingtonpost.com/world/national-security/obama-calls-for-review-of-rules-on-subpoenas-to-the-media/2013/05/23/e037122c-c3d9-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.5104d10f29bc.

expanding the presumption of negotiations with, and notice to, members of the news media when Department attorneys request authorization to seek newsgathering records³⁵.”

In the report, the Justice Department decide to first maintain that journalists themselves were never under the prosecution of the government for their newsgathering activities, only in relation to that of a leaker. The report also maintained both President Obama and Attorney General Eric Holder’s support for a Media Shield Law to be passed by Congress to further set in stone many of the changes they have proposed³⁶.

There are ten revisions outlined in the report that pertain to news media involvement in the prosecution of leaking cases. Many changes proposed surround internal processes and protocol for the Justice Department. One such modification is the creation of a News Media Review Committee.

This committee will come into play in the following circumstances, according to the Justice Department report:

“Department attorneys request authorization to seek media-related records in investigations into the unauthorized disclosure of information; when Department attorneys request authorization to seek media-related records in any law enforcement investigation without providing prior notice to the relevant member of the media; and

³⁵ Et al

³⁶ Savage, Charlie. “Under Fire, White House Pushes Media Shield Law.” The New York Times, The New York Times, 15 May 2013, www.nytimes.com/2013/05/16/us/politics/under-fire-white-house-pushes-to-revive-media-shield-bill.html.

when Department attorneys request authorization to seek testimony from a member of the media that would disclose the identity of a confidential source.”

This committee will be comprised of Justice Department officials with relevant expertise and experience, and who have absolutely no involvement in the investigations. The committee’s sole purpose will be to ensure that appropriate and fair action is taken regarding the use of certain tools to gather information about members of the media in a case.

The policy regarding the lack of advance notice of the seizure of records, as the Associated Press argued was overbearing,³⁷ was also modified.

“...presumption of advance notice will be overcome only if the Attorney General affirmatively determines, taking into account recommendations from the newly established News Media Review Committee described below, that for compelling reasons, advance notice and negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.”

This new policy will allow news organizations notice when their records may be used, but also grant them the ability to challenge the seizure in federal court. The shift of power solely to the Attorney General indicates there is more scrutiny and thought regarding when seizure of records would be necessary when prosecuting a leaker.

³⁷ “AP Letter to Eric Holder on Seizure of Phone Records.” USA Today, Gannett Satellite Information Network, 14 May 2013, www.usatoday.com/story/news/2013/05/13/doj-seizes-ap-phone-records/2156819/.

The policy also specifies that the use of keyword search tools when utilizing seized records would limit the level of intrusion being suffered on behalf of the journalist or their news organization.

The Justice Department also increased the standard for use of search warrants and orders. The Privacy and Protection Act of 1980³⁸ already protects journalists who plan to disseminate information to the public, but includes a provision named the suspect exception that allows seizure of information if there is probable cause to believe a person has committed a crime.

The Justice Department has further amended this policy to only apply if the purpose of the investigation is of a person other than a member of the news media. Suspect exception cannot be used on a journalist who worked with a leaker if the criminal activity in question is not directly assigned to them outside normal newsgathering practices. The report states it includes the following:

"...the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data" under enumerated code provisions. See 42 U.S.c. §§ 2000aa(a)(\) and (b)(\). Under current Department policy, a Deputy Assistant Attorney General may authorize an application for a search warrant that is covered by the PPA, and no higher level reviews or approvals are required."

³⁸ Electronic Privacy Information Center. "EPIC - The Privacy Protection Act of 1980." Electronic Privacy Information Center, epic.org/privacy/ppa/.

The approvals process for such a seizure has also been modified to need the express approval of the Attorney General for search warrants and court orders. The report states the Attorney General would have to argue that:

“...the information sought is essential to a successful investigation, that other reasonable alternative investigative steps to obtain the information have been exhausted, and that the request has been narrowly tailored to obtain only the information necessary for the investigation (including the use of search methods that limit any intrusion into potentially protected materials, as described above).”

The presumption of notice would also be applied to these search warrants and authorization for such a seizure will now be the responsibility of the Deputy Attorney General and the Attorney General.

Addressing the issue of harm to national security, the Director of National Intelligence would have to certify to the Attorney General that the disclosure in question caused harm to the United States or national security interests and whether the information was appropriately classified.

Another key provision is the guarantee of protection of information seized. Revisions to the disclosure of private information pertaining to an ongoing case include: access to the records being limited to Justice Department personnel directly working on the case and only being used for the case, a guarantee they will not be shared with any other department, and a single copy of the information will be maintained as required by law.

However, the report states that broader use of the information can be authorized by the Attorney General if they find the following:

“...specific, identifiable records are evidence of a separate past or imminent crime involving (i) death; (ii) kidnapping; (iii) substantial bodily harm; (iv) conduct that constitutes a criminal offense that is a specified offense against a minor as defined in 42 U.S.C. § 16911; or (v) incapacitation or destruction of critical infrastructure as defined in 42 U.S.C. § 5195c(e)...”

The report also indicates it reserves the right to make additional revisions to policies regarding news media subpoenas to account for changes in newsgathering as a result of technological changes.

An oversight group, the News Media Dialogue Group was also established. It was charged with assessing the Justice Department’s news media policies annually. Members of the group range from Justice Department attorneys to members of the news media.

The last note in the report details the department’s willingness to further review its policies regarding leaks of classified national defense information and pledged to work with the administration to develop protocols for that scenario.

Chapter 5:

Gauging the Effectiveness of the Policy Changes

The most important improvement to the Justice Department's procedures is the modifications to when investigators can seize information without warning. This basic due process allows journalists to be aware of what is happening with their data and records and the legal avenue it provides to protest decisions can help a publication or journalist protect their information.

The Justice Department's News Media Dialogue Group was a success as well and was created in conjunction with the Reporter's Committee For Freedom of the Press³⁹. Founded in 1970, this 501(c)(3) nonprofit association is focused on providing assistance to journalists and offers tools and support to help protect their legal rights. Even more changes were made to the process of issuing subpoenas and search warrants to journalists.

Not only are there modifications to the report, but the committee is working to amend language from policies not touched since the 1980s that affect journalists by way of the prosecution of leakers.⁴⁰ This indicates that the inclusion of this group has been helpful and worked to both the benefit of the Justice Department, and journalists.

Groups such as the Reporter's Committee maintain that not enough is done, but that they are encouraged by the willingness of the Attorney General to listen to their concerns and work to improve internal policies⁴¹.

The across the board increase in severity is also a positive change. No longer will investigators or even the deputy attorney general be making the final decisions on right to privacy situations in investigations. That decision will be the responsibility of the Attorney

³⁹ "DOJ Issues New Guidelines on Reporter Subpoenas Following Dialogue with Reporters Committee and Other News Media Representatives." Child Online Protection Act Ruled Unconstitutional | Reporters Committee for Freedom of the Press, 14 Jan. 2015, www.rcfp.org/doj-issues-new-guidelines-reporter-subpoenas-following-dialogue-reporters-committee-and-other-news-m.

⁴⁰ Et al

⁴¹ "Revising the Attorney General's Guidelines." Child Online Protection Act Ruled Unconstitutional | Reporters Committee for Freedom of the Press, 11 Mar. 2015, www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2015/revising-attorney-generals-.

General and after careful review including consulting with other administrative and federal officials they will recommend whether or not it is the appropriate course of action⁴².

What is still not solved by this report is that there is limited congressional oversight into these processes. In the absence of checks and balance we risk a one-sided interpretation of rules and rights. The administration outlined their interest in supporting the passage of a Media Shield Law that would legalize and guarantee many of the new protections set out in this report.

Journalists and watchdog groups have raised concerns surrounding the power of the subpoenas.⁴³ Even with the proposed Media Shield Law, judges would not be able to lift a subpoena from the Justice Department, and many people would prefer that power stay with judges rather than the federal government.⁴⁴

These decisions in the hands of judges allow for multiple branches of government to allow for more transparency and fairness in these processes for journalists and news media organizations. This lack of oversight does not offer any protection from potentially politically-motivated prosecutions either.

⁴² Calderone, Michael, and Ryan J. Reilly. "DOJ Reviews Media Guidelines Following Leak Investigation Controversy." The Huffington Post, TheHuffingtonPost.com, 12 July 2013, www.huffingtonpost.com/2013/07/12/justice-department-media-guidelines_n_3587819.html.

⁴³ Savage, Charlie. "Under Fire, White House Pushes Media Shield Law." The New York Times, The New York Times, 15 May 2013, www.nytimes.com/2013/05/16/us/politics/under-fire-white-house-pushes-to-revive-media-shield-bill.html.

⁴⁴ Bump, Philip. "Obama Is Pushing for a Media Shield Law That Could Also Shield Him." The Atlantic, Atlantic Media Company, 15 May 2013, www.theatlantic.com/politics/archive/2013/05/obama-media-shield-law/315224/.

Chapter 6:

Recommendations for the Future

The Trump Administration has prosecuted a leaker faster than any other administration before, largely following in the legal precedent the Obama administration set.⁴⁵ In a series of Tweets,⁴⁶ President Trump outlined he believed the journalists were to hold equal blame to the leakers for the exposure of classified information.

⁴⁵ Green, Justin. “Trump Threatens Obama Record on Prosecuting Leakers.” Axios, Axios, 16 Feb. 2017, www.axios.com/trump-threatens-obama-record-on-prosecuting-leakers-1513300490-0ca63081-9da6-4976-917b-8dce1d3f565e.html.

⁴⁶ Et al

This provides a stark contrast to the previous administration's admission (by way of the review) that there are merits to journalists performing their duties to keep the government accountable to its people.

The president's crusade against news organizations could add fuel to the fire and altogether disrupt this ideal.⁴⁷ This would mean there is an association between protecting national security interests, and restricting access of journalists to the Whitehouse and blaming them for leaks. It is possible this situation is misconstrued to present journalists themselves as a threat to national security.

Now that prosecutions are normalized and each person's digital footprint means their actions are easily traceable, this also discourages whistleblowing. Though often these processes are sanctioned by the government agency, they are often not easy to navigate or encouraged.

In order for leaking to stop, or even slow, these avenues will have to be much better. Employees will need to feel as if this is a safe and secure way for them to report things about the agency that make them uneasy or uncomfortable. That means there must also be a response system in place that is reassuring to people that something will come of their actions.

The single most important thing to be aware of is the existence of a Media Shield Law. There is no guarantee these changes are permanent, or will even be executed the same way administration to administration without the force of the law behind them. They really just are procedural changes any Justice Department could tweak or amend as they see fit.

A Media Shield Law would also guarantee congressional oversight, and in the event someone feel their rights have been violated or procedure has not gone according to the rules stipulated in the law, they can take their case to court and include a third branch of government

⁴⁷ Et al

in this important decision. Having all three branches able to influence this process would ensure that it was fair to all, and lived up to the principles of our democracy.

Through my research I have concluded that the Justice Department did in fact did live up to their promise of increased senior department officials oversight and clarifying and expanding notice to the media when they gathered data in their efforts to strengthen protections for members of the news media. However, these changes were not made permanent, and no other branch of government would ultimately be able to intervene assist the Justice Department in the future with any cases should there be an abusive of power or lack of empathy in decision-making.

This is an important first step in communicating the needs of journalists with the necessity of a government to keep secrets.

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AUTHOR BIOGRAPHY

Jasleen Shokar was born and raised in Houston and grew up playing tennis, reading and crafting. In high school, she moved to El Paso and worked for her school yearbook and newspaper. At the University of Texas at Austin she studied Plan II Honors and Journalism, the intersection of which brought her thesis topic to life. In college she was a member of the Senate of College Councils, Student Government and The Daily Texan. Jasleen hopes to continue her interest in government accountability by staying engaged in the political process throughout her life.