

Balancing National Security and Freedom of the Press

The day after his inauguration on his first full day in office, President Obama signed an Executive Order and two presidential memoranda that he claimed would “mark the beginning of a new era of openness in our country.”¹ One memorandum vowed to “establish a system of transparency... Openness will strengthen our democracy.” He acknowledged, “Transparency promotes accountability and provides information for citizens about what their Government is doing.”² Speaking that day before his senior staff and cabinet secretaries he assured that, “Starting today, every agency and department should know that this administration stands on the side *not* of those who seek to withhold information but those who seek to make it known.”³ It was a commitment to creating “an unprecedented level of openness in Government”⁴, yet six years later *New York Times* public editor Margaret Sullivan would describe it as a government “of unprecedented secrecy and of unprecedented attacks on a free press.”⁵

It did not take long for the intractable burden of national security to sober the high expectations set on those first days of office. This year the United States dropped a precipitous 13 spots in the annual Press Freedoms Rankings compiled by U.S. Reporters Without Borders.⁶ A host of issues including the record volume of prosecutions of whistleblowers under the Espionage Act, the secret seizure of AP phone records and the general chill associated with revelations of NSA surveillance were all cited as causes for the decline.⁷ It is clear that this Presidency has failed to obtain the standard it set for itself six years ago. It will not be fulfilled until the conflict between national security and transparency is resolved.

The friction is visible even in the way the White House communicates with the press. Recent diminution of press access has culminated in 38 of the nation’s largest and most respected media organizations sending a letter of protest to the White House lamenting the new limitations barring photographers’ access to the President.⁸ “As if they were placing a hand over a journalist’s camera

lens, officials in this administration are blocking the public from having an independent view of important functions of the Executive Branch of government.”⁹ These restrictions have led some to criticize the White House for trying to “systematically ... bypass the media by releasing a sanitized visual record of [the President’s] activities through official photographs and videos, at the expense of independent journalistic access.”¹⁰ It might not be unfair to view these efforts as a natural extension and improvement upon the eternal effort to manage the image of the public officials. Indeed, in light of some of the more adversarial actions of this administration, these restrictions appear comparatively benign.

A more significant challenge to press relations is censorship of public records in response to Freedom of Information Act requests. “The government’s responsiveness under the FOIA is widely viewed as a barometer of the federal offices’ transparency”¹¹ and for that reason the President made an early promise that “All agencies should adopt a presumption in favor of disclosure” and that “In the face of doubt, openness” would prevail.¹² While according to an AP analysis, in 2012 the Obama administration answered more FOIA requests than it had the previous year, it also “more often than it ever has, cited legal exceptions to censor or withhold material.”¹³ It fully rejected over one-third of all requests and cited exemptions to censor or withhold records in a 22 percent increase over the previous year.¹⁴ The AP could not determine whether the national security exemption was being abused, but ACLU staff attorney Alexander Abdo noted “a meteoric rise in the number of claims to protect secret law, the government’s interpretations of laws or its understanding of its own authority.”¹⁵

Naturally, this has generated tension not only for investigative journalists but also for judges who must weigh the balance between national security and public information. Federal judge Colleen McMahon acknowledged the “Alice in Wonderland nature” of the “paradoxical situation” she was in when the *New York Times* and ACLU requested records about the government’s legal justification for killing terrorist suspects (including Americans) overseas. The judge opined that she could “find no way

around the thicket of laws and precedents that effectively allow the executive branch of our government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret.”¹⁶ According to deputy legal director Jameel Jaffer, such a ruling “denies the public access to crucial information” including government policies on extrajudicial killing of U.S. citizens.¹⁷

The AP analysis reveals that the government has steadily continued to invoke the national security exception to the FOIA in a roughly 37% increase from Obama’s first year in office.¹⁸ The CIA cited national security to withhold or censor nearly 60% of its requests, and “nearly half the Pentagon’s denials last year under that clause came from its National Security Agency.”¹⁹ As public debate over controversial policies such as domestic surveillance and targeted killings has heightened, the demand for public documents has proportionally increased. Despite answering more requests than ever and curbing the rate of newly classified documents, the increased rate of national security exemptions belie the government’s unyielding opacity regarding matters of national security and its legal interpretations regarding such policies. This attitude is reflected in the Attorney General’s unprecedented prosecution of leakers and whistleblowers.

To his credit the President has signed into law the Whistleblower Protection Enhancement Act of 2012, as well as a presidential policy directive aimed at protecting government employees from retaliation for whistleblowing. Yet contractors such as Edward Snowden were notably excluded from such protections, and for federal employees in designated “national security sensitive” positions the administration won an appellate court decision that removed “their right to appeal personnel actions by their agencies, which could include retaliation for whistle-blowing.”²⁰ This amounts to what Senate Intelligence Committee member, Senator Ron Wyden described as “a mountain of barriers and hurdles for intelligence agency whistle-blowers.”²¹

It is clear that while the President has expressed a desire to protect “those whistle-blowers

exposing a contractor getting paid for work they are not performing” he has a very “different policy for classified information whistle-blowers.”²² Ultimately, according to Angela Canterbury, director of public policy for the Project on Government Oversight, “we have a president with two minds in regard to whistle-blowing”.²³ The former executive editor of the *Washington Post*, Leonard Downie, Jr. criticized the government’s distinction that “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.”²⁴ The unprecedented aggressiveness in pursuing leakers has produced eight prosecutions under the Espionage Act, more than all prior administrations combined.²⁵

This excessive use of the Espionage Act has undoubtedly led to its misuse, such as in the case of NSA employee Thomas Drake. After voicing concerns to no avail, first within the NSA and then to a congressional investigator, Drake furnished documents to a *Baltimore Sun* reporter about a decision that “shelved a cheaper surveillance program with privacy safeguards for Americans in favor of a much more costly program without such safeguards”.²⁶ A separate investigation spurred by a *New York Times* story exposing warrantless wiretapping carried out by the Bush administration targeted Drake, two of his colleagues and the congressional investigator despite their being uninvolved in the *New York Times* story. All had their homes raided by armed federal officers and two-and-a-half years later the Obama administration would indict Drake on ten felony counts including violations of the Espionage Act. In truth, most of the information revealed was not classified and according to former NSA director Michael Hayden, “Prosecutorial overreach was so great that it collapsed under its own weight.”²⁷ Judge Richard D. Bennett dismissed the ten felony counts, saying, “It was not proper. It doesn’t pass the smell test” and criticized the “four years of hell” that Drake was subject to.²⁸

It is beyond doubt that leakers can bring to light information that is crucial for an informed public debate on government policies. From Daniel Ellsberg to Edward Snowden, unauthorized

disclosures have indelibly impacted modern history and demonstrated that in some conditions it is permissible to reveal classified information for the benefit of an informed public. Indeed, the act has long been endemic to the White House, and its failure to prosecute high level officials for leaks affirm the administration's tacit support for such acts. For instance, journalist Bob Woodward published scores of classified disclosures from a highly confidential briefing between then President-elect Obama and the Director of National Intelligence, yet no criminal investigation was ever pursued. According to former general counsel to the CIA, John Rizzo, "in the past pursuing criminal cases against those who leaked to Woodward for his books has proved especially difficult because many of the 'leaks' appear to have been authorized or sanctioned at the highest levels of the government by officials like the president or the CIA director."²⁹

Whistleblower John Kiriakou laments that he went to prison charged under the Espionage Act, which is inconsistently applied to political opponents. "Gen. James 'Hoss' Cartwright, was reportedly targeted as the source of information about the Stuxnet virus leaked to a New York Times writer [yet] that investigation has dropped from sight, and Cartwright has so far faced no charges", accuses Kiriakou.³⁰ He also claims that the lack of action over an accidental slip of classified information from former CIA director Leon Panetta at a CIA awards ceremony attended by a Hollywood screenwriter who lacked proper security clearance is evidence of a double standard in enforcement of the Espionage Act.³¹ Administrations in recent history have been accused of leaking information to make a case for war or to bolster and cultivate their image.³²

While accusations of abuse are speculative, the conduct of federal investigators in pursuing leak investigations has caused definitive damage to press freedom. As part of an investigation into a leaked story about a foiled bomb plot in Yemen reported by the Associated Press, the Justice Department secretly seized two months of phone records from numerous AP bureaus. "Federal authorities obtained cellular, office and home telephone records of individual reporters and an editor" as well as the general

AP office numbers for bureaus in New York City, Washington, D.C., Hartford, Connecticut, and the House of Representatives.³³ Under normal circumstances Justice Department regulations “call for notice and negotiations, giving the news organization a chance to challenge the subpoena in court ‘unless doing so would pose a substantial threat to the integrity of the investigation.’” Yet it was at least two months before the AP general counsel received a letter from the U.S. attorney informing them of the seizures and an example of what would jeopardize the investigation was never provided.³⁴

By depriving the AP an opportunity to quash the subpoena, the Department of Justice delayed any discussion of the scope of the investigation and acted “on its own as judge, jury and executioner in secret.”³⁵ It isn’t possible to know the exact number of journalists who used those phone lines during that period, but “more than 100 journalists work in the offices where phone records were targeted”³⁶, and “thousands upon thousands of newsgathering calls” were made during that time.³⁷ In a letter of protest to Attorney General Eric Holder, AP President and CEO Gary Pruitt wrote indignantly that “There can be no possible justification for such an overbroad collection of the telephone communications of the Associated Press and its reporters. 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 operations that the government has no conceivable right to know.”³⁸ U.S. Attorney Macher assured in a response that “Consistent with Department policy, the subpoenas were limited in both time and scope”³⁹ and did not target content of conversations. But according to Steven Aftergood, a government secrecy expert at the Federation of American Scientists, “This investigation is broader and less focused on an individual source or reporter than any of the others we’ve seen,”⁴⁰ and Pruitt contends that “The sheer volume of records obtained, most of which can have no plausible connection to any ongoing investigation, indicates, at a minimum, that this effort did not comply with...the regulations that, in all cases and without exception, a subpoena for a

reporter's telephone toll records must be 'as narrowly drawn as possible.'"⁴¹

A letter written by a coalition of over 50 American news organizations to Attorney General Holder noted that "none of us can remember an instance where such an overreaching dragnet for newsgathering materials was deployed by the Department, particularly without notice to the affected reporters or an opportunity to seek judicial review."⁴² "The message being sent is if you talk to the press we're going to go after you", Pruitt said on *Face the Nation*. Michael Oreskes, senior managing editor of the Associated Press described how months after the investigation, "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."⁴³ It was only a week after the controversy of the AP subpoena surfaced that the contents of a court affidavit from the government's investigation of journalist James Rosen indicated a troubling trend emerging of pursuing not only the leakers of classified information but the publishers and journalists as well.

The *Washington Post* first reported on the FBI warrant to seize two days' worth of personal email and all of Rosen's personal communications with Stephen Kim, a former government contractor convicted of leaking details regarding the North Korean nuclear program. In the documents, FBI agent Reginald Reyes wrote that "there was evidence Rosen had broken the law, 'at the very least, either as an aider, abettor and/or co-conspirator.'"⁴⁴ Ann Marimow of the *Washington Post* reported that "privacy protections limit searching or seizing a reporter's work, but not when there is evidence that the journalist broke the law against unauthorized leaks. A federal judge signed off on the search warrant—agreeing that there was probable cause that Rosen was a co-conspirator."⁴⁵ Such conduct demonstrates what journalist Glenn Greenwald describes as "part of a broader campaign on the part of the Obama administration, to try and either threaten journalists that they will be criminalized or outright criminalize them by prosecuting us for the journalism that we're doing."⁴⁶

Upon reflecting on these stories Attorney General Holder announced new media regulations that Department of Justice Attorney Neil MacBride assured makes clear that “reporters are not going to be prosecuted ever for simply going about their very important business of reporting on the news.”⁴⁷ Yet hostile statements still continue to permeate the atmosphere; for instance, Director of National Intelligence James Clapper has characterized “anyone who is assisting Edward Snowden ... through the unauthorized disclosure of stolen documents” as an “accomplice”.⁴⁸ House Intelligence Committee Chair Mike Rogers recently posed the question to an evasive FBI Director James Comey: “[I]f I’m a newspaper reporter for fill-in-the-blank and ...I’m hocking stolen classified material that I’m not legally in the possession of for personal gain and profit, is that not a crime?”⁴⁹ Language used by Director of the NSA Keith Alexander which accused newspaper reporters of “selling” documents⁵⁰ does little to assuage Greenwald’s fear that “this most recent escalation is showing that they’re not content to just go after the newsgathering process and also their source—our sources, but also to start threatening us with criminality, with prosecution.”⁵¹

Out of fear for their involvement in communicating with Snowden and writing about his disclosures, neither Laura Poitras nor Greenwald have returned to the United States. Greenwald elaborated: “the risk of something happening is certainly more than trivial. And so, the U.S. government is also refusing to give us any indication about their intentions, despite being asked many times by our lawyers. They obviously want to keep us in a state of uncertainty. And this recent escalation of rhetoric and accusations obviously makes that concern more acute.”⁵² Even if the Justice Department is not determined to prosecute journalists for writing about unauthorized disclosures, there remains a very legitimate obstacle regarding their communication with such sources, one which also carries a realistic possibility of imprisonment.

The use of confidential sources is a cornerstone of investigative journalism and indispensable to the newsmaking process. Confidentiality is essential in instances in which “An officeholder may fear

his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views.”⁵³ When a reporter is subpoenaed to testify and reveal confidential information, the interests between the public’s right to “every man’s evidence” and the journalist’s professional obligations collide. When the Supreme Court last visited the matter of a reporter’s privilege to shield them from revealing their confidential sources in *Branzburg v. Hayes* they came to a 5-4 ruling which concluded that “neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.”⁵⁴ During this time in 1972, “A number of States [had] provided newsmen a statutory privilege of varying breadth but the majority [had] not done so”.⁵⁵ In the time since, “forty-nine states and the District of Columbia have provided journalists with a ‘reporter’s privilege’ protecting them if a state government seeks to make him or her reveal confidential information, including the identity of a source.”⁵⁶ Unfortunately for those in Wyoming and at the federal level, no such protections exist. Most recently, in 2013, the United States Court of Appeals for the Fourth Circuit, in Richmond, VA, “which includes where most national security agencies like the Pentagon and the Central Intelligence Agency are” located,⁵⁷ maintained the precedent established in *Branzburg*. Until a comprehensive protection is created, this ruling ensures continuing strife for investigative journalists about national security matters. For instance, in 2005 *New York Times* reporter Judith Miller was jailed for 85 days for refusing to testify against news sources in the investigation into leaks of a CIA operative named by White House officials.⁵⁸

For two-time Pulitzer Prize winner James Risen, the reporter at the center of *United States v. Sterling*, the ruling of the three-judge panel could have serious implications. Risen’s career is highly distinguished and his reporting has revealed numerous newsworthy events of great public significance.

Risen's reporting exposed the warrantless domestic wiretapping program under President George W. Bush, CIA use of waterboarding terrorism suspects, and a secret government program that accessed thousands of Americans' bank records of financial transactions through the international SWIFT database.⁵⁹ In his 2006 book *State of War* he disclosed many revelations including a chapter on a botched covert operation to sabotage Iran's nuclear program that drew the attention of a federal investigation of former CIA officer Jeffrey Sterling. In an affidavit to the court, Risen stated that he could not have written *State of War* or many if not all of those articles and books without the use of confidential sources. "My source provided me with information with the understanding I would not reveal their identity. In circumstances in which I promise confidentiality to a source, I cannot break that promise. Any testimony I were to provide to the Government would compromise to a significant degree my ability to continue reporting as well as the ability of other journalists to do so."⁶⁰

In his vigorous dissent in *Sterling*, Justice Gregory extols the virtues of the press in exposing fraud and abuse and informing the electorate of a free and open society. "If reporters are compelled to divulge their confidential sources 'the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic.'"⁶¹ But the majority adopted a different perspective cleaving closely to the reasoning set out in *Branzburg*. To permit a reporter to be immune on First Amendment grounds from testifying about known criminal activity would acknowledge "that the freedom of the press is the freedom to do wrong with impunity".⁶² In *Branzburg*, Supreme Court Justice White writes that it "implies the right to frustrate and discharge those governmental duties upon the performance of which the freedom of all depends."⁶³ While Justice Gregory sees "reporters in an atmosphere of confidentiality and trust" engaged "in a mission critical to an informed and functioning democracy", in Judge Traxler's view James Risen's "primary goal is to protect the identity of the person who communicated with him because their communication violated federal, criminal laws." A journalist's

commitment to confidentiality amounts to “concealment of a crime” and “deserves no encomium” and certainly no First Amendment protections.

The prevailing view set out in *Branzburg* is that “the obligation of the newsmen... is that of every citizen... to appear when summoned, with relevant written or other material required, and to answer relevant and reasonable inquires.”⁶⁴ Judge Traxler echoes this opinion in *Sterling*, affirming the notion developed in *Branzburg* that “testimonial privileges are disfavored” as they “obstruct the search for truth and serve as obstacles to the administration of justice.”⁶⁵ Risen contends that Federal Rule of Evidence 501, which “implemented the authority of federal courts to consider common-law privileges ‘in the light of reason and experience’”, allows for the possibility for the privilege to be granted. The rules “defined nine specific nonconstitutional privileges which the federal courts recognize”, among them “lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and identity of informer”, though a reporter-source relationship is conspicuously absent.⁶⁶ Risen reasons that “the public and private interests in recognizing a reporter’s privilege ‘are surely as great as the significant public interest at stake in patient and psychotherapist communication.’” Traxler explains that “The recognized privileges promote the public’s interest in full and frank communications between persons in special relationships by protecting the confidentiality of their private communications.” Either because “Risen does not seek to protect from public disclosure the ‘confidential communications’ made to him” or because he is protecting the confidence of a wrongdoer, these actions invalidate the analogy in Traxler’s view. Yet at the same time he acknowledges: “The attorney-client privilege must necessarily protect the confidences of wrongdoers”, so vital is “open client and attorney communication to the proper functioning of our adversary system of justice.”⁶⁷ Yet surely the public interest in a vibrant press secure in its vital tools is as great as our interests in those other enumerated privileges. Justice Gregory argued “The unanimity of the States compels my conclusion that Rule 501 calls for a reporter’s privilege.”⁶⁸

In the end the court deferred to an over 40-year-old ruling with a myopic view that “only where news sources themselves are implicated in crime or possess information relevant to a grand jury’s task need they or the reporter be concerned about subpoenas.”⁶⁹ Its understanding that only when a “source is not engaged in criminal conduct but has information suggesting illegal conduct by others” does it possibly have a legitimate claim to protection is misleading according to Justice Stewart. “It is obviously not true that the only persons about whom reporters will be forced to testify will be those ‘confidential informants involved in actual criminal conduct’ ... given the grand jury’s extraordinarily broad investigative powers and the weak standards of relevance and materiality that apply during such inquiries, reporters, if they have no testimonial privilege, will be called to give information about informants who have neither committed crimes nor have information about crime.”⁷⁰ The distinction of an informer vs. a criminal source is similar to the view adopted by the Obama administration and is easily disabused by our nation’s storied history of both kinds of sources providing crucial information which has ignited debate and sparked national reform.

The opinion in *Branzburg* has no doubt given rise to a kind of double censorship: “Forcing a reporter before a grand jury will have two retarding effects upon the ear and the pen of the press,” says Justice Douglas in his dissent, “Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And fear of accountability will cause editors and critics to write with more restrained pens.”⁷¹ Depending upon *Branzburg v Hayes* as precedent is only further muddled by Justice Powell’s “enigmatic concurring opinion.” At odds in part with the majority opinion he joined, “in the concurrence, Justice Powell emphasized ‘the limited nature of the Court’s holding,’ and endorsed a balancing test.” In short, Justice Stewart says “Justice Powell’s concurrence and the subsequent appellate history have made the lessons of *Branzburg* about as clear as mud.”⁷²

Absent a showing of bad faith, harassment or other such non-legitimate motive, the reporter lacks a shield for protecting her confidential sources. If we are to allay the fears of Risen that this

“investigation started as part of an effort to punish me and silence me”⁷³ and the suspicions that the court is inviting “state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government,”⁷⁴ then we must adopt a qualified reporter’s privilege. If not, decisions like *Branzburg* and *Sterling* mean an inevitable erosion of trust between journalists like Risen and their sources. In a 2009 study, Brigham Young University law professor Ronnell Andersen Jones noted that annually, federal agencies issued about 400 subpoenas to news organizations targeting confidential sources, and the number of federal subpoenas continues to grow.⁷⁵

We need not advocate for such an absolute privilege as Justice Douglas does when he vehemently states that inevitably “Any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all.”⁷⁶ Instead, a high standard should be set to protect confidential sources which can be overcome for considerations of national security by satisfying several basic requirements. “A reporter should not be forced either to appear or testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure.”⁷⁷ Such a provision should also consider two additional factors put forward by Justice Gregory, namely “the harm caused by the public dissemination of the information, and the newsworthiness of the information conveyed.” The newsworthiness would be measured by “the value to the public of the leaked information concerning the issues of the day.”⁷⁸ Newsworthy information can be outweighed by the consequences of the leak.

This mediates a moderate position between our competing goals. It would readily allow exceptions to the privilege for national security considerations, while affirming that press

confidentiality will only be intruded upon as an absolute last resort. To broadly apply to emerging and unconventional media formats, Senator Charles Schumer and Lindsay Graham's bi-partisan Free Flow of Information Act pragmatically defines a journalist as "someone employed by or in contract with a media outlet for at least one year within the last 20 years or three months within the last five years; someone with a substantial track record of freelancing in the last five years; or a student journalist as well as persons deemed appropriate by a federal judge, so long as their newsgathering practices have been consistent with the law."⁷⁹ Despite leaving possible gaps for bloggers, citizen journalists and groups like WikiLeaks, the bill has broad backing from groups such as the Society of Professional Journalists and the consistent and vocal support of President Obama (despite the Department of Justice's contradicting arguments to the 4th Circuit that "there is no reporter's privilege, period, in criminal cases").⁸⁰

Despite optimism on the part of the bill's sponsors, there is skepticism that the law will muster enough votes to pass.⁸¹ By whatever means, something must be done to secure a media shield, lest stories of critical importance to the public debate never see the light of day. Without the unauthorized disclosures which prompted public outcry over secret surveillance programs the President's Review Group on Intelligence and Communications Technologies would likely never have been appointed and its recommendation that the NSA should end its bulk data collection of American phone records would not have been made. This and other recent reforms to our national security intelligence collection practices would not have been achieved without leakers and their confidential relationship with the press.

In 1971 a group of activists calling themselves the Citizens' Commission to Investigate the FBI broke into an FBI office in the dead of night and stole over a thousand classified documents, searching for evidence that the "FBI was systematically trying to squash dissent."⁸² They exposed documents which ordered to "enhance the paranoia" of antiwar activists, black and student dissident groups, and to

“get the point across there is an F.B.I. agent behind every mailbox.” They also revealed the existence of a program called COINTELPRO, which Noam Chomsky describes as “the worst systematic and extended violation of basic civil rights by the federal government.”⁸³ Their revelations were a major contributing factor that led to the Church Committee investigation of some of the worst abuses in FBI, CIA and NSA history. It is now 40 years later and the perpetrators lead honest law-abiding lives. The core essence of their civil virtue is attested to by the risks they took in the name of nonviolent civil disobedience and activism for the sake of transparency and justice. The integrity of those informers who provide unauthorized disclosures of secret programs are criticized thoroughly, while perhaps it is the progenitors of such controversial programs who are more deserving of our close scrutiny. Government employees have an obligation to expose waste, fraud and abuse, and a higher commitment, in the words of Daniel Ellsberg, that when “a nondisclosure agreement and secrecy conflict with [your] oath, so help me God, to defend and support the Constitution of the United States” the superseding authority warrants your responsibility to inform the public.⁸⁴

The government has the legal and moral authority to prosecute unauthorized disclosures that fail to answer to the justifications of transparency and liberty. Unless steps are taken to ensure that intrusions on the press are taken only as an absolute last resort, the government’s enforcement of the law may ultimately serve to subvert justice more than aid it. The function of the press is more vital now than it has ever been as “private and public aggregations of power burgeon in size.”⁸⁵ It is necessary to acknowledge that some disclosures have real potential to cause harm by revealing sources and methods, but other informers have oft proven their necessity to our civil society. As James Madison said: “A popular Government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”⁸⁶

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