



The Obama Administration and the Press

Leak investigations and surveillance in post-9/11 America

By Leonard Downie Jr. with reporting by Sara Rafsky



A special report of the Committee to Protect Journalists

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U.S. President Barack Obama came into office pledging open government, but he has fallen short of his promise. Journalists and transparency advocates say the White House curbs routine disclosure of information and deploys its own media to evade scrutiny by the press. Aggressive prosecution of leakers of classified information and broad electronic surveillance programs deter government sources from speaking to journalists. **A CPJ special report by Leonard Downie Jr. with reporting by Sara Rafsky**



Barack Obama leaves a press conference in the East Room of the White House August 9.
(AFP/Saul Loeb)

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In the Obama administration's Washington, government officials are increasingly afraid to talk to the press. Those suspected of discussing with reporters anything that the government has classified as secret are subject to investigation, including lie-detector tests and scrutiny of their telephone and e-mail records. An "Insider Threat Program" being implemented in every government department requires all federal employees to help prevent unauthorized disclosures of information by monitoring the behavior of their colleagues.

Six government employees, plus two contractors including Edward Snowden, have been subjects of felony criminal prosecutions since 2009 under the 1917 Espionage Act, accused of leaking classified information to the press—compared with a total of three such prosecutions in all previous U.S. administrations. Still more criminal investigations into leaks are under way. Reporters' phone logs and e-mails were secretly subpoenaed and seized by the Justice Department in two of the investigations, and a Fox News reporter was accused in an affidavit for one of those

subpoenas of being “an aider, abettor and/or conspirator” of an indicted leak defendant, exposing him to possible prosecution for doing his job as a journalist. In another leak case, a *New York Times* reporter has been ordered to testify against a defendant or go to jail.

Compounding the concerns of journalists and the government officials they contact, news stories based on classified documents obtained from Snowden have revealed extensive surveillance of Americans' telephone and e-mail traffic by the National Security Agency. Numerous Washington-based journalists told me that officials are reluctant to discuss even unclassified information with them because they fear that leak investigations and government surveillance make it more difficult for reporters to protect them as sources. “I worry now about calling somebody because the contact can be found out through a check of phone records or e-mails,” said veteran national security journalist R. Jeffrey Smith of the Center for Public Integrity, an influential nonprofit government accountability news organization in Washington. “It leaves a digital trail that makes it easier for the government to monitor those contacts,” he said.

“I think we have a real problem,” said *New York Times* national security reporter Scott Shane. “Most people are deterred by those leaks prosecutions. They're scared to death. There's a gray zone between classified and unclassified information, and most sources were in that gray zone. Sources are now afraid to enter that gray zone. It's having a deterrent effect. If we consider aggressive press coverage of government activities being at the core of American democracy, this tips the balance heavily in favor of the government.”

At the same time, the journalists told me, designated administration spokesmen are often unresponsive or hostile to press inquiries, even when reporters have been sent to them by officials who won't talk on their own. Despite President Barack Obama's repeated promise that his administration would be the most open and transparent in American history, reporters and government transparency advocates said they are disappointed by its performance in improving access to the information they need.

“This is the most closed, control freak administration I've ever covered,” said David E. Sanger, veteran chief Washington correspondent of *The New York Times*.



Obama and host Jay Leno tape 'The Tonight Show with Jay Leno' at NBC Studios on August 6 in Burbank, California. (AFP/Mandel Ngan)

The Obama administration has notably used social media, videos, and its own sophisticated websites to provide the public with administration-generated information about its activities, along with considerable government data useful for consumers and businesses. However, with some exceptions, such as putting the White House visitors' logs on the whitehouse.gov website and selected declassified documents on the new U.S. Intelligence Community website, it discloses too little of the information most needed by the press and public to hold the administration accountable for its

policies and actions. "Government should be transparent," Obama stated on the White House website, as he has repeatedly in presidential directives. "Transparency promotes accountability and provides information for citizens about what their government is doing."

But his administration's actions have too often contradicted Obama's stated intentions. "Instead," *New York Times* public editor Margaret Sullivan wrote earlier this year, "it's turning out to be the administration of unprecedented secrecy and unprecedented attacks on a free press."

"President Obama had said that default should be disclosure," *Times* reporter Shane told me. "The culture they've created is not one that favors disclosure."

White House officials, in discussions with me, strongly objected to such characterizations. They cited statistics showing that Obama gave more interviews to news, entertainment, and digital media in his first four-plus years in office than Presidents George W. Bush and Bill Clinton did in their respective first terms, combined. They pointed to presidential directives to put more government data online, to speed up processing of Freedom of Information Act requests, and to limit the amount of government information classified as secret. And they noted the declassification and public release of information about NSA communications surveillance programs in the wake of Snowden's leak of voluminous secret documents to *The Washington Post* and the *Guardian*.

"The idea that people are shutting up and not leaking to reporters is belied by the facts," Obama's press secretary, Jay Carney, told me, pointing in frustration to anonymously sourced media reports that same day about planning for military action against the government of President Bashar al-Assad in Syria.

"We make an effort to communicate about national security issues in on-the-record and background briefings by sanctioned sources," said deputy White House national security adviser Ben Rhodes. "And we still see investigative reporting from nonsanctioned sources with lots of unclassified information and some sensitive information."

He cited as an example the administration's growing, if belated, official openness about its use of drone aircraft to attack suspected terrorists, including declassification of information about strikes in Yemen and Somalia, following revelations about drone attacks in the news media. "If you can be transparent, you can defend the policy," Rhodes told me. "But then you're accused of jeopardizing national security. You're damned if you do and damned if you don't. There is so much political controversy over everything in Washington. It can be a disincentive."

The administration's war on leaks and other efforts to control information are the most aggressive I've seen since the Nixon administration, when I was one of the editors involved in *The Washington Post's* investigation of Watergate. The 30 experienced Washington journalists at a variety of news organizations whom I interviewed for this report could not remember any precedent.

"There's no question that sources are looking over their shoulders," Michael Oreskes, senior managing editor of The Associated Press, told me months after the government, in an extensive leak investigation, secretly subpoenaed and seized records for telephone lines and switchboards used by more than 100 AP reporters in its Washington bureau and elsewhere. "Sources are more jittery and more standoffish, not just in national security reporting. A lot of skittishness is at the more routine level. The Obama administration has been extremely controlling and extremely resistant to journalistic intervention. There's a mind-set and approach that holds journalists at a greater distance."

Washington Post national security reporter Rajiv Chandrasekaran, a member of CPJ's board of directors, told me that "one of the most pernicious effects is the chilling effect created across government on matters that are less sensitive but certainly in the public interest as a check on government and elected officials. It serves to shield and obscure the business of government from necessary accountability."

Frank Sesno, a former CNN Washington bureau chief who is now director of the School of Media and Public Affairs at

George Washington University, said he thought the combined efforts of the administration were “squeezing the flow of information at several pressure points.” He cited investigations of “leakers and journalists doing business with them” and limitations on “everyday access necessary for the administration to explain itself and be held accountable.”



Obama answers questions from the media in the Brady press briefing room at the White House, April 30. (Reuters/Jason Reed)

The Insider Threat Program being implemented throughout the Obama administration to stop leaks—first detailed by the McClatchy newspapers’ Washington bureau in late June—has already “created internal surveillance, heightened a degree of paranoia in government and made people conscious of contacts with the public, advocates, and the press,” said a prominent transparency advocate, Steven Aftergood, director of the Government Secrecy Project at the Federation of American Scientists in Washington. None of these measures is anything like the government controls, censorship, repression, physical danger, and even death that journalists and their sources face daily in many countries throughout the world—from Asia, the Middle East and Africa to Russia, parts of Europe and Latin America, and including nations that have offered asylum from U.S. prosecution to Snowden. But the United States, with its unique constitutional guarantees of free speech and a free press—essential to its tradition of government accountability—is not any other country.

“The investigation and potential indictment of investigative journalists for the crime of doing their jobs well enough to make the government squirm is nothing new,” Suzanne Nossel, executive director of PEN American Center, wrote earlier this year. “It happens all over the world, and is part of what the Obama administration has fought against in championing press and Internet freedom globally. By allowing its own campaign against national security leaks to become grounds for trampling free expression, the administration has put a significant piece of its very own foreign policy and human rights legacy at risk.”

Financial Times correspondent Richard McGregor told me that, after coming to Washington several years ago from a posting in China, he was surprised to find that “covering this White House is pretty miserable in terms of getting anything of substance to report on in what should be a much more open system. If the U.S. starts backsliding, it is not only a bad example for more closed states, but also for other democracies that have been influenced by the U.S.” to make their governments more transparent.

This report will examine all these issues: legal policies of the Obama administration that disrupt relationships between journalists and government sources; the surveillance programs that cast doubt on journalists’ ability to protect those sources; restrictive practices for disclosing information that make it more difficult to hold the government accountable for its actions and decision-making; and manipulative use of administration-controlled media to circumvent scrutiny by the press.

September 11, 2001, is a watershed

Of course, every U.S. administration in modern times has tried, with varying degrees of success, to control its message and manage contacts with the media and the public. “When I’m asked what is the most manipulative and secretive administration I’ve covered, I always say it’s the one in office now,” Bob Schieffer, the veteran CBS television news anchor and chief Washington correspondent, told me. “Every administration learns from the previous administration. They become more secretive and put tighter clamps on information. This administration exercises more control than George W. Bush’s did, and his before that.”

The terrorist attacks on the United States on September 11, 2001, were a watershed. They led to a rapid buildup of what *The Washington Post* later characterized as a sprawling “Top Secret America” of intelligence and other government agencies, special military forces, and private contractors to combat terrorism. The “black budget” for the 16 U.S. intelligence agencies alone was more than \$50 billion for the fiscal year 2013, according to an NSA document Edward Snowden gave to *The Post*.

Since the 9/11 attacks, “the national security role of the government has increased hugely,” said Harvard Law School professor Jack Goldsmith, a senior national security lawyer in the Pentagon and the Justice Department during the Bush administration. It has amounted to a “gigantic expansion of the secrecy system,” he told me, “both the number of secrets and the numbers of people with access to secrets.”

By 2011, more than 4 million Americans had security clearances for access to classified information of one kind or another, according to a U. S. Intelligence Community report to Congress required by the 2010 Intelligence Authorization Act, and more and more information was being classified as secret. In that year alone, government employees made 92 million decisions to classify information—one measure of what Goldsmith called “massive, massive over-classification.” For example, the 250,000 U.S. State Department cables that Army Pvt. Chelsea Manning (then known as Pvt. Bradley Manning) downloaded and gave to the Wikileaks website included countless previously published newspaper articles that were classified as secret in diplomatic dispatches to Washington.



President George W. Bush is applauded after signing the FISA Amendments Act of 2008 in the White House Rose Garden.
(AP/Ron Edmonds)

The Patriot Act, passed by Congress after the 9/11 attacks and since amended and extended in duration, gave the government increased powers to protect national security, including secret investigations of suspected terrorist activity.

During the Bush administration, the NSA, working with the Federal Bureau of Investigation, secretly monitored large amounts of telephone calls that flowed through U.S. telecommunications companies and facilities. This electronic surveillance to detect terrorism threats was eventually authorized and expanded by the closed FISA court created by the 1978 Foreign Intelligence Surveillance Act, enabling the NSA to secretly collect, store, and access records of most telephone and Internet traffic in and passing through the United States.

Initially, the American press did not discover these or other secret counterterrorism activities. It also did not appear to be aggressive in challenging President George W. Bush's rationale for going to war in Iraq, in addition to the continuing military activity in Afghanistan. "The Bush administration was working to sell the wars and covert programs to journalists," syndicated foreign affairs columnist David Ignatius told me. "Access was a routine matter."

But the press coverage gradually changed. In 2003, reporter Barton Gellman detailed in *The Washington Post* how an American task force had been unable to find any evidence of weapons of mass destruction in Iraq after the American invasion. In 2004, CBS television news and *New Yorker* magazine writer Seymour Hersh separately reported that U.S. soldiers and intelligence agency interrogators had abused and tortured wartime prisoners in Iraq's Abu Ghraib prison. In 2005, *Washington Post* reporter Dana Priest revealed that the Central Intelligence Agency had detained and aggressively interrogated terrorism suspects in extralegal "black site" secret prisons outside the U.S. Later that year, *New York Times* reporters James Risen and Eric Lichtblau first reported about the warrantless intercepts of Americans' telephone calls in the NSA's secret electronic surveillance program. In 2006, Risen published a book in which he revealed a failed CIA covert operation to sabotage Iran's nuclear program.

These kinds of revelations enabled Americans to learn about questionable actions by their government and judge for themselves. But they infuriated Bush administration officials, who tried to persuade news executives to stop or delay such stories, which depended, in part, on confidential government sources of classified information. The Bush administration started intensive investigations to identify the sources for the stories on CIA secret prisons and NSA electronic surveillance and for Risen's book. By the time Bush left office, no one had been prosecuted, although a CIA officer was fired for unreported contacts with Priest, and several Justice Department investigations were continuing.

The Bush White House and Vice President Dick Cheney did not hesitate to take issue with an increasingly adversarial press publicly and privately, especially as the wars in Iraq and Afghanistan—and the Bush administration itself—became more unpopular. But journalists and news executives, including myself, were still able to engage knowledgeable officials at the highest levels of the administration in productive dialogue, including discussions of sensitive stories about classified national security activities. "The Bush administration had a worse reputation," Marcus Brauchli, my immediate successor as executive editor of *The Washington Post*, told me, "but, in practice, it was much more accepting of the role of journalism in national security."

And not just in national security. Ellen Weiss, Washington bureau chief for E.W. Scripps newspapers and stations, said "the Obama administration is far worse than the Bush administration" in trying to thwart accountability reporting about government agencies. Among several examples she cited, the Environmental Protection Agency "just wouldn't talk to us" or release records about environmental policy review panels "filled by people with ties to target companies."

Obama promises transparency

Obama, who during the 2008 campaign had criticized the "excessive secrecy" of the Bush administration, came into the Oval Office promising an unprecedentedly open government. By the end of his first full day there on January 21, 2009, he had issued directives to government agencies to speed up their responses to Freedom of Information Act requests and to establish "Open Government Initiative" websites with information about their activities and the data they collect.

The government websites turned out to be part of a strategy, honed during Obama's presidential campaign, to use the Internet to dispense to the public large amounts of favorable information and images generated by his administration, while limiting its exposure to probing by the press. Veteran political journalists Jim VandeHei and Mike Allen described the administration's message machine this way on the news website *Politico*: "One authentically new technique pioneered by the Obama White House is government creation of content—photos of the president, videos of White House officials, blog posts written by Obama aides—which can then be instantly released to the masses through social media. And they are obsessed with taking advantage of Twitter, Facebook, YouTube and every other social media forum, not just for campaigning, but governing. They are more disciplined about cracking down on staff that leak, or reporters who write things they don't like."



Obama's 'Open Government Initiative' websites turned out to be part of a strategy to minimize the administration's exposure to the press. (CPJ)

A senior White House official told me, "There are new means available to us because of changes in the media, and we'd be guilty of malpractice if we didn't use them." The official said that, for example, the White House often communicated brief news announcements on Twitter to the more than 4 million followers of @whitehouse.

"Some of you have said that I'm ignoring the Washington press corps—that we're too controlling," Obama jokingly told assembled journalists at the annual Gridiron Dinner in Washington in March. "Well, you know what? You were right. I was wrong, and I want to apologize in a video you can watch exclusively at whitehouse.gov," one of the administration's websites.

"There is no access to the daily business in the Oval Office, who the president meets with, who he gets advice from," said ABC News White House correspondent Ann Compton, who has been covering presidents since Gerald Ford. She said many of Obama's important meetings with major figures from outside the administration on issues like health care, immigration, or the economy are not even listed on Obama's public schedule. This makes it more difficult for the news media to inform citizens about how the president makes decisions and who is influencing them.

"In the past," Compton told me, "we would often be called into the Roosevelt Room at the beginning of meetings to hear the president's opening remarks and see who's in the meeting, and then we could talk to some of them outside on the driveway afterward. This president has wiped all that coverage off the map. He's the least transparent of the seven presidents I've covered in terms of how he does his daily business."

Instead of providing greater access for reporting by knowledgeable members of the press, Compton noted, the Obama White House produces its own short newscast, "West Wing Week," which it posts on the White House website. "It's five

minutes of their own video and sound from events the press didn't even know about," she said.

"When you call the White House press office to ask a question or seek information, they refer us to White House websites," said Chris Schlemmer, Washington producer for Britain's Channel 4 television news network. "We have to use White House website content, White House videos of the president's interviews with local television stations and White House photographs of the president."

West Wing Week: 06/28/13 or "The Case For Action"

The screenshot shows a Facebook post by Adam Garber, dated June 28, 2013, at 12:00 AM EDT. The post includes a video player with a red play button and a blue banner at the bottom that reads "WEST WING WEEK". Above the video, there is a small profile picture of Adam Garber and a text description: "This week, the President gave a major speech on climate change policy, hosted a roundtable discussion with business leaders, named a new director of the FBI, and welcomed the next class of Presidential Innovation Fellows." Below the video player, there are social sharing options for E-Mail, Tweet, and Share, along with a plus sign for more options.

The White House produces its own short newscast, 'West Wing Week,' on events which journalists may not have known about. (CPJ)

The Obama administration is using social media "to end run the news media completely," Sesno at George Washington University told me. "Open dialogue with the public without filters is good, but if used for propaganda and to avoid contact with journalists, it's a slippery slope."

Brushing off such concerns as special pleading from the news media, a senior administration official told me that White House videos of otherwise closed meetings, for example, provide the public with "a net increase in the visibility of these meetings." Several reporters told me that the White House press office and public affairs officials in many government agencies often don't respond to their questions and interview requests or are bullying when they do. "In the Obama administration, there is across-the-board hostility to the media," said veteran Washington correspondent and author Josh Meyer, who reports for the Atlantic Media national news website *Quartz*. "They don't return repeated phone calls and e-mails. They feel entitled to and expect supportive media coverage."

Reporters and editors said they often get calls from the White House complaining about news content about the administration. "Sometimes their levels of sensitivity amaze me—about something on Twitter or a headline on our website," said *Washington Post* Managing Editor Kevin Merida.

Obama press secretary Carney, who had covered the White House for *Time* magazine, minimized such complaints as being part of a "natural tension" in any administration's relationship with the press. "That's not new. I was yelled at by people during the Clinton and Bush administrations," he told me.

"The Obama people will spend an hour with you, off the record, arguing about the premise of the story," said Josh Gerstein, who covers the White House and its information policies for *Politico*. "If the story is basically one that they don't want to come out, they won't even give you the basic facts."

Eric Schmitt, national security correspondent of *The New York Times*, told me: "There's almost an obligation to control the message the way they did during the campaign. More insidious than the chilling effect of the leaks investigations is

the slow roll or stall. People say, 'I have to get back to you. I have to clear it with public affairs.'"

"They're so on message," said Channel 4's Schlemon. "I thought Bush was on message, but they've taken it to a whole new level."



White House Press Secretary Jay Carney, a former journalist, says media complaints are part of a 'natural tension' in any administration's relationship with the press. (Reuters/Kevin Lamarque)

White House under pressure to stop leaks

As this information-control culture took root after Obama entered the White House in January 2009, his administration also came under growing pressure from U.S. intelligence agencies and congressional intelligence committees to stem what they considered an alarming accumulation of leaks of national security information. According to a *New York Times* story this summer, Obama's first director of national intelligence, Dennis C. Blair, noted that during the previous four years 153 national security leaks had been referred by the intelligence agencies in "crime reports" to the Justice Department, but that only 24 had been investigated by the FBI, and no leaker had yet been prosecuted in those investigations.

"According to Mr. Blair," *The Times* reported, "the effort got under way after Fox News reported in June 2009 that American intelligence had gleaned word from within North Korea of plans for an imminent nuclear test." Blair told *The Times* that he and Attorney General Eric H. Holder Jr. then coordinated a more aggressive approach aimed at producing speedy prosecutions. "We were hoping to get somebody and make people realize that there are consequences to this and it needed to stop," Blair told *The Times*. "It was never a conscious decision to bring more of these cases than we ever had," Matthew Miller, Holder's spokesman at the time, told me this summer. "It was a combination of things. There were more crime reports from the intelligence agencies than in previous years. There was pressure" from Capitol Hill, where Holder, Blair and other administration officials "were being harangued by both sides: 'Why aren't leakers being prosecuted? Why aren't they being disciplined?'"

"Some strong cases," inherited from the Bush administration, "were already in process," Miller said. "And a number of cases popped up that were easier to prosecute" with "electronic evidence," including telephone and e-mail records of government officials and journalists. "Before, you needed to have the leaker admit it, which doesn't happen," he added, "or the reporter to testify about it, which doesn't happen."

Leak prosecutions under Obama have been “a kind of slap in the face,” said Smith of the Center for Public Integrity. “It means you have to use extraordinary measures for contacts with officials speaking without authorization.”

Use of Espionage Act gathers steam

The first Obama administration prosecution for leaking information popped up quickly in April 2009, when a Hebrew linguist under contract with the FBI, Shamai K. Leibowitz, gave a blogger classified information about Israel. The administration has never disclosed the nature of the information, the identity of the blogger, or the government’s evidence in the relatively little-noticed case. Leibowitz pleaded guilty in May 2010, and was sentenced to 20 months in prison for a violation of the 1917 Espionage Act. It was the Obama administration’s initial use of a law passed during World War I to prevent spying for foreign enemies.

The campaign against leaks then gathered steam with Espionage Act prosecutions in two of the investigations inherited from the Bush administration.

In the first, NSA employee Thomas Drake was indicted on April 14, 2010, on charges of providing information to *The Baltimore Sun* in 2006 and 2007 about spending and management issues at the NSA, including disagreements about competing secret communications surveillance programs. Drake gave information to Siobhan Gorman, then a *Sun* reporter, including copies of documents that, in his view, showed the NSA had wrongly shelved a cheaper surveillance program with privacy safeguards for Americans in favor of a much more costly program without such safeguards. Drake and two of his NSA colleagues believed they were whistle-blowers who had first voiced their concerns within the NSA and to a sympathetic congressional investigator, to no avail. Gorman’s stories in the *Sun* angered government officials, including Gen. Michael Hayden, who was the NSA director when Drake objected to Hayden’s decision to switch the communications surveillance programs.

At the time when the *Sun* was publishing Gorman’s stories, the Bush administration’s investigation of the 2005 *New York Times* story about NSA warrantless communications surveillance had not found any leakers to prosecute. Apparently Drake, his NSA colleagues, and the congressional investigator to whom Drake had turned then became the focus of that investigation, even though they were never identified as sources for *The Times*. The homes of the other three—former NSA officials William Binney and J. Kirk Weibe and House Intelligence Committee staff member Diane Roark—were raided by armed federal agents on July 26, 2007. The raids frightened and angered them, but they were not prosecuted.

However, when Drake’s home was searched four months later, federal agents found copies of documents about the NSA programs that were the subjects of *The Baltimore Sun* stories. Drake volunteered to investigators that, acting as a whistle-blower, he had sent copies of documents and hundreds of e-mails to *Sun* reporter Gorman. Only after the Obama administration took office more than a year later, and the Justice Department became more aggressive in prosecuting leakers, was Drake indicted on 10 felony counts, including violations of the Espionage Act, for “willful retention of national defense information” and “making false statements” when he insisted to federal agents that the documents he had copies of were not secret.

Eventually, Drake’s lawyers and supporters showed that most of the information at issue was not classified or, as former Justice spokesman Miller told me, “other officials had been talking about the same things.” In June, as the government’s case “fell apart,” in Miller’s words, the federal prosecutor agreed not to seek a prison sentence for Drake in return for his guilty plea to the misdemeanor crime of misusing the NSA’s computer system. When Judge Richard D. Bennett sentenced Drake in Federal District Court to a year’s probation and 240 hours of community service, he said it was “unconscionable” that Drake and his family had endured “four years of hell” before the government dismissed its 10-count felony indictment. Drake, who was forced to resign from the NSA, now works in an Apple computer store.

Former NSA director Hayden told me that, despite his differences with Drake, the employee should never have been prosecuted under the Espionage Act. “He should have been fired for unauthorized meetings with the press,” Hayden said. “Prosecutorial overreach was so great that it collapsed under its own weight.”

Whatever his role in the NSA's internal rivalries at the time, Drake appears to be a whistle-blower whose information about the secretive agency's telecommunications surveillance methods should have resulted in greater government accountability at the time, rather than a criminal prosecution for spying.

Who is a whistle-blower?

In the second investigation inherited from the Bush administration, former CIA officer Jeffrey Sterling was indicted on Dec. 22, 2010, and arrested on Jan. 6, 2011, on charges of providing *New York Times* reporter James Risen with extensive information about a failed CIA effort to sabotage Iran's nuclear program. *The Times* never published a story about it, but the information appeared to be the basis for a chapter in Risen's 2006 book, *State of War*. Sterling, who is black, had unsuccessfully sued the CIA for discrimination after he lost his job there.



New York Times reporter James Risen has vowed to go to jail rather than identify a source in court. (AP/The New York Times)

Years of communications records for the two men were subpoenaed and seized during the government's investigation—and itemized in Sterling's indictment. They showed dozens of telephone calls and e-mails between Sterling and Risen, beginning in 2002, when Risen wrote in *The Times* about Sterling's allegations of racial discrimination when he worked on the CIA's Iran task force. In hindsight, it was the first clear evidence that the Justice Department was digging into the phone and e-mail records of both government officials and journalists while investigating leaks.

“Jeffrey Sterling is not a whistle-blower,” Miller, the former Justice Department spokesman, insisted to me, even though Sterling, whatever his motive, apparently was knowledgeable about significant problems plaguing the CIA at the time. “He was fired for cause. He went to court and the case was thrown out. No waste, fraud, or abuse was involved.”

This is a disturbing distinction that the Obama administration has made repeatedly. Exposing “waste, fraud and abuse” is considered to be whistle-blowing. But exposing questionable government policies and actions, even if they could be illegal or unconstitutional, is often considered to be leaking that must be stopped and punished. This greatly reduces the potential for the press to help hold the government accountable to citizens.

Beginning in early 2008, the Justice Department repeatedly tried to subpoena Risen to testify against Sterling in what has become a long-running legal battle closely watched by journalists and media lawyers. In support of the latest subpoena, filed in April 2010, Justice argued that “James Risen is an eyewitness to the serious crimes with which the grand jury charged Sterling.”

In July 2011, Judge Leonie Brinkema ruled in Federal District Court that, while Risen must testify to the accuracy of his reporting, he could not be compelled by the government to reveal his source. She concluded that courts, dating back to the U.S. Supreme Court's divided ruling in *Branzburg v. Hayes* in 1972, had, in effect, established a qualified privilege under the First Amendment that protects reporters against identifying their sources if their need to protect their sources' identities to do their reporting outweighs the government's need for the reporters' testimony to establish its case. It was the first time a reporter had successfully invoked such a privilege at the grand jury and trial stages of a federal

prosecution.

The Obama administration appealed Brinkema's decision, leaving the Sterling trial in limbo. A coalition of 29 news organizations and related groups came forward to support Risen, a two-time winner of the Pulitzer Prize for journalism. In an appellate brief, they pointed to the many significant national security and government accountability news stories over the years that could not have been reported by the press without confidential sources.

However, in July this year, a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit in Richmond, Va., reversed Brinkema's decision from two years earlier. A 2-to-1 majority ruled that the First Amendment did not protect Risen from being forced to testify against his source. Also citing *Branzburg*, Chief Judge William Byrd Traxler wrote: "Clearly, Risen's direct, firsthand account of the criminal conduct indicted by the grand jury cannot be obtained by alternative means, as Risen is without dispute the only witness who can offer this testimony."

Ominously, perhaps, Traxler added that Risen "is inextricably involved in it. Without him, the alleged crime would not have occurred, since he was the recipient of illegally-disclosed, classified information."

Dissenting, Judge Roger Gregory argued that the decision could be a serious blow to investigative journalism. "The majority exalts the interests of the government while unduly trampling those of the press," he wrote, "and, in doing so, severely impinges on the press and the free flow of information in our society."

Risen asked the full 15-judge appellate court to review the case, and he vowed to go to jail rather than identify his source. Backed once again by many press organizations, he also formally asked the Justice Department to withdraw the subpoena. The Justice Department has continued to press for enforcement of the subpoena by asking the full appellate court not to hear further arguments in the case.

Manning case is a turning point

The Obama administration's next prosecution originated with a June 11, 2009, story on the Fox News network's website. Fox News's chief Washington correspondent, James Rosen, reported that U.S. Intelligence had discovered that North Korea was planning, in defiance of the United Nations, to escalate its nuclear program and conduct another nuclear weapons test. The Justice Department soon began a secret investigation, which produced an August 19, 2010, felony indictment of Stephen Jin-Woo Kim, a State Department contract analyst. He was charged with violating the Espionage Act by giving classified intelligence information about North Korea to Rosen, who was not named in the indictment.

The indictment of Kim contained just two bare-bones paragraphs—the tip of an iceberg of secret investigations on which the Obama administration and the press would collide resoundingly nearly three years later.

Overshadowing the Kim case at the time was the arrest in May 2010 of Manning, the Army private, in the most voluminous leak of classified documents in U.S. history. Manning was an emotionally troubled young soldier concerned about U.S. conduct in the wars in Iraq and Afghanistan. Manning used computer access as an Army intelligence analyst in Baghdad to download an enormous amount of classified information and give it to the anti-secrecy group Wikileaks. The data included more than 250,000 U.S. State Department diplomatic cables, 500,000 U.S. Army incident reports from the two wars, dossiers on terrorist suspects detained at Guantánamo Bay, and videos of two American airstrikes that killed civilians in Iraq and Afghanistan.

News media throughout the world published scores of stories based on the documents obtained through Wikileaks during 2010 and 2011. The State Department cables contained American diplomats' unvarnished views of numerous countries' government and diplomatic activities. The military logs detailed troubling issues, including civilian deaths, in waging the wars in Iraq and Afghanistan. While news organizations did further reporting for what they published, and decided to

leave out some names and other details after talking to government officials, Wikileaks posted unredacted documents on its own website, exposing, among other things, the identities of foreign nationals in contact with U.S. embassies around the world.



Army Pvt. Chelsea Manning (then known as Pvt. Bradley Manning) was arrested for the most voluminous leak of classified documents in U.S. history. (AP/Patrick Semansky)

Manning was eventually charged in a military court with 22 offenses, including violations of the Espionage Act, and pleaded guilty in February 2013 to 10 of the lesser charges of accessing and communicating classified information. The government nevertheless continued to pursue the prosecution, and Manning was convicted by a military judge in July of the rest of the charges, except the most serious offense under the Uniform Code of Military Justice—aiding the enemy. In August, the court-martial judge, Col. Denise R. Lind, sentenced Manning to 35 years in prison. With credit for time served awaiting the trial and verdict, she could be eligible for parole in seven years. It was a long sentence for leaking classified information, as extensive as it was, to news media, rather than spying for a foreign government.

The Manning case appears to have been another turning point. “After Wikileaks, the administration got together and decided we’re not going to let this happen again,” said Lucy Dalglish, who monitored developments closely while director of the Reporters Committee for the Freedom of the Press. “Prosecution under the 1917 Espionage Act is almost their only tool,” she told me. “They’re sending a message. It’s a strategy.”

Dalglish, now dean of the Philip Merrill College of Journalism at the University of Maryland, along with Danielle Brian of the Project on Government Oversight (POGO) and other longtime government transparency advocates, met with President Obama in the Oval Office on March 28, 2011, to thank him for his frequent promises about transparency and early actions on open government. They used the opportunity to explain why they thought much more needed to be done. According to Brian’s written account in the POGO blog the next day, the president seemed sympathetic to the issues they raised, including the over-classification of government information as secret.

But when Brian brought up “the current aggressive prosecution of national security whistle-blowers” and the “need to create safe channels for disclosure of wrongdoing in national security agencies,” she wrote, “The president shifted in his seat and learned forward. He said he wanted to engage on this topic because that may be where we have some differences. He said he doesn’t want to protect the people who leak to the media war plans that could impact the troops. He differentiated these leaks from those whistle-blowers exposing a contractor getting paid for work they are not performing.”

Dalglish told me there was a follow-up meeting at the White House in June 2011, with national security journalists and

lawyers from the director of national intelligence, CIA, FBI and the Pentagon. But they made little progress. “When the journalists said that in the past you could negotiate with agencies” about national security information, “there was no real response,” Dalglish recalled. When they asked, with the Risen subpoena in mind, about a proposed federal shield law that could protect reporters from being forced to identify their sources, Dalglish said, the lawyers told them, “You can get a shield law, but you’ve probably seen your last subpoena. We don’t need you anymore.”

Another leaker’s motives in question

On October 7, 2011, the Obama White House launched an ambitious new effort to curb leaks. “Following the unlawful disclosure of classified information by Wikileaks,” it announced, “the National Security Staff formed an interagency committee to review the policies and practices surrounding the handling of classified information, and to recommend government-wide actions to reduce the risk of a future breach.” An accompanying executive order from the president established an Insider Threat Task Force to develop within a year “a government-wide program for insider threat detection and prevention to improve protection and reduce potential vulnerabilities of classified information from exploitation, compromise, or other unauthorized disclosure.”

Meanwhile, the administration launched another Espionage Act prosecution. Former CIA officer John Kiriakou was indicted on April 5, 2012, on five felony counts accusing him of disclosing classified information, including the names of two CIA agents, to freelance journalist Matthew Cole and to *New York Times* reporter Scott Shane. Kiriakou, who retired from the CIA in 2004, had led the team that located and captured senior Al Qaeda operative Abu Zubaydah in 2002 in Pakistan. He became a sought-after news source—and a bête noire for the CIA—after a 2007 ABC News television interview in which he confirmed that Zubaydah had been water-boarded during his interrogation. Kiriakou said he believed the measure was necessary, legal, and effective, but probably constituted torture that should not be used again.



Former CIA officer John Kiriakou walks to U.S. District Court in Alexandria, Virginia, October 23, 2012. (AP/Cliff Owen)

Amid his many subsequent media appearances and contacts with journalists, Kiriakou discussed a covert CIA agent with Cole, who, in turn, discussed the agent with a researcher for defense lawyers for Al Qaeda suspects detained at Guantánamo Bay. Later, Kiriakou confirmed to Shane the identity of a former CIA officer, Deuce Martinez, who was involved in the Zubaydah interrogation. Shane told me that Kiriakou had showed him a non-CIA private business card for Martinez, whom Shane was trying to locate. “Martinez had been undercover, but he had asked that he no longer be, and he wasn’t,” said Shane, who wrote a detailed *Times* story about “enhanced interrogations” of terrorist suspects, which stated that Martinez had declined to be interviewed.

When government officials discovered that the Guantánamo defense lawyers were identifying CIA witnesses to their clients’ interrogation, the agency filed a crime report that prompted a Justice Department investigation. A defense lawyer and a researcher, who had been targets of the inquiry, were eventually cleared of any illegality. Instead, the investigation turned into a criminal leaks case after investigators seized scores of e-mails between Kiriakou and journalists. They revealed Kiriakou as both Cole’s source of the identity of the covert CIA agent and a frequent contact of *Times* reporter Shane. In a plea bargain, Kiriakou admitted guilt on October 22, 2012, to a single count of violating the Intelligence Identities Protection Act for giving the covert CIA agent’s name to Cole. In return, the other charges, including three counts of violating the Espionage Act, were dropped. Kiriakou was sentenced to 30 months in prison.

Once again, there was disagreement about the leaker's motivation in a questionable espionage case. Kiriakou and his supporters characterized him as a patriotic, if self-promoting, whistle-blower who exposed abusive interrogation methods later condemned as torture, while none of the government officials responsible for them had been punished. However, Judge Brinkema said in sentencing Kiriakou, "this is not a case of a whistle-blower" because of the seriousness of revealing the identity of a covert intelligence officer.

In a statement to CIA employees the day after Kiriakou's sentencing, David H. Petraeus, then the CIA director, made clear the administration's intentions. "The case yielded the first successful prosecution"—under the Intelligence Identities Protection Act—"in 27 years, and it marks an important victory for our agency, for our intelligence community, and for the country," Petraeus told them. "Oaths do matter, and there are indeed consequences for those who believe they are above the laws that protect our fellow officers and enable American intelligence agencies to operate with the requisite degree of secrecy."

The chilling lesson for reporters and sources, *The Times's* Shane told me, contrary to Petraeus, "is that seemingly innocuous e-mails not containing classified information can be construed as a crime."

Journalist and author Steve Coll, now dean of the Columbia School of Journalism, raised questions about the case in a *New Yorker* magazine article last April. "Which matters more: Kiriakou's motives or his reliability, or the fact that, however inelegantly, he helped to reveal that a sitting president"—George W. Bush—"had ordered international crimes?" Coll asked. "Does the emphasis on the messenger obscure the message?" There is no "perfect solution to this problem" of how to protect necessary secrets while informing citizens about their government, Jack Goldsmith, the Harvard Law professor and former Bush administration lawyer, told me. "Too much secrecy and too much leaking are both bad," he said. "A leaker has to be prepared to subject himself to the penalties of law, but leaks can serve a really important role in helping to correct government malfeasance, to encourage government to be careful about what it does in secret and to preserve democratic processes."

Climate of fear sets in

The next escalation in the Obama administration's war on leaks had already been prompted by a May 7, 2012, Associated Press story revealing the CIA's success in penetrating a Yemen-based group, Al-Qaeda in the Arabian Peninsula, that had developed an improved "underwear bomb" improvised explosive device (IED) for a suicide bomber to detonate aboard U.S.-bound aircraft. At the request of the White House and the CIA, the AP had held the story for five days to protect continuing aspects of the covert operation. The AP's discussions with government officials were similar to many I had participated in with several administrations during my years as executive editor of *The Washington Post*, when I was deciding how to publish significant stories about national security without causing unnecessary harm.

After the AP story first appeared on its wire service, the White House spoke freely about it on the record, publicly congratulating the CIA. Intelligence officials, however, were angry that the AP story and subsequent reporting had revealed their covert operation in Yemen. "The irresponsible and damaging leak of information was made," CIA Director John Brennan later told Congress, "when someone informed The Associated Press that the U.S. had intercepted an IED that was supposed to be used in an attack and that the U.S. government currently had the IED in its possession and was studying it." Brennan said that he had himself been questioned by the FBI in the investigation of the leak.

Then, on June 1, 2012, *The New York Times* published a story by David E. Sanger describing a covert operation code-named Olympic Games, in which a computer worm called Stuxnet, developed by the U.S. and Israel, had been used in cyberattacks on the computer systems running Iran's main nuclear enrichment facilities. Sanger also detailed the operation in his book, *Confront and Conceal*, published at the same time.

Even though the existence of the worm was already known because a computer error had sent it around the world two years earlier, the details in Sanger's story and book helped cause political trouble for Obama. Republicans in Congress and conservative pundits loudly accused the administration of purposely leaking classified information used in the AP and *New York Times* stories to embellish Obama's counterterrorism credentials in an election year.

The Justice Department responded by opening aggressive investigations to find and prosecute the unnamed sources of both stories. Rejecting Republican calls for special prosecutors, Attorney General Holder assigned two senior U.S. attorneys to run the investigations. *The New York Times* reported that federal prosecutors and the FBI questioned scores of officials throughout the government who had knowledge of either covert operation or who were identified in computer analyses of phone, text, and e-mail records as having any contact with the journalists involved.

"A memo went out from the chief of staff a year ago to White House employees and the intelligence agencies that told people to freeze and retain any e-mail, and presumably phone logs, of communications with me," Sanger told me. As a result, he said, longtime sources would no longer talk to him. "They tell me, 'David, I love you, but don't e-mail me. Let's don't chat until this blows over.'"



Director of National Intelligence James Clapper testifies at a Senate Intelligence Committee hearing on FISA legislation on September 26. (Reuters/Jason Reed)

The director of national intelligence, James Clapper, announced on June 25, 2012, his own internal steps to stem leaks. Employees of all 16 U.S. intelligence agencies—including the CIA, NSA, FBI and Defense Intelligence Agency—would be asked during routine polygraph examinations whether they had disclosed any classified information to anyone. And the new inspector general for the Intelligence Community, with jurisdiction over all its agencies, would investigate leak cases that had not produced prosecutions by the Justice Department to determine what alternative action should be taken. A classified report from the inspector general to Clapper, obtained about the same time by the FBI Director Robert S. Mueller, showed that the inspector general was already reviewing 375 unresolved investigations of intelligence agency employees.

Five months later, on November 21, 2012, after a year's planning by its Insider Threat Task Force, the White House issued a presidential memorandum instructing all federal government departments and agencies to set up Insider Threat Programs to monitor employees with access to classification information and prevent "unauthorized disclosure." According to the National Insider Threat Policy, each agency must, among other things, develop procedures "ensuring employee awareness of their responsibility to report, as well as how and to whom to report, suspected insider threat activity." Officials cited the Manning case as the kind of threat the program was intended to prevent.

A survey of government department and agencies this summer by the Washington bureau of the McClatchy newspapers found that they had wide latitude in defining what kinds of behavior constituted a threat. "Government documents reviewed by McClatchy illustrate how some agencies are using that latitude to pursue unauthorized disclosures of any information, not just classified material," it reported in June. "They also show how millions of federal employees and contractors must watch for 'high-risk persons or behaviors' among co-workers and could face penalties, including criminal charges, for failing to report them. Leaks to media are equated with espionage."

Michael Hayden, who was director of the NSA and then the CIA during the Bush administration, told me that, in his view, the unfolding Insider Threat Program "is designed to chill any conversation whatsoever."

"The simplest thing to do is to avoid contacts with the press," the government transparency advocate Steven Aftergood said about the program. "It discourages even casual contacts with the press and members of the public," he said.

"Reporters are interviewing sources through intermediaries now," *Washington Post* national news editor Cameron Barr told me, "so the sources can truthfully answer on polygraphs that they didn't talk to reporters."

Media outraged over AP secret subpoena

In May of this year, two revelations of Justice Department tactics in the war on leaks caused already roiling tensions between news media and the Obama administration to boil over.

On May 13, the Justice Department informed the Associated Press—three months after the fact—that as part of its investigation of the AP story a year earlier about the CIA's covert operation in Yemen, it had secretly subpoenaed and seized all records for 20 AP telephone lines and switchboards for April and May of 2012. The records included outgoing calls for the work and personal phone lines of individual reporters, for AP news bureau lines in New York, Washington, and Hartford, Conn., and for the main AP phone number in the press gallery of the U.S. House of Representatives. Although only five AP reporters and an editor were involved in the May 12, 2012, Yemen story, "thousands upon thousands of newsgathering calls" by more than 100 AP journalists using newsroom, home, and mobile phones were included in the seized records, AP President Gary Pruitt said in an interview with CBS News' "Face the Nation" television program. "There can be no possible justification for such an overbroad collection of the telephone communications of The Associated Press and its reporters," Pruitt wrote in a letter of protest to Attorney General Holder. "These records potentially reveal communications with confidential sources across all of the newsgathering activities undertaken by the AP during a two-month period, provide a road map to AP's newsgathering operations and disclose information about AP's activities and operation that the government has no conceivable right to know."

"I don't know what their motive is," Pruitt said on "Face the Nation." But, he added, "I know what the message being sent is: If you talk to the press, we're going after you." There was an immediate outcry from the rest of the press. The next day, a coalition of more than 50 American news media organizations—including the Newspaper Association of America, National Association of Broadcasters, American Society of News Editors, Society of Professional Journalists, ABC, NBC, CNN, NPR, Gannett, McClatchy, Tribune, *The New York Times*, and *The Washington Post*—joined the Reporters Committee for the Freedom of the Press in a strong protest letter to Holder. The secret subpoena and seizure of AP phone records, the letter stated, call "into question the very integrity of Department of Justice policies toward the press and its ability to balance, on its own, its police powers against the First Amendment rights of the news media and the public's interest in reporting all manner of government conduct, including matters touching on national security which lie at the heart of this case." CPJ's board of directors also sent an unprecedented letter of protest to Holder.

Substantively, the news organizations charged in their letter that the Justice Department "appears to have ignored or brushed aside almost every aspect" of its own four-decade-old guidelines governing subpoenas of journalists and news

organizations. The Justice guidelines prescribed that such a subpoena should be used only a last resort in a federal investigation. They stated that “the subpoena should be as narrowly drawn as possible,” that the targeted news organization “shall be given reasonable and timely notice” to negotiate the subpoena with Justice or to fight it in court, and that “the approach in every case must be to strike the proper balance between the public’s interest in the free dissemination of ideas and information and the public’s interest in effective law enforcement and the fair administration of justice.”



News organizations accuse Attorney General Eric Holder of ignoring Justice Department guidelines governing subpoenas of journalists.
(AP/J. Scott Applewhite)

By secretly serving the subpoena for the records directly on telephone companies without notifying the AP, the Justice Department avoided negotiations with the news agency or a court challenge over its broad scope. That would be permitted as an exception to the Justice guidelines if prosecutors believed prior notification and negotiations would “pose a substantial threat to the integrity of the investigation.” But there was never an explanation of what threat might have been posed in this case, since preservation of the records by the phone companies was never in question and the news leak under investigation had occurred long before.

I can remember only one similar event during my 17 years as executive editor of *The Washington Post*. In 2008, the FBI director at the time, Robert S. Mueller III, formally apologized to me and to the executive editor of *The New York Times* for the unexplained secret seizure four years earlier of the phone records of our foreign correspondents working in Jakarta, Indonesia—because the Justice guidelines had been violated and no subpoena had been issued. But I recall a number of instances during several U.S. administrations in which other federal investigative requests, for which the newspaper had prior notification, were successfully negotiated in ways that protected our newsgathering independence in accordance with the Justice guidelines.

A week after the revelation of the secret seizure of AP telephone records, *The Washington Post* reported that the Justice Department had also secretly subpoenaed and seized telephone and e-mail records of the Fox News chief Washington correspondent, James Rosen, in the Espionage Act prosecution of Stephen Jin-Woo Kim. Federal investigators used the records to trace phone conversations and e-mail exchanges between Rosen and Kim in June, 2009, at the time of Rosen’s story about U.S. intelligence monitoring of North Korea’s nuclear program. Although investigators had already gathered evidence from Kim’s phone records and computer at the State Department, where he worked as a contract analyst with access to classified information, they used the secret subpoena to seize Rosen’s phone records and personal e-mails. They also used electronic security badge records to track the comings and goings of Rosen and Kim at the State Department.

Most disturbing for journalists and news organizations, the FBI affidavit filed in support of the successful federal court application for the secret subpoena declared that “there is probable cause to believe that the reporter has committed or is committing a violation” of the Espionage Act—“at the very least, either as an aider, abettor and/or co-conspirator” —in seeking and accepting information from Kim while doing his job as a journalist. “The reporter did so by employing flattery and playing to Mr. Kim’s vanity and ego,” the affidavit said, potentially—if not laughably—criminalizing a routine interview tip taught to every cub reporter.

Although the secret subpoena was approved by Holder in May 2010, it and the records seizure did not become known until court records were unsealed three years later. Those records showed that the Justice Department went back to court repeatedly during that time for approval to avoid notifying Rosen and Fox News about the subpoena, in an apparent effort to continue to monitor Rosen’s e-mail for other contacts with government officials. It amounted to open-ended government surveillance of a reporter’s communications.

“As with the AP subpoenas, this search is overbroad and has a chilling effect on reporters,” stated a *Wall Street Journal* editorial that expressed a view widespread among journalists. “The chilling is even worse in this case because Mr. Rosen’s personal communications were subject to search for what appears to be an extended period of time. With the Fox News search following the AP subpoenas, we now have evidence of a pattern of anti-media behavior. ... The suspicion has to be that maybe these ‘leak’ investigations are less about deterring leakers and more about intimidating the press.”

In the midst of the controversy, Obama said in a major speech on national security at the National Defense University on May 23 that he was “troubled by the possibility that leak investigations may chill the investigative journalism that holds government accountable.” He said, “Journalists should not be at legal risk for doing their jobs,” even though his administration would still aggressively investigate government officials “who break the law” by leaking classified information.

The president asked Holder “to review existing Department of Justice guidelines governing investigations that involve reporters.” And Obama called on Congress to revive and pass a federal “shield law”—similar to those in 40 states and the District of Columbia—that would spell out defenses for journalists facing legal efforts to uncover their confidential sources and reporting contacts.

Two months later, after a series of Justice Department meetings with news executives, reporters, and media lawyers, Holder announced Obama-approved revisions to the Justice guidelines that somewhat narrowed the circumstances under which federal investigators could subpoena and seize communications records of news organizations or reporters. News organizations would be given advance notice of such subpoenas unless the attorney general personally determined “for compelling reasons” that it would pose a clear and substantial threat to an investigation. Search warrants could be issued for a reporter’s phone and e-mail records only if the journalist was the focus of a criminal investigation for conduct not connected to ordinary newsgathering.

“Members of the news media will not be subject to prosecution based solely on newsgathering activities,” the Justice Department said. It also would explore “ways in which intelligence agencies themselves, in the first instance, can address information leaks internally through administrative means, such as the withdrawal of security clearances and imposition of other sanctions,” rather than criminal prosecutions.

Media lawyers who negotiated with Justice welcomed the revisions to the guidelines as significant progress, despite remaining exceptions. The reactions of journalists were mixed. *Times* reporter Sanger told me that the revisions were “just formalizing what was observed in past administrations. The guidelines worked pretty well until the Obama administration came in.”

Even as the Justice Department was working with the news media on revising the guidelines, it was using the Associated

Press reporters' phone records it had secretly seized to identify and convict a former FBI agent for the leak about the covert CIA operation in Yemen. On September 23, Justice announced that Donald J. Sachtleben, a former FBI bomb technician working as a contractor for the bureau, had agreed to plead guilty to "unlawfully disclosing national defense information relating to a disrupted terrorist plot" in Yemen. "Sachtleben was identified as a suspect in the case of this unauthorized disclosure" to a reporter, according to the announcement, "only after toll records for phone numbers related to the reporter were obtained through a subpoena and compared to other evidence collected during the leak investigation." Sachtleben agreed to a 43-month prison sentence in the leak case, in addition to a 97-month sentence for his guilty plea in an unrelated child pornography case.



U.S. Senators South Carolina Republican Lindsey Graham, right, and Charles Schumer, a New York Democrat, proposed a new shield law to protect journalists from having to identify their sources. (Reuters/Claro Cortes IV)

Focusing on what it called the defendant's "egregious betrayal of our national security" in the AP case, the Justice announcement contained another strong warning to potential leakers of classified information to the news media. "This prosecution demonstrates our deep resolve to hold accountable anyone who would violate their solemn duty to protect our nation's secrets and to prevent future, potentially devastating leaks by those who would wantonly ignore their obligations to safeguard classified information," it stated. "With these charges, a message has been sent that this type of behavior is completely unacceptable and no person is above the law."

After reiterating that the seized phone records of AP reporters had enabled the FBI to identify Sachtleben, the statement added, "The FBI will continue to take all necessary steps to pursue such individuals who put the security of our nation and the lives of others at risk by their disclosure of sensitive information." While it didn't address the breadth and secrecy of the AP subpoena, Justice appeared to be vowing that it would, when it deemed necessary, make aggressive use of the national security exceptions in both its revised guidelines and a proposed federal shield law for reporters.

Weeks before this announcement, a supporter of a federal shield law, Sen. Ron Wyden, the Oregon Democrat, expressed his concerns about targeting reporters' phone records to discover their sources. "As a member of the Senate Intelligence Committee for a decade now, I won't take a back seat to anybody in protecting genuine national security information, but that doesn't mean that everything done in the name of stopping leaks is a good public policy," Wyden told me. "Some of the tactics the Justice Department has used in recent leaks investigations have been overly broad. Seizing phone records of journalists is in effect treating journalists as accomplices in committing crimes."

Obama and Holder have both expressed support for congressional passage of a federal reporter shield law. A compromise bill approved by the Senate Judiciary Committee on September 12 would make it more difficult for the

government in federal investigations to compel reporters to reveal their sources except in “classified leak cases when information would prevent or mitigate an act of terrorism or harm to national security.” It would require a judge, not the attorney general, to approve subpoenas for reporters’ records or sources.

A potential sticking point for the shield law had been how Congress should define who is a journalist in this participatory digital media era. The compromise language in the Senate bill would cover anyone who had an “employment relationship” with a news organization for at least one year in the past 20 years, or three months in the previous five years; student journalists; anyone with a “substantial track record” of freelance journalism in the previous five years; and anyone else “whom a federal judge has decided should be able to avail him or herself of the protections of the privilege, consistent with the interests of justice and the protection of lawful and legitimate newsgathering activities.” Journalists and press freedom advocates are divided over whether the federal government should define who is a journalist at all, even though many state shield laws already do. They are concerned about any restrictions on whose journalism would be protected.

“You give us a definition of what a journalist is, you define exemptions, you’re painting us into a corner,” Scott Armstrong, an independent investigative journalist and the executive director of the government transparency advocate Information Trust, said of the reporter shield legislation at a Newseum Institute panel discussion in Washington in September. Armstrong said that, as a First Amendment absolutist, he opposes any congressional legislation governing the press. He added that the national security exemption means that the legislation “won’t protect national security reporters. Federal agencies can still investigate us.”

But others on the panel argued that a shield law would provide some needed protection from federal government interference for countless journalists covering other subjects across the country. “This shield law could keep a lot of reporters out of court,” said Kevin Goldberg, legal counsel for the American Society of News Editors.

Congressional passage of a federal shield law in some form would “not be a cure-all, but helpful,” Associated Press managing editor Michael Oreskes told me, if it is “a statement that the act of reporting and finding sources is as important as the constitutional right to publish.”

Surveillance revelations deepen the chill

While the fate of the shield legislation remained uncertain, the Obama administration, Congress, and the American people reacted to Snowden’s revelations about the NSA’s extensive secret collection and surveillance of American and foreign telephone and e-mail traffic. On June 5, the *Guardian* and *The Washington Post* began publishing what became a steady stream of stories, documents, and exhibits from the large amount of highly classified information Snowden had given separately to *Post* reporter Barton Gellman and *Guardian* reporter Glenn Greenwald. Snowden was connected to them by documentary filmmaker Laura Poitras, who was developing a documentary about U.S. electronic surveillance, and who shared some reporting with the two journalists.

Snowden, while working as a Booz Allen Hamilton consultant for the NSA in Hawaii in the spring of 2013, downloaded a still-unknown amount of information about the NSA’s secret surveillance programs. He communicated with Gellman by encrypted e-mail and met secretly with Greenwald and Poitras in Hong Kong. Their stories revealed details of secret NSA operations that acquire, store, and search huge amounts of telephone call, text, and e-mail data from American telephone and Internet companies, under secret FISA court authorization, to find and track communications that might be tied to terrorist activity. The published documents also included the “black budget” for U.S. intelligence agencies, classified government charts illustrating how the NSA surveillance programs operate, and legal memos and FISA court decisions underpinning the programs.

Not long after publication began in *The Post* and the *Guardian*, Snowden publicly identified himself as the source of their

information. When Gellman asked him at the time about his motive, Snowden said he had discovered an immense expansion of government electronic surveillance, which is “such a direct threat to democratic government that I have risked my life and family for it.”



A monitor in a Hong Kong shopping mall broadcasts news on the charges against Edward Snowden on June 22, 2013.

(Reuters/Bobby Yip)

On June 21, the Justice Department unsealed a criminal complaint, filed a week earlier, charging Snowden with several violations of the Espionage Act. The U.S. government began a wide-ranging effort to have him extradited to the United States, including revoking his passport. But Snowden eventually made his way from Hong Kong to Russia, where he was granted temporary asylum on August 1.

Greenwald and Poitras worked on his stories and her documentary in Brazil, expressing concern about the U.S. and allied governments' using border security powers to harass and hamper them. Poitras, whose previous films were critical of U.S. anti-terrorism policies, had already been stopped and questioned and had her computers searched several times by the U.S. Customs and Border Patrol when re-entering the country in recent years. Greenwald's partner, David Miranda, serving as a courier for him and the *Guardian*, was similarly detained and his equipment confiscated at Heathrow airport in London on his way back to Rio de Janeiro from Europe in mid-August.

That appeared to be part of an effort by British officials to stop or limit the *Guardian's* publication of material from Snowden, which included U.S. government documents describing the NSA's collaboration on electronic surveillance with its secretive British counterpart, Government Communications Headquarters (GCHQ). After threatening the use of Britain's draconian Official Secrets Act, officials supervised destruction in the *Guardian* offices of computer hard drives containing some of the secret files obtained by Snowden, even though other copies remained in the U.S. and Brazil. Like *The Washington Post*, the *Guardian* continued to publish stories based on Snowden's documents, and it began sharing some of them with *The New York Times* and the nonprofit investigative reporting group ProPublica, based in New York.

At this writing, no connection has been established between the NSA surveillance programs and the many leak investigations being conducted by the Obama administration—but the surveillance has added to the fearful atmosphere surrounding contacts between American journalists and government sources.

“There is greater concern that their communications are being monitored—office phones, e-mail systems,” *Post* reporter Chandrasekaran said. “I have to resort to personal e-mail or face to face, even for things I would consider routine.”

Journalists who aren't worried about their communications being monitored should be; if not, they could be putting their

sources at risk, said Oktavía Jónsdóttir, program director of the S.A.F.E. Initiative of the Washington-based nonprofit IREX, which advocates for independent media and civil society internationally.

“The key I think is whether journalists today can guarantee their sources anonymity, and at this point that is very difficult, but I will say, not impossible,” Jónsdóttir said. “Sources need to understand the risks they take, agree with the journalists how far they will go and then put ultimate trust in that individual’s ability to protect that information and ensure that even though the information may be compromised, the source is not.”

Washington Post national security reporter Dana Priest told me: “People think they’re looking at reporters’ records. I’m writing fewer things in e-mail. I’m even afraid to tell officials what I want to talk about because it’s all going into one giant computer.”

The work of foreign journalists could be especially vulnerable to surveillance by the NSA or other U.S. intelligence agencies, because they are legally authorized to monitor telephone and Internet communications of non-U.S. nationals. The German magazine *Der Spiegel*, citing documents from Snowden, reported in August that the NSA had hacked into internal communications of the international news organization Al-Jazeera. The Qatar-based broadcaster and the U.S. government have often been at odds since it broadcast videotaped statements by Osama bin Laden after the 9/11 attacks.

Peter Horrocks, director of global news at the BBC, said all journalists at the British broadcaster must now take training in information security. “The nature of their work means journalists are often in touch with organizations representing extremist viewpoints and sources whose identities must be protected, and the BBC is particularly concerned with protecting those journalists who are travelling and working in sensitive locations,” he said.



Germans protest the U.S. National Security Agency's monitoring of international Internet traffic in Frankfurt on July 27, 2013.
(Reuters/Kai Pfaffenbach)

The European Union opened an investigation in September “to determine the impact of [U.S.] surveillance activities on EU citizens,” including journalists. In teleconferenced testimony to the European Parliament’s Civil Liberties Committee, *Guardian* editor Alan Rusbridger said that Miranda’s airport detention and the destruction of NSA materials at the *Guardian* could be “chilling and obstructive to journalism.” He called for EU oversight of such actions by member governments, adding, “Please find ways to protect journalism.”

Five days after Snowden was charged, Barton Gellman was asked in a panel discussion at the Center for Strategic and International Studies in Washington why he and *The Post* had published stories based on classified documents from Snowden. “Congress passes a vague law and a secret court makes secret rulings,” Gellman said. “Where should the

line be between intelligence gathering and privacy? We haven't had that discussion.”

The discussion started by Snowden's revelations quickly grew into a national debate. Members of Congress complained publicly that they had been kept in the dark or misled about the nature and dimensions of the NSA programs. Clapper, the director of national intelligence, was forced to apologize for falsely denying in earlier testimony to Congress that the NSA had secretly collected data about the telephone calls of millions of Americans. A bipartisan group of 26 senators wrote to Clapper to demand more information about the NSA surveillance, which they said “raises serious civil liberties concerns and all but removes the public from an informed national security and civil liberties debate.” Two judges of the secret FISA court gave unprecedented, if brief, statements about how it worked to *The Washington Post*. Senate Intelligence Committee chairwoman Dianne Feinstein wrote an opinion article in *The Post* defending the NSA surveillance as a necessary counterterrorism tool, while promising to work in Congress to make changes “to increase transparency and improve privacy protections.”

In July, as more members of Congress expressed skepticism about the NSA programs and what they knew about them, several of them introduced bills to rein in the programs. On July 24, a bipartisan plan to defund the NSA's telephone data collection program was defeated by just seven votes in the House of Representatives.

The Obama administration responded by explaining for the first time the legal rationale, execution and oversight of the secret NSA surveillance programs. The president declassified and ordered the release of many previously secret government reports, court decisions, and other documents, including the total number of surveillance orders issued each year to telecommunications companies. At a news conference on August 9, the president said he would ask Congress to tighten privacy protections in the Patriot Act authorization of the NSA programs and add an advocate for privacy rights to the secret FISA court proceedings that govern the NSA programs, in which only the government has been represented. He also created a panel to assess the phone records collection programs and suggest changes by the end of the year.

Adding to his administration's roster of government-run information sites, Obama announced that the 16-agency U.S. Intelligence Community was launching its own website, “IC on the Record.” The website posts statements from intelligence agencies, responses to what they characterize as erroneous press reports, and copies of declassified documents, which were dramatically labeled on the website with illustrations of opened locks.

Though the White House is taking credit for this welcome new openness about the NSA's activities, the fact is that the Obama administration—and the Bush administration before it—should have been more open and accountable for the NSA's surveillance activities in the first place. It seems highly unlikely this new transparency would have begun without Snowden's disclosures. That would appear to make him a whistle-blower, although he obviously broke laws governing access to highly classified information and his own security clearance, and the full extent, distribution and potential national security impact of the information he obtained is still not known.

In November, the president signed the congressionally passed Whistle-Blower Act of 2012, along with a presidential policy directive aimed at protecting from retaliation all government whistle-blowers, including employees—but not contractors—in intelligence agencies. However, the administration won an appellate court decision in August that takes away from the many federal employees in designated “national security sensitive” positions the right to appeal personnel actions by their agencies, which could include retaliation for whistle-blowing. And the administration has insisted that government whistle-blowers first raise their issues internally, rather than to outsiders, including the press.

Senator Wyden told me that he has studied the intelligence agencies' personnel rules and found that whistle-blowers “have to go first to the people perpetrating the problems they want to expose, before they can come to Congress, for example. There are a mountain of barriers and hurdles for intelligence agency whistle-blowers,” he said.

“We have a president with two minds in regard to whistle-blowing,” said Angela Canterbury, director of public policy for the Project on Government Oversight. “He deserves credit for doing more than any other president, but there's a

different policy for classified information whistle-blowers.”

When I asked deputy national security adviser Ben Rhodes about this, he said, “The president doesn’t like leaks of unauthorized information that can harm national security.” But not nearly all “unauthorized” or classified government information presents that danger. The Obama administration could do much more to reduce unnecessary classification. “The system is bent deeply in the direction of over-classification of information,” Senator Wyden said. “If done properly to protect only genuine national security information, it would be easier to protect government secrets.” He said it seemed as if classification were being used more to protect people from political embarrassment.



The 16-agency U.S. Intelligence Community launched a new website following criticism that surveillance policies were not transparent. (CPJ)

“Even when acting in good faith, officials are liable to over-classify,” said open government advocate Steven Aftergood. “There is no review of classification decisions.”

Obama directed government officials in a December 2009 executive order not to classify information if they had significant doubts about whether it needed to be secret. The number of newly classified documents has declined somewhat since then, according to the White House, and declassification of older documents has accelerated. But the administration has yet to take action on more far-reaching recommendations to reduce over-classification made to the president in a December 6, 2012, report by the congressionally authorized Public Interest Declassification Board (PIDB). It concluded that “present practices for classification and declassification of national security information are outmoded, unsustainable and keep too much information from the public.”

The administration’s accelerated cyberwarfare activities, revealed in news reports of documents provided by Snowden, were cited by *The Times’s* Sanger as an example of information the government should have declassified in some form before it was leaked. “I think there is a public interest in revealing things like that to alert the American people that an entirely new class of weapons to which the U.S. would be vulnerable were being deployed by the U.S.—to start public debate, even if the details of it are classified.”

In an April 23, 2013, open letter, 30 government transparency organizations called on the president “to promptly establish and provide active White House leadership for a Security Classification Reform Steering Committee” to push government agencies to implement the PIDB recommendations “to help correct what you have called ‘the problem of over-classification.’” The groups urged that the White House “take ownership of the reform effort.”

The White House and the Justice Department should also vigorously enforce the directive they issued on the president’s first full day in office, ordering government agencies to respond to Freedom of Information Act requests “promptly and in

a spirit of cooperation.” It directed that information should not be withheld merely because “public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.” The default response to information inquiries, with or without formal FOIA requests, was supposed to be disclosure.

Instead, reporters and open government advocates told me that their FOIA requests too often faced denials, delays, unresponsiveness or demands for exorbitant fees, with cooperation or obstruction varying widely from agency to agency. Government transparency advocate Danielle Brian of POGO told me that, while “non-intelligence parts” of the Pentagon were responsive to information requests, many other parts of the Obama administration—especially the State Department, Agency for International Development, and the Environmental Protection Agency—were “off the charts bad on FOIA.”

An Associated Press analysis, published in March, found that “more often than it ever has,” the Obama administration “cited legal exceptions to censor or withhold the material” and “frequently cited the need to protect national security and internal deliberations.” Some of the administration’s new government information policies also contain vague privacy exceptions that could be used to hide records crucial to accountability reporting about such subjects as health care payments, government subsidies, workplace accidents, or detentions of terrorism suspects.

A Washington-based consortium of more than 80 open government advocacy organizations called OpenTheGovernment.org is working on recommendations to the Obama administration to make the FOIA work better for the press and the public. They include reducing the number and breadth of exemptions used to withhold requested information, creating an effective process for appealing and overturning denials of information, reforming fee systems in federal agencies, and streamlining and centralizing the federal FOIA system, as some other countries have done.

When I asked Lucy Dalglish what she thought the Obama administration should do to fulfill the president’s promises of transparency and open government, her list included: Keep fewer secrets, improve the FOIA process, be open and honest about government surveillance, and build better bridges with the press, rather than trying to control or shut it out.

With so much government information digitally accessible in so many places to so many people, there are likely to be more Mannings and Snowdens among those who grew up in a digital world with blurred boundaries between public and private, shared and secret information. That makes access by the press to a range of government sources of information and guidance more important than ever.

“Closing doors to reporters is hurting themselves,” *Washington Post* journalist and author Bob Woodward told me, “because less responsible news organizations will publish or broadcast whatever they want. In the end, it does not hurt the press; it can damage national security.”

Journalists from other countries pointed out that hostility by the U.S. government to the news media can be damaging to press freedom elsewhere, contrary to the openness the Obama administration has been advocating internationally. Mohamed Elmenshawy, the widely published Egyptian columnist and director of regional studies at the Middle Eastern Institute in Washington, said, “As journalists from Third World countries, we look at the U.S. as a model for the very things we want: more freedom of expression and professionalism. We are fighting for free news and not to be threatened, and when we see some issues here regarding regulating news and reporting, it is bad news for us because usually our governments, especially undemocratic ones, use this as an example in a very negative way.”

President Obama is faced with many challenges during his remaining years in office, the outcome of which will help shape his legacy. Among them is fulfilling his very first promise—to make his administration the most transparent in American history amid national security concerns, economic uncertainty, political polarization, and rapid technological change. Whether he succeeds could have a lasting impact on U.S. government accountability and on the standing of America as an international example of press freedom.

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