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Repository Citation

Amitai Etzioni, *A Liberal Communitarian Approach to Security Limitations on the Freedom of the Press*, 22 Wm. & Mary Bill Rts. J. 1141 (2014), <http://scholarship.law.wm.edu/wmborj/vol22/iss4/4>

A LIBERAL COMMUNITARIAN APPROACH TO SECURITY LIMITATIONS ON THE FREEDOM OF THE PRESS

Amitai Etzioni*

INTRODUCTION

In 2013, following the publication of classified information gleaned from top-secret documents leaked to the press, the U.S. government conducted several investigations into these unauthorized disclosures.¹ The government eventually extended these investigations to the press—collecting phone records and subpoenaing reporters—not to prosecute the reporters, but to identify the leakers.² These actions were widely criticized by the media, civil libertarians, liberals, and others who decried the government for constraining freedom of the press.³ At the same time, government officials and their defenders argued that clamping down on leaks was necessary in order to preserve ongoing national security efforts.⁴ This Article asks: What normative framework should one apply in finding the proper balance between the freedom of the press and national security? What effect, if any, should the change in historical conditions have on this balance?⁵ When highly sensitive national-security information is leaked to the press—who has the authority to render the weighty decisions about whether to publish such information?⁶ To what extent has the publication of classified information damaged national security?⁷ To what extent have the subsequent leak investigations undermined freedom of the press?⁸

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¹ Sharon LaFraniere, *Math Behind Leak Crackdown: 153 Cases, 4 Years, 0 Indictments*, N.Y. TIMES, July 21, 2013, at A1.

² See, e.g., Charlie Savage & Scott Shane, *Justice Dept. Defends Seizure of Phone Records*, N.Y. TIMES, May 15, 2013, at A15.

³ See, e.g., NAA President and CEO Caroline H. Little Comments on the Justice Department's Seizure of Associated Press Confidential Telephone Records, NEWSPAPER ASS'N OF AM. (May 13, 2013), <http://www.naa.org/News-and-Media/Press-Center/Archives/2013/Caroline-Little-Comments-on-Justice-Department-Seizure-of-AP-Phone-Records.aspx> ("These actions shock the American conscience and violate the critical freedom of the press protected by the U.S. Constitution and the Bill of Rights.").

⁴ See Savage & Shane, *supra* note 2.

⁵ See *infra* Part I.

⁶ See *infra* Part II.

⁷ See *infra* Part III.

⁸ See *infra* Part IV.

What mechanisms are available if the balance between liberty and security needs to be recalibrated?⁹ What steps can be taken to narrow the conflict between freedom of the press and national security?¹⁰ What role must moral dialogues play before major legal and institutional changes can be introduced?¹¹

This Article argues that, although the harm to national security caused by published leaks seems greater than much of the media is willing to acknowledge, there are other ways to protect the public's right to know and the press's right to publish than those that are currently in place.

I. ADVOCACY VERSUS THE COMMUNITARIAN APPROACH

A. *The Advocacy Model*

Deliberations about public policy often follow the advocacy model characteristic of the American courts. In this model, each side—of which there are only two—presents its interpretation of the facts in the way that most strongly supports its position.¹² The case of Chelsea (formerly Bradley) Manning, who was charged with leaking hundreds of thousands of secret military documents to WikiLeaks in 2010, illustrates this mode of deliberation.¹³ The defense presented the young soldier as “naïve but good-intentioned.”¹⁴ To her champions in the media and on the left, Manning is a heroic whistleblower and a victim of government overreach.¹⁵ By contrast, the government contended that Manning is a traitor, guilty of aiding the enemies of the United States.¹⁶ The prosecutor asserted that Manning “used [her] military training to gain the notoriety [she] craved.”¹⁷

These positions reflect the state of the debate over government secrecy more broadly. Law Professor David E. Pozen notes that,

[f]or every governmental assertion of leaks “that have collectively cost the American people hundreds of millions of dollars, and . . . done grave harm to national security,” one finds the rebuttal that “there has not been a single instance in the history

⁹ See *infra* Parts V.A–C.

¹⁰ See *infra* Part VI.

¹¹ See *infra* Part VII.

¹² See, e.g., David A. Garvin & Michael A. Roberto, *What You Don't Know About Making Decisions*, 79 HARV. BUS. REV. 108, 110 (2001) (likening the advocacy model to a contest).

¹³ See, e.g., Ashley Fantz & Paul Courson, *Prosecutors: Bradley Manning 'Craved' Notoriety*, CNN (June 3, 2013), <http://www.cnn.com/2013/06/03/US/manning-court-martial>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

of the United States in which the press's publication of a 'legitimate but newsworthy' government secret has gravely harmed the national interest"—indeed, that there have been few destructive leaks anywhere in the world.¹⁸

Many public-policy deliberations follow the same pattern of strong, often extreme, one-sided advocacy between two conflicting positions. Key examples include the debates between pro-life and pro-choice advocates;¹⁹ those who favor gun control and those who defend an individualized right to own guns;²⁰ and free market champions and those who favor strong regulations.²¹ Data show that American media and politics have become more polarized in recent years—that is, they are drawing more on the advocacy model and focusing less on finding common ground, forging compromises, and devising “third way” solutions.²²

In public discourse, the give-and-take about freedom of the press and the way publishers ought to handle “leaks”—information the government classified on the grounds that publication would damage national security—has taken a particular turn. In the media, which usually *seeks*²³ to keep news reporting separate from editorializing, coverage of the recent leak investigations has been loaded with emotive terms criticizing the way these investigations have been conducted. News reports concerning the Department of Justice's investigations into James Rosen and its seizure of Associated Press phone records include such editorializing terms as

¹⁸ David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 542–43 (2013) (citations omitted).

¹⁹ See Lydia Saad, “Pro-Choice” Americans at Record-Low 41%, GALLUP (May 23, 2012), <http://www.gallup.com/poll/154838/pro-choice-americans-record-low.aspx> (highlighting the close divide between pro-choice and pro-life Americans).

²⁰ See *Gun Control: Key Data Points from Pew Research*, PEW RES. CENTER (July 27, 2013), <http://www.pewresearch.org/key-data-points/gun-control-key-data-points-from-pew-research> (reporting that the division among Americans on the gun rights debate is virtually even).

²¹ See *Market Troubles*, ECONOMIST (Apr. 6, 2011, 3:25 PM), http://www.economist.com/blogs/dailychart/2011/04/public_opinion_capitalism (noting a split in Americans' opinion of the free market).

²² For more discussion on the fragmentations of the media, see Rebecca Chalif, *Political Media Fragmentation: Echo Chambers in Cable News*, 1 ELECTRONIC MEDIA & POL. 46 (July 2011), available at [http://www.emandp.com/site_content_uploads/main_content/Political%20Media%20Fragmentation-%20Echo%20Chambers%20in%20Cable%20News\(1\).pdf](http://www.emandp.com/site_content_uploads/main_content/Political%20Media%20Fragmentation-%20Echo%20Chambers%20in%20Cable%20News(1).pdf). For more evidence of political polarization, see Amitai Etzioni, *Gridlock?*, 10 FORUM (2012), available at <http://icps.gwu.edu/files/2013/01/Gridlock.pdf>; David R. Jones, *Party Polarization and Legislative Gridlock*, 54 POL. RES. Q. 125 (2001).

²³ I choose the word “seeks” deliberately because the media endeavors, but does not necessarily achieve, this goal.

“unprecedented,”²⁴ “sweeping,”²⁵ and “aggressive.”²⁶ Further, the editorial pages of many newspapers and magazines have been particularly partisan in their rhetoric. They refer to a “war” on free speech,²⁷ contend that the Rosen investigation is “as flagrant an assault on civil liberties as anything done by George W. Bush’s administration,”²⁸ and declare that the Obama Administration “uses technology to silence critics in a way Richard Nixon could only have dreamed of.”²⁹ The editors of the *New York Times* assert that “the Obama [A]dministration has moved beyond protecting government secrets to threatening fundamental freedoms of the press to gather news.”³⁰ Nick Gillespie of the *Daily Beast* writes that the Obama Administration’s crusade “declares ‘war on journalism’ by essentially criminalizing the very act of investigative reporting.”³¹ At the *San Francisco Chronicle*, the editors write, “[t]he feds seemed to have conflated journalism with espionage.”³² And Ron Fournier claims in the *National Journal* that “[t]he leak inquiry threatens national security.”³³

The media has given little room, even on the op-ed pages presumably set aside for views opposed to those of a newspaper’s own editorials, for articles that explain—let alone seek to justify—the government’s viewpoint. One of the media’s own, former *NBC* anchorman Tom Brokaw, noted that “[m]any of the same reporters who are tough on the gun lobby when it comes to second amendment rights, run behind the shield of the first amendment, without doing it in a way that is qualitatively

²⁴ Ann E. Marimow, *A Rare Peek into a Justice Department Leak Probe*, WASH. POST (May 19, 2013), http://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4-a479289a31f9_story.html.

²⁵ Mark Hosenball & Tabassum Zakaria, *AP Records Seizure Just Latest Step in Sweeping U.S. Leak Probe*, REUTERS (May 15, 2013, 8:51 PM), <http://www.reuters.com/article/2013/05/16/us-usa-justice-ap-investigation-idUSBRE94F01F20130516>.

²⁶ Charlie Savage & Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES, May 14, 2013, at A1.

²⁷ See, e.g., Nick Gillespie, *Obama’s War on Journalism: ‘An Unconstitutional Act,’* DAILY BEAST (May 22, 2013), <http://www.thedailybeast.com/articles/2013/05/22/obama-s-war-on-journalism-an-unconstitutional-act.html>.

²⁸ Dana Milbank, *In AP, Rosen Investigations, Government Makes Criminals of Reporters*, WASH. POST (May 21, 2013), http://articles.washingtonpost.com/2013-05-21/opinions/39419370_1_obama-administration-watergate-benghazi.

²⁹ *Id.*

³⁰ Editorial, *Another Chilling Leak Investigation*, N.Y. TIMES, May 22, 2013, at A26.

³¹ Gillespie, *supra* note 27.

³² *Justice Department Run Amok on Journalists’ Sources*, S.F. CHRON. (May 22, 2013, 6:19 PM), <http://www.sfchronicle.com/opinion/editorials/article/Justice-Department-run-amok-on-journalists-4540632.php>.

³³ Ron Fournier, *You Know What Really Risks National Security? Leak Investigations*, NAT’L J. (May 17, 2013), <http://www.nationaljournal.com/politics/you-know-what-really-risks-national-security-leak-investigations-20130517>.

analytical, and not just a knee-jerk reaction.”³⁴ Similarly, *Washington Post* reporter Walter Pincus lamented the “circling of the media wagons.”³⁵ In response to the White House Correspondents’ Association’s statement that “[o]ur country was founded on the principle of freedom of the press and nothing is more sacred to our profession,”³⁶ Pincus wrote, “I worry that many other journalists think that last phrase should be ‘nothing is more sacred *than* our profession.’”³⁷

In contrast, the Government has been unusually ambivalent in defending its position. On the one hand, Attorney General Eric Holder stated that the leak to the AP “put the American people at risk,” and that trying to determine who was responsible “required very aggressive action.”³⁸ However, soon thereafter he struck a conciliatory tone, saying in an interview with the *Daily Beast* that “[w]hile both of these cases were handled within the law and according to Justice Department guidelines, they are reminders of the unique role the news media plays in our democratic system, and signal that both our laws and guidelines need to be updated.”³⁹ President Obama recently stated that “we must keep information secret that protects our operations and our people in the field.”⁴⁰ But in the same speech, he also said that he was “troubled by the possibility that leak investigations may chill the investigative journalism that holds government accountable,”⁴¹ and that “[j]ournalists should not be at legal risk for doing their jobs.”⁴²

The Government’s hesitant defense of its actions seems to reflect several factors: The administration is highly vulnerable to criticism from the press;⁴³ it faces push-back from both sides of the political and ideological spectrum;⁴⁴ a high level of

³⁴ Alex Weprin, *Tom Brokaw: ‘The Press Always Has to Be Careful About Having a Glass Jaw,’* TVNEWSER (May 29, 2013, 7:01 AM), http://www.mediabistro.com/tvnewser/tom-brokaw-on-the-brokaw-files-the-state-of-media-and-the-presidents-press-policy_b181138.

³⁵ Walter Pincus, *A Knee-Jerk Circling of the Media Wagons*, WASH. POST, May 28, 2013, at A9.

³⁶ *Correspondents’ Association Statement on Monitoring of Journalists*, FOX NEWS (May 21, 2013), <http://www.foxnews.com/politics/2013/05/21/correspondents-association-statement-on-monitoring-journalists/>.

³⁷ Pincus, *supra* note 35.

³⁸ Tom Curry, *Holder Addresses AP Leaks Investigation, Announces IRS Probe*, NBC NEWS (May 14, 2013, 4:57 PM), http://nbcpolitics.nbcnews.com/_news/2013/05/14/18253923-holder-addresses-ap-leaks-investigation-announces-irs-probe?lite.

³⁹ Daniel Klaidman, *Holder’s Regrets and Repairs*, DAILY BEAST (May 28, 2013), <http://www.thedailybeast.com/articles/2013/05/28/holder-s-regrets-and-repairs.html>.

⁴⁰ President Barack Obama, Remarks at the National Defense University (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Pozen, *supra* note 18, at 577.

⁴⁴ *Id.* at 514.

distrust in the government prevails;⁴⁵ and Americans have long been suspicious of the federal government's accumulation of power at the expense of individual rights.⁴⁶ As a result, the government seems wary of picking a fight with those "who buy ink by the barrel," an approach that holds even in the digital age.⁴⁷ All said and done, in this case public discourse is hampered not merely by the advocacy approach, but also by the fact that the voice of one of the two sides, that of government speaking for national security, is muted.

B. A Liberal Communitarian Approach

The liberal communitarian approach favors the model exemplified by the *agora* in ancient Greece,⁴⁸ the *loya jirgas* of Afghanistan,⁴⁹ and the U.S. Senate in earlier decades⁵⁰: one of dialogue, in which opposing sides engage in a civil compromise and commit to finding a course acceptable to all concerned.

In contrast to the advocacy model, this Article draws on a liberal communitarian philosophy, which assumes that we, as a nation, face two fully legitimate normative and legal claims—protecting national security and the freedom of the press—and that neither can be maximized nor fully reconciled, as there is an inevitable tension between these two claims. It thus follows that some balance must be worked out between the conflicting claims. That is, the liberal communitarian model assumes from the outset that the nation is committed to both individual rights and the advancement of the common good, and that neither should be assumed to *a priori* trump the other.⁵¹ The liberal communitarian philosophy is dedicated to achieving

⁴⁵ See Jeffrey M. Jones, *Americans' Trust in Government Generally Down This Year*, GALLUP (Sept. 26, 2013), <http://www.gallup.com/poll/164663/americans-trust-government-generally-down-year.aspx> (reporting that trust in the executive branch fell to fifty-one percent in 2013).

⁴⁶ See Pozen, *supra* note 18, at 573.

⁴⁷ Matthew Cooper, *Why a Media Shield Law Isn't Enough to Save Journalists*, NAT'L J. (May 29, 2013), <http://www.nationaljournal.com/politics/why-a-media-shield-law-isn-t-enough-to-save-journalists-20130529>.

⁴⁸ See, e.g., Kostas Vlassopoulos, *Free Spaces: Identity, Experience and Democracy in Classical Athens*, 57 CLASSICAL Q. 33, 39–47 (2007).

⁴⁹ See *Q&A: What Is a Loya Jirga?*, BBC NEWS (July 1, 2002, 10:22 PM), http://news.bbc.co.uk/2/hi/south_asia/1782079.stm.

⁵⁰ See Dylan Matthews, *It's Official: The 112th Congress Was the Most Polarized Ever*, WASH. POST (Jan. 17, 2013, 11:07 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/17/its-official-the-112th-congress-was-the-most-polarized-ever/>.

⁵¹ AMITAI ETZIONI, *THE COMMON GOOD* (2004). In contrast, authoritarian and East Asian communitarians tend to be concerned with the common good and pay heed to rights mainly insofar as they serve the rulers' aims. See Amitai Etzioni, *Communitarianism*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/1366457/communitarianism> (last visited Apr. 15, 2014) [hereinafter Etzioni, *Communitarianism*]. At the opposite end of the spectrum, contemporary liberals emphasize individual rights and autonomy over societal formulations of the common good. *Id.*

a balance between individual rights and social responsibilities, which emanates from the need to serve the common good.⁵²

The Fourth Amendment provides an important text for the liberal communitarian philosophy when it states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”⁵³ By banning only *unreasonable* searches and seizures, it recognizes that there are *reasonable* ones—those that serve the common good (or, to use a term more familiar to the legal community, the public interest).

Liberal communitarians thus take for granted that deliberations about legitimate public policy ought to start with the assumption that the public’s “right to know” and the freedom of the press must be balanced with concern for national security, rather than from the position that limitations on the press are ipso facto a violation of a basic right or freedom.

The liberal communitarian philosophy further holds that the advocacy model is flawed in that it assumes that the clash of two strong one-sided views will lead to a just conclusion, reasonable judgments, and sound public policies.⁵⁴

C. *Within History*

Achieving a communitarian balance, however, does not mean invariably opting for the *same* golden middle ground between rights and responsibilities, or freedom and security. Rather, it requires consideration of how changes in historical conditions might shift the equilibrium point. The September 11, 2001, attacks against the United States heightened the country’s need to attend to homeland security.⁵⁵ One can argue over the severity of the threat terrorism now poses and how far one should reach while seeking to protect the United States from future attacks. However, one cannot deny that the combination of less-than-fully-secured nuclear arms in Pakistan and Russia and the existence of many thousands of people around the world who seek to harm the United States continues to pose a security risk.⁵⁶

A second set of factors that affects the historically appropriate balance between security and freedom of the press is the technological developments that have taken

⁵² *Id.*

⁵³ U.S. CONST. amend. IV.

⁵⁴ See ETZIONI, *supra* note 51, at 3–4.

⁵⁵ On September 11, 2001, Islamist terrorist group al Qaeda carried out a series of attacks on United States soil. See, e.g., N. R. Kleinfield, *U.S. Attacked; Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror*, N.Y. TIMES, Sept. 12, 2001, at A7.

⁵⁶ See generally *National Terrorism Advisory System*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/national-terrorism-advisory-system> (last visited Apr. 15, 2014) (stating that “Americans . . . should always be aware of the heightened risk of terrorist attack in the United States”).

place since the advent of the “cyber age,” around 1990.⁵⁷ This revolution in computing technologies has made classified information more broadly accessible, retrievable from remote locations, and easily transferrable.⁵⁸ Chelsea Manning, a young soldier stationed in the middle of the desert in Iraq, was able to download and share many thousands of top-secret documents, undetected by her superiors.⁵⁹ In the age of ink and paper, such a feat would have been physically impossible. Moreover, the Internet and the twenty-four-hour news cycle put pressure on reporters to publish as soon as they receive a story. In times past, a newspaper that received classified information had time, at least until printing the next edition, to weigh whether or not to publish and to consult with the authorities. Today, the same newspaper, fearing being “scooped” by the competition, often posts the story online, where it becomes instantly available, not only to a domestic audience, but also to declared enemies of the United States.

These developments seem to justify *some* rebalancing. A liberal communitarian holds that deliberations should focus both on the extent of this recalibration and on ensuring that corrective measures are neither excessive nor irreversible as historical and technological conditions change again.⁶⁰ However, to ignore these new historical developments seems unreasonable. We have not reached the point where we can declare, with regard to the campaign against terrorism and the need to protect the United States from future attacks, “mission accomplished.”

II. WHO DECIDES?

Who decides whether the information contained in a particular *classified* document—or a collection of many thousands of such documents—the disclosure of which the government claims will harm national security, ought to be published? Currently, this decision ultimately rests with the editors of the press.⁶¹ If the government happens to find out that such information is about to be published, or the reporters choose to consult with the government before the presses roll, officials

⁵⁷ See *The Comprehensive National Cybersecurity Initiative*, WHITE HOUSE, <http://www.whitehouse.gov/issues/foreign-policy/cybersecurity/national-initiative> (last visited Apr. 15, 2014) (identifying “cybersecurity as one of the most serious economic and national security challenges we face as a nation, but one that we as a government or as a country are not adequately prepared to counter”).

⁵⁸ *Id.*

⁵⁹ See, e.g., Marc Ambinder, *WikiLeaks: One Analyst, So Many Documents*, NAT’L J. (Nov. 29, 2010), <http://www.nationaljournal.com/whitehouse/wikileaks-one-analyst-so-many-documents-20101129>. Mark Feldstein writes that Wikileaks’ “instantaneous global reach poses a challenge not only to state secrets everywhere, but even perhaps to the very idea of government itself.” Mark Feldstein, *The Implications of Wikileaks*, AM. JOURNALISM REV. (Dec. 14, 2010), <http://www.ajrarchive.org/Article.asp?id=4999>.

⁶⁰ See Etzioni, *Communitarianism*, *supra* note 51.

⁶¹ To save breath, I use the term editors to include publishers and owners.

may present their case to the editors and request that they not proceed.⁶² The editors then consider whether to grant the government's request.⁶³ Ultimately, though, the final judgment is theirs.

There is a very strong presumption in the American legal tradition, as well as a normative consensus, against punishing editors or publications that air classified—or even top-secret—information and against the application of prior restraint (preventing publication by court order).⁶⁴ As a result, editors—not Congress or the courts, and certainly not the White House—currently have the ultimate authority in the matter.⁶⁵

Jack Goldsmith summarizes:

[T]he way the system works, for better or worse, is that the government makes the case to the media about the national security harms of publication, and the media assesses the government's arguments, weighs the perceived national security harm against the perceived benefits of publication, and decides whether and how to publish.⁶⁶

Bill Keller, former Executive Editor of the *New York Times*, and Dean Baquet, former managing editor at the *Los Angeles Times*, described this decision-making process as follows: “[W]e weigh the merits of publishing against the risks of publishing. There is no magic formula, no neat metric for either the public's interest or the dangers of publishing sensitive information. We make our best judgment.”⁶⁷

Former *Washington Post* Executive Editor Leonard Downie, Jr. has stated, “[v]ery, very seldom do we decide not to publish a story at all. But quite often we will leave out specific details, technical details, location details that would put lives or programs in jeopardy unnecessarily.”⁶⁸ Part of the editor's job, he says, is “weighing how to publish significant stories about national security without causing unnecessary harm.”⁶⁹

⁶² Rachel Smolkin, *Judgment Calls*, 28 AM. JOURNALISM REV. 22, 23, 25–26 (Oct./Nov. 2006).

⁶³ *Id.* at 26.

⁶⁴ See generally Douglas E. Lee, *Prior Restraint*, FIRST AMEND. CENTER (Sept. 13, 2002), <http://www.firstamendmentcenter.org/prior-restraint>.

⁶⁵ See *id.*

⁶⁶ Jack Goldsmith, *The Patriotism of the American Media*, LAWFARE (Feb. 28, 2011, 7:11 AM), <http://www.lawfareblog.com/2011/02/the-patriotism-of-the-american-media/#.Ut6MICg8ly4>.

⁶⁷ Dean Baquet & Bill Keller, *When Do We Publish a Secret?*, N.Y. TIMES, July 1, 2006, at A15.

⁶⁸ Smolkin, *supra* note 62, at 26.

⁶⁹ Leonard Downie, Jr., *Leonard Downie: Obama's War on Leaks Undermines Investigative Journalism*, WASH. POST (May 23, 2013), <http://www.washingtonpost.com/opinions>

David Ignatius of the *Washington Post* raises a valuable point when he writes, “[w]e journalists usually try to argue that we have carefully weighed the pros and cons and believe that the public benefit of disclosure outweighs any potential harm. The problem is that we aren’t fully qualified to make those judgments.”⁷⁰ Editors are typically trained in the humanities (often English literature) or journalism rather than in security studies or international relations.⁷¹ Most of the leading editors, those who render pivotal decisions on the matter at hand, gained the bulk of their experience in the world of media, rather than in military service, or through a stint in the intelligence or diplomatic communities.⁷² Their motivation—and that of the profit-making corporations that own most of the media—is not limited to serving the public’s right to know.⁷³

After the *New York Times* exposed the George W. Bush Administration’s secret monitoring of suspected terrorist financial transactions,⁷⁴ then-Secretary of the Treasury John Snow wrote to Keller:

[T]he fact that your editors believe themselves to be qualified to assess how terrorists are moving money betrays a breathtaking arrogance and a deep misunderstanding of this program and how it works . . . [T]he paper has given itself free license to expose any covert activity that it happens to learn of—even those that are legally grounded, responsibly administered, independently overseen, and highly effective.⁷⁵

Further, the editors have access only to the leaked information on the particular secret at hand, forcing them to render their decisions primarily on the basis of whatever the leaker chose to reveal. As Steven Coll, a former managing editor at the

/leonard-downie-obamas-war-on-leaks-undermines-investigative-journalism/2013/05/23/4fe4ac2e-c19b-11e2-bfdb-3886a561c1ff_story.html [hereinafter Downie, *Obama’s War*].

⁷⁰ David Ignatius, *Beyond ‘Trust Us,’* WASH. POST, July 5, 2006, at A13.

⁷¹ Cf. Jean Folkerts, John Maxwell Hamilton & Nicholas Lemann, *Educating Journalists: A New Plea for the University Tradition* (Columbia Journalism Sch., New York, N.Y.), Oct. 2013, at 1, 12.

⁷² See Killian Young & Matthew Kovac, *Journalists and Military History: A Caution*, MEDILL NAT’L SECURITY ZONE (Mar. 4, 2013), <http://nationalsecurityzone.org/site/journalists-and-military-history-a-caution/>.

⁷³ See, e.g., Victor Pickard, *Take the Profit Motive out of News*, GUARDIAN (July 23, 2009, 11:00 AM), <http://www.theguardian.com/commentisfree/cifamerica/2009/jul/23/news-papers-internet-advertising>.

⁷⁴ Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

⁷⁵ Letter from John W. Snow, Sec’y, U.S. Dep’t of the Treasury, to Bill Keller, Managing Editor, N.Y. Times (June 26, 2009), available at <http://www.treasury.gov/press-center/press-releases/Pages/4339.aspx>.

Washington Post, puts it, “You’re in the fog all the time, always groping . . . you’re always concerned that you’re missing something.”⁷⁶ Such awareness of their own limitations, though, often did not suffice to stop editors from ignoring the government’s pleas. Editors state that they ultimately must rely on “their gut” and “instinct.”⁷⁷ Moreover, the government, when pleading with them not to publish, often cannot divulge more information, lest additional state secrets be published.

Sometimes, editors suggest that they acted responsibly, indeed magnanimously, by granting the government a short reprieve and delaying the publication of a national security leak. The Associated Press, for example, withheld a story about an operation to foil a bomb plot until the operation was complete.⁷⁸ Nevertheless, it later revealed that the successful operation had relied on a mole that had infiltrated al Qaeda and was passing vital intelligence on to the United States.⁷⁹ This report compromised the mole’s identity and deprived the United States of any further life-saving information he could have gained while undercover.⁸⁰

Furthermore, even when the media outlets that consider themselves responsible—such as the *New York Times*, the *Washington Post*, and *National Public Radio*—refrain from publishing a particular piece of classified information, other news outlets, which in the cyber age include Internet publications and amateur bloggers, are less careful. Initially, upon receiving leaked military and diplomatic documents, WikiLeaks worked with the *Guardian*, the *New York Times*, *Der Spiegel*, *Le Monde*, and *El Pais*, all of which published redacted versions to protect the identities of sources, human rights workers, and informants.⁸¹ However, in 2011, around 100,000 secret cables were “either released by WikiLeaks by accident, or ‘recklessly’ published by the *Guardian*,” prompting WikiLeaks to post its full archives online.⁸² Papers that had worked with the organization issued a joint statement, saying, “[w]e deplore the decision of WikiLeaks to publish the unredacted state department cables, which may put sources at risk. . . . We cannot defend the needless publication of the complete

⁷⁶ Smolkin, *supra* note 62, at 25 (quoting Coll).

⁷⁷ *See id.* at 30.

⁷⁸ *A Look at Public Statements About AP Story About Foiled Terror Plot*, FOX NEWS (May 14, 2013), <http://www.foxnews.com/us/2013/05/14/look-at-public-statements-about-ap-story-about-foiled-terror-plot/> [hereinafter *Public Statements*].

⁷⁹ Scott Neuman, *Leaks, Bombs and Double Agents: More on That AP Story*, NPR (May 15, 2013, 5:19 PM), <http://www.npr.org/blogs/thetwo-way/2013/05/15/184274166/leaks-bombs-and-double-agents-more-on-that-ap-story>.

⁸⁰ Matt Smith, *Bomb Plot Story at Heart of Probe, AP Says*, CNN (May 14, 2013, 7:11 PM), <http://www.cnn.com/2013/05/14/us/justice-ap-plot/>.

⁸¹ Dylan Byers, ‘*New York Times*’, ‘*Guardian*’ Condemn WikiLeaks: Former Partners Say Leak Endangers Sources, ADWEEK (Sept. 2, 2011, 1:12 PM), <http://www.adweek.com/news/press/new-york-times-guardian-condemn-wikileaks-134586>.

⁸² Elizabeth Flock, *Wikileaks Posts All Cables Unredacted*, WASH. POST (Sept. 2, 2011, 8:59 AM), http://www.washingtonpost.com/blogs/blogpost/post/wikileaks-publishes-full-cache-of-unredacted-cables-online/2011/09/02/gIQAHAhWwJ_blog.html.

data—indeed, we are united in condemning it.”⁸³ As another example, in the mid-1980s when reporters at the *Washington Post* uncovered a U.S. operation to intercept Soviet cable communications, called “Ivy Bells,”⁸⁴ the *Washington Post* delayed publication of the story in response to government requests—but *NBC* still carried the story.⁸⁵ News organizations that have published leaked National Security Agency documents have inadvertently disclosed the names of at least six intelligence workers and other government secrets they never intended to give away.⁸⁶

Unlike doctors or lawyers, journalists need no license to practice; anyone, including bloggers and even foreign spies, can claim that they are journalists, solicit classified information, and publish it. The *New York Times* labeled two teenagers who wrote an article for their high school newspaper about school security “student journalists.”⁸⁷ It seems to follow that those considered neither informed enough to vote nor responsible enough to drive or have a drink could decide on their own whether to publish top-secret information if someone leaked it to them. Should all these persons and outlets be free to proceed unchecked and be shielded from the consequences of their actions? Or, is the responsible media willing to make a list of legitimate editors and outlets that can assume the mantle of making these fateful decisions? Will the “press” then hold that the government should enjoin or punish the “irresponsible” publishers? Robert D. Epstein writes that not only journalists, but also “lobbyists, academics, think-tank experts, and others, particularly in Washington,” make their stock in trade of “often secret or classified” information.⁸⁸ Are they all entitled to the same special status the “responsible” press acquired?

The term used most often to describe the role of the government in dealing with the media on these matters is particularly telling. President Bush and his aides are reported to have “plead[ed]” with the *New York Times* “for more than a year” not to publish the article about the National Security Agency’s (NSA) highly classified wiretapping program.⁸⁹ The term is very appropriate because currently as a matter

⁸³ James Ball, *WikiLeaks Publishes Full Cache of Unredacted Cables*, *GUARDIAN* (Sept. 2, 2011, 7:55 AM), <http://www.theguardian.com/media/2011/sep/02/wikileaks-publishes-cache-unredacted-cables>.

⁸⁴ Smolkin, *supra* note 62, at 29.

⁸⁵ *Id.*

⁸⁶ Associated Press, *Media Sometimes Try, Fail to Keep NSA’s Secrets*, *N.Y. TIMES* (Feb. 8, 2014, 8:41 AM), <http://www.nytimes.com/aponline.2014/02/08/world/europe/ap-us-nsa-surveillance.html>.

⁸⁷ Al Baker, *Seeking Exposé, Students End up in Handcuffs*, *N.Y. TIMES*, June 15, 2013, at A1.

⁸⁸ Robert D. Epstein, *Balancing National Security and Free-Speech Rights: Why Congress Should Revise the Espionage Act*, 15 *COMMLAW CONSPECTUS* 483, 505 (2007) (citation omitted).

⁸⁹ GABRIEL SCHOENFELD, *NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW* 17 (2010).

of fact, if not necessarily by law, editors have the final authority.⁹⁰ There is no place the government can appeal if editors reject the government's petitions.⁹¹ Editors have, as a matter of practice, absolute authority over what they publish and are rarely punished, even if it becomes clear after the fact that the harm they caused by doing so is substantial.⁹²

Thomas Powers argues that “[y]ou could ransack the literature and not come up with three examples” of leaks that harmed national security.⁹³ David Wise, an author and former White House correspondent who has written extensively on the intelligence community, claims that, “[i]t’s a phony business, the whole secrecy racket. It’s a racket designed to allow political leaders to maintain information control.”⁹⁴ How valid are these claims?

The Article turns next to asking, in line with the liberal communitarian quest for balance: Have publications of classified information significantly damaged national security, and have the government’s countermeasures unduly curbed the freedom of the press?

III. HARM TO NATIONAL SECURITY?

In order to assess the security implications of media reporting on classified information, consider the following notable leaks:

- In 1942, the *Chicago Tribune* reported that the “Navy had Word of Jap Plan to Strike At Sea,” revealing to the Japanese that the United States had broken their naval code.⁹⁵
- In 1943, the press reported that Japanese depth charge attacks were ineffective because they were set to explode at too shallow a depth. This allowed the Japanese military to adjust the depth of their attacks, which cost the U.S. Navy at least ten submarines.⁹⁶
- In 1974, after leaving the CIA, Victor Marchetti co-authored with John D. Marks, a former State Department officer, *The CIA and the Cult of Intelligence*,⁹⁷ a book highly critical of the organization, which also

⁹⁰ See generally Robert A. Sedler, *The Media and National Security*, 53 WAYNE L. REV. 1025, 1026–27 (2007) (stating that the First Amendment presents a formidable obstacle to government efforts to regulate media expression).

⁹¹ See *id.* at 1027–29.

⁹² See Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL’Y REV. 185, 185–86 (2007).

⁹³ Smolkin, *supra* note 62, at 28.

⁹⁴ *Id.*

⁹⁵ See Dina Goren, *Communication Intelligence and the Freedom of the Press. The Chicago Tribune’s Battle of Midway Dispatch and the Breaking of the Japanese Naval Code*, 16 J. CONTEMP. HIST. 663, 663–64 (1981).

⁹⁶ See SCHOENFELD, *supra* note 89, at 124.

⁹⁷ VICTOR MARCHETTI & JOHN D. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* (1974).

included sensitive information about intelligence collection methods and sources.⁹⁸

- In 1975, former CIA agent Philip Agee published *Inside the Company: CIA Diary*,⁹⁹ and included in the book the names and positions of about two hundred and fifty CIA officers and foreign agents.¹⁰⁰ He later uncovered approximately one thousand agents all over the world and inspired followers.¹⁰¹ On November 17, 1975, Richard Welch was assassinated by a terrorist organization while working in Greece after the American magazine *CounterSpy* exposed his identity as a CIA agent.¹⁰² An official at the American Embassy in Jamaica fell victim to an armed assault after being identified by *Covert Action Information*, another publication dedicated to such outings.¹⁰³
- In 1979, the *Progressive* published a detailed technical account of how to build a nuclear bomb by piecing together mostly public information.¹⁰⁴ By compiling the disparate pieces of information, the publication made it much easier for those seeking to build a bomb to proceed.¹⁰⁵
- In 1984, Samuel Morison provided a British magazine, *Jane's Defence Weekly*—at which he sought employment—with top-secret pictures of Soviet military sites obtained through U.S. reconnaissance.¹⁰⁶
- In 1998, a leak published in the *Washington Times*¹⁰⁷ is reported to have alerted Osama bin Laden to the fact the United States was using his satellite phone to monitor him, leading him to stop using the phone and all other such devices.¹⁰⁸

⁹⁸ See SCHOENFELD, *supra* note 89, at 196.

⁹⁹ PHILIP AGEE, *INSIDE THE COMPANY: CIA DIARY* (1975).

¹⁰⁰ Scott Shane, *Philip Agee, 72, Dies; Exposed Other C.I.A. Officers*, N.Y. TIMES, Jan. 10, 2008, at A28.

¹⁰¹ Vanessa Bauza, *CIA Leak Comes Full Circle*, SUN SENTINEL (Aug. 21, 2005), http://articles.sun-sentinel.com/2005-08-21/news/0508200650_1_cia-diary-philip-agee-white-house.

¹⁰² Richard Immerman et al., *Biographies of Important CIA Administrators: Philip Agee*, in *THE CENTRAL INTELLIGENCE AGENCY: SECURITY UNDER SCRUTINY 235* (Athan Theoharis et al. eds., 2006).

¹⁰³ See SCHOENFELD, *supra* note 89, at 205.

¹⁰⁴ Howard Morland, *The H-Bomb Secret*, PROGRESSIVE, Nov. 1979, at 3.

¹⁰⁵ *Id.*

¹⁰⁶ See *Morison v. United States*, 486 U.S. 1306 (1988); Stephen Engelberg, *Spy Photos' Sale Leads to Arrest*, N.Y. TIMES, Oct. 3, 1984, at A8.

¹⁰⁷ Martin Sieff, *Terrorist Is Driven by Hatred for U.S., Israel*, WASH. TIMES, Aug. 21, 1998, at A1.

¹⁰⁸ This claim is controversial; some disagree that it was a press leak that led bin Laden to abandon his phone. See Glenn Kessler, *File the Bin Laden Phone Leak Under 'Urban Myths'*, WASH. POST, Dec. 22, 2005, at A2.

- In 2005, the *New York Times* reported on an NSA program of warrantless domestic spying on Americans.¹⁰⁹ Democratic and Republican lawmakers alike condemned the *Times* for “damag[ing] critical intelligence capabilities.”¹¹⁰
- In 2005, Dana Priest of the *Washington Post* chronicled the George W. Bush Administration’s use of secret prisons in Eastern Europe, though she heeded the government’s request not to publish the names of the countries involved.¹¹¹
- In 2006, the *New York Times* exposed a secret Treasury Department program (SWIFT) for monitoring terrorist financial transactions.¹¹²
- In his 2009 report that the North Koreans were about to launch another nuclear test, *FOX News* reporter James Rosen “alerted the North Koreans that the United States had penetrated their leadership circle,” thus compromising a highly placed source of intelligence.¹¹³
- In 2010, Bob Woodward exposed numerous highly classified details about the Obama Administration’s activities in his book, *Obama’s Wars*.¹¹⁴ Among the disclosed details were the existence of a secret CIA paramilitary group, the code names of NSA programs, and a “retribution plan” in case of a Pakistani terrorist attack on the United States.¹¹⁵
- In 2010, Private Manning was reported to have given WikiLeaks classified video footage of a U.S. airstrike that resulted in civilian deaths, Afghanistan and Iraq war logs, files from Guantanamo Bay, and hundreds of thousands of diplomatic cables.¹¹⁶
- In 2011, Shakil Afridi, a Pakistani doctor who helped the CIA find Osama bin Laden, was caught by the Pakistani intelligence agency and sentenced to thirty-three years in prison.¹¹⁷ Some charge that he was identified as a result of the publication of a leak that came directly from the White House.¹¹⁸

¹⁰⁹ See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

¹¹⁰ SCHOENFELD, *supra* note 89, at 31.

¹¹¹ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

¹¹² Lichtblau & Risen, *supra* note 74.

¹¹³ Pincus, *supra* note 35.

¹¹⁴ BOB WOODWARD, *OBAMA’S WARS* (2010).

¹¹⁵ *Id.* at 8, 10, 46.

¹¹⁶ See *What Did WikiLeaks Reveal?*, PRIVATE MANNING SUPPORT NETWORK (Aug. 16, 2011), <http://www.privatemanning.org/news/what-did-wikileaks-reveal>.

¹¹⁷ Habibullah Khan & Muhammad Lila, *Pakistani Doctor Who Aided Bin Laden Hunt Gets 33 Years*, ABC NEWS (May 23, 2012), <http://abcnews.go.com/Blotter/shakil-afриди-pakistani-doctor-aided-bin-laden-hunt/story?id=16412064>.

¹¹⁸ See, e.g., Donna Cassata, *McCain Says Classified Leaks Done to Boost Obama*, ASSOCIATED PRESS (June 5, 2012, 5:53 PM), <http://bigstory.ap.org/article/mccain-says-classified>

- In his 2012 book *Confront and Conceal*,¹¹⁹ excerpts of which were published in the *New York Times*, David E. Sanger revealed that “President Obama secretly ordered increasingly sophisticated attacks on the computer systems that run Iran’s main nuclear enrichment facilities,” intensifying the “Olympic Games” program started under the previous administration.¹²⁰ This was the first time the United States was identified as a nation using cyber weapons for a major kinetic attack, setting a precedent for others to follow.¹²¹
- An Associated Press (AP) story in 2012 about a foiled terrorist plot originating in Yemen¹²² alerted al Qaeda that the United States had succeeded in infiltrating its ranks.¹²³
- In the summer of 2013, former NSA contractor Edward Snowden leaked an estimated 1.7 million documents from official databases to the media. The leaks led to stories about previously secret operations of the NSA, including its phone metadata collection and PRISM programs. According to John Sawers, the head of the British intelligence agency MI6, the Snowden leaks “have put our operations at risk.”¹²⁴ A senior U.S. intelligence official reports that several terrorist groups changed their communication behaviors as a result.¹²⁵ Prior to Snowden’s actions, it was widely assumed that computers not connected to the Internet were safe from surveillance. Snowden leaked the information that the NSA has developed means to access computers not even connected to the Internet.¹²⁶

Snowden provided specific details of U.S.-based cyber-attacks launched against Hong Kong targets, including the Chinese University of Hong Kong, students, and

-leaks-done-boost-obama; Felicia Sonmez, *Paul Ryan Suggests White House Leaked Identity of Pakistani Doctor*, WASH. POST (Sept. 12, 2012, 3:52 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/09/12/paul-ryan-suggests-white-house-leaked-identity-of-pakistani-doctor>.

¹¹⁹ DAVID E. SANGER, *CONFRONT AND CONCEAL: OBAMA’S SECRET WARS AND SURPRISING USE OF AMERICAN POWER* (2012).

¹²⁰ David E. Sanger, *Obama Order Sped up Wave of Cyberattacks Against Iran*, N.Y. TIMES, June 1, 2012, at A1.

¹²¹ *Id.*

¹²² *Public Statements*, *supra* note 78.

¹²³ *Id.*

¹²⁴ Lee Ferran & Marcus Wilford, *Al Qaeda ‘Gleeful’ over Snowden Leaks*, MI6 Head Says, ABC NEWS (Nov. 7, 2013), <http://abcnews.go.com/Blotter/al-qaeda-gleeful-snowden-leaks-mi6-head/story?id=20816271>.

¹²⁵ Pierre Thomas et al., *Officials: How Edward Snowden Could Hurt the U.S.*, ABC NEWS (June 24, 2013, 6:38 PM), <http://abcnews.go.com/blogs/headlines/2013/06/officials-how-edward-snowden-could-hurt-the-u-s/>.

¹²⁶ David E. Sanger & Thom Shanker, *N.S.A. Devises Radio Pathway into Computers*, N.Y. TIMES, Jan. 15, 2014, at A1.

public officials.¹²⁷ And he revealed that the NSA was hacking “major Chinese telecommunications companies, a Beijing university and the corporate owner of the region’s most extensive fiber-optic submarine cable network.”¹²⁸

A *preliminary* overview of these leaks seems to suggest that many of them did considerable harm to national security. In some cases, Americans who volunteered to risk their lives in service of their country were killed (for example, CIA agents and those operating the ten submarines¹²⁹); in other cases, the United States and its allies were left more vulnerable to terrorist attacks (for example, when the mole in Yemen was exposed¹³⁰)—and, arguably, even to nuclear attacks (for example, when the existence of a mole inside North Korea was exposed¹³¹).

This does not account for the less tangible effects: Allies may think twice about assisting the United States in the campaign against terrorism, and foreign diplomats may no longer speak candidly for fear of reading their revelations in the *New York Times*.¹³² Edward Snowden reportedly told China exactly which of its computers the NSA had accessed.¹³³ Moreover, “[l]eaks about our methods tip our hand to our adversaries and give them the opportunity to adapt their defenses against those methods.”¹³⁴

David Ignatius points out that the “[t]he CIA claimed at the time that it had suffered great damage from [Philip] Agee’s revelations, but it’s still very much in business.”¹³⁵ This is, of course, a play on words. Although the CIA never claimed that

¹²⁷ *Id.*

¹²⁸ Kurt Eichenwald, *How Edward Snowden Escalated Cyber War with China*, NEWSWEEK (Nov. 1, 2013, 6:52 AM), <http://www.newsweek.com/how-edward-snowden-escalated-cyber-war-1461>.

¹²⁹ SCHOENFELD, *supra* note 89, at 124–25; Immerman et al., *supra* note 102, at 235.

¹³⁰ Smith, *supra* note 80 (quoting U.S. Attorney General Eric Holder as saying that the leak “put the American people at risk”).

¹³¹ *See* Pincus, *supra* note 35 (arguing that the person who leaked information disclosing that the United States had a mole in North Korea “harmed national security”).

¹³² *See, e.g.*, Mary Beth Sheridan, *Calderon Cites ‘Serious Damage’ to U.S. Ties*, WASH. POST, Mar. 4, 2011, at A9; David Batty, *Afghan’s Finance Minister Warns Leaked Cables Will Damage Relations with US*, GUARDIAN (Dec. 4, 2010, 8:21 AM), <http://www.theguardian.com/world/2010/dec/04/afghan-finance-minister-leaked-cables-damage>; *Saudi Prince Turki bin Faisal on Wikileaks: ‘People Will No Longer Speak to American Diplomats Frankly,’* SPIEGEL ONLINE (Dec. 5, 2010, 1:04 PM), <http://www.spiegel.de/international/world/saudi-prince-turki-bin-faisal-on-wikileaks-people-will-no-longer-speak-to-american-diplomats-frankly-a-732950.html>.

¹³³ David Firestone, Editorial, *Snowden’s Questionable New Turn*, N.Y. TIMES (June 17, 2013, 4:02 PM), <http://takingnote.blogs.nytimes.com/2013/06/17/snowdens-questionable-new-turn/>.

¹³⁴ *National Security Leaks and the Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 13 (2012) [hereinafter *National Security Leaks and the Law*] (statement of Kenneth L. Wainstein, Cadwalader, Wickersham & Taft LLP).

¹³⁵ David Ignatius, Editorial, *Snowden Knows Best?*, WASH. POST, June 13, 2013, at A21.

the death of one of its agents and the identification of about one thousand others put it out of business, it nevertheless seems reasonable to conclude that significant harm was done to its work—and most assuredly to the agent shot dead and his family.¹³⁶

On the same first reading, it also seems that only a small minority of leaks shed light on instances of government abuse or illegal activities. In fact, in many cases—such as Ivy Bells,¹³⁷ planting moles in North Korea,¹³⁸ and al Qaeda¹³⁹—the revelations painted the government in a positive light, whereas in others the public seemed to gain very little at great security expense. For instance, the public gained very little by reading a technical article on assembling nuclear bombs while nations set on making bombs gained much more.¹⁴⁰

On closer examination, all of these cases turn out to be much more complicated and are open to different interpretations and assessments, especially given that the public does not know all the details. To the extent that details are known, it is often difficult to reach a simple summary judgment. Thus, although the report that U.S. submarines greatly benefitted from Japan's miscalculation of the range of its depth charges¹⁴¹ would seem to be a straightforward instance of the press causing significant harm to national security, a media advocate could point out that the information was released by a careless member of Congress, not a journalist.¹⁴² An advocate of more stringent prosecution of leaks may then respond that the Japanese were extremely unlikely to attend the meeting in which the Congressman revealed this information, and hence they would not have known about it without the help of the press. A free press advocate may respond that there is no hard evidence that the Japanese learned about the press story and that, regardless, it is not the job of the press to protect the nation from members of Congress or anyone else that speaks out of turn.

Likewise, press advocates may point out that the 1979 *Progressive* article,¹⁴³ providing information as to how to build a bomb, merely pieced together previously published articles and therefore revealed no new information. Security advocates may well respond that, by compiling information and creating a comprehensive publication, the *Progressive* made assembling a hydrogen bomb much easier. Press advocates say that information about U.S. surveillance of Internet traffic overseas was well-known and hence writing about it was harmless; critics are likely to point out that terrorists tend to become careless and eventually use the Internet to communicate—and the publication of leaks reminds them to be more cautious.

¹³⁶ See Immerman et al., *supra* note 102, at 235.

¹³⁷ See *supra* notes 84–86 and accompanying text.

¹³⁸ See *supra* notes 113, 131 and accompanying text.

¹³⁹ See *supra* notes 114–15, 122–23 and accompanying text.

¹⁴⁰ See *supra* notes 104–05 and accompanying text.

¹⁴¹ See SCHOENFELD, *supra* note 89, at 124–25.

¹⁴² See, e.g., *id.* at 125 (“If appalling stupidity like [Kentucky Congressman Andrew Jackson] May’s was one facet of the security problem, its even more significant side came as a nasty brew of one part recklessness and nine parts politics.”).

¹⁴³ Morland, *supra* note 104.

The AP points to the fact that it withheld a story for a week at the government's request, but moved forward with publication against the wishes of the White House, after the operation was complete and those involved were out of harm's way.¹⁴⁴ However, "[w]e shouldn't pretend that this leak of an unbelievably sensitive, dangerous piece of information is okay because nobody died," former White House national security spokesman Tommy Vietor warns.¹⁴⁵ Officials say that the CIA was unable to keep the same double agent in al Qaeda's Yemeni branch after his cover was blown by the AP's story.¹⁴⁶ Even if the United States can find another agent willing to risk his life as a mole, al Qaeda has undoubtedly learned from the incident and will be harder to infiltrate.

In short, although there seems to be considerable evidence of harm, it is very difficult for a non-specialized observer, without access to classified information that has not been leaked, to render a definitive judgment on the extent of the harm in many of the cases.

Finally, *on further deliberation*, one realizes that an important part of the judgment about the various leaks—and hence about in which direction the balance between security and freedom of the press ought to be recalibrated, that is, which side is to be given more “leeway” under the prevailing historical circumstances—is the basic normative assumptions that underlie our laws and public policies.¹⁴⁷ One cannot separate consideration of the facts from consideration of their meaning in terms of the values we hold dear. At the foundation of the American constitutional democracy is the principle that the government needs to be checked and held accountable to the people—in this particular sense, that it should not be trusted but rather supervised.¹⁴⁸ However, how far this distrust is permitted to extend must still be resolved. If one assumes that all government statements are misleading—including those by inspectors general, congressional oversight committees, and investigations by independently appointed prosecutors—there remain very few ways besides the press by which one can discern the actual situation. The system of

¹⁴⁴ Carol D. Leonnig & Julie Tate, *Some Question Whether AP Leak to AP Put Nation 'At Risk,'* WASH. POST, May 16, 2013, at A8.

¹⁴⁵ *Id.*

¹⁴⁶ See Ted Barrett & Kate Bolduan, *Leaks in Foiled Plot Compromised Mole, Alerted al Qaeda, Lieberman Says*, CNN (May 10, 2012, 5:33 PM), <http://www.cnn.com/2012/05/10/us/lieberman-terror-leak/>.

¹⁴⁷ See generally MARTIN LINSKY, *IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICY-MAKING* 181–222 (1986) (discussing the impact of leaks, why some people choose to leak confidential information, various politicians' and journalists' views on the value of leaking, and how it all informs policymaking).

¹⁴⁸ See generally Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 37–38 (1955) (noting that both Federalists and Anti-Federalists alike displayed a “profound distrust of man's capacity to use power wisely and well,” and believed a “political machinery” was necessary to supervise government).

checks and balances is composed of the three branches of government. However, if one cannot trust any one of them—or all of them in combination—one faces a much greater challenge than protecting the freedom of the press.

Similarly, when leaks reveal that the government engaged in spying, initiated cyber attacks, formed secret prisons, and perpetrated targeted killing and torture, they raise issues that are not merely factual. Their evaluation depends on the values we hold, according to which some of these acts may be deemed quite tolerable (and best kept in the shadows) and others completely reprehensible (and best aired and stopped).

My response to these fundamental questions follows in three major steps. I ask: (1) What effect have the investigations into news outlets and reporters, inquiries that seek to find and deter leakers, had on the freedom of the press? To what extent did they, as the media repeatedly claims, “chill” the press’s sources in the government?; (2) What changes in policy and institutions can reduce the tension between security and press freedom?; and (3) Is there a way to come to a new shared understanding as to which principles should guide the recalibration of whatever imbalance exists?

IV. LIMITING OF THE PRESS?

When the Justice Department’s decision to subpoena James Rosen and investigate the Associated Press surfaced in 2013,¹⁴⁹ the media held that “[t]here’s no question that this has a chilling effect. People who have talked in the past are less willing to talk now. Everyone is worried about communication and how to communicate, and [asking if there] is there any method of communication that is not being monitored.”¹⁵⁰ Gary Pruitt, president of the AP, stated that the government’s message to officials is “that if you talk to the press, we’re going to go after you” and that “people we would talk to in the normal course of news gathering, are already saying to us that they’re a little reluctant to talk to us; they fear that they will be monitored by the government.”¹⁵¹ The *New York Times*’ Margaret Sullivan wrote that

[t]he ability of the press to report freely on its government is a cornerstone of American democracy. That ability is, by any reasonable assessment, under siege. Reporters get their information from sources. They need to be able to protect those sources and

¹⁴⁹ See *infra* notes 211–14 and accompanying text.

¹⁵⁰ Greg Mitchell, Editorial, *Obama’s War on Leaks: Already Having ‘Chilling Effect’ on the Media?*, NATION (May 22, 2013, 8:31 AM), <http://www.thenation.com/blog/174477/obamas-war-leaks-already-having-chilling-effect-media> (quoting Mark Mazzetti, a *New York Times* reporter, as interviewed by the *Washington Post*).

¹⁵¹ Ravi Somaiya, *Head of the A.P. Criticizes Seizure of Phone Records*, N.Y. TIMES, May 20, 2013, at B8 (quoting Pruitt).

sometimes offer them confidentiality. If they can't be sure about that—and it looks increasingly like they can't—the sources will dry up. And so will the information.¹⁵²

Jill Abramson, an editor at the *Times*, told Bob Schieffer on CBS's *Face the Nation* that “[t]he reporters who work for the Times in Washington have told me many of their sources are petrified even to return calls”¹⁵³ The *Washington Post*'s Leonard Downie, Jr. warns that “the Obama administration's steadily escalating war on leaks, the most militant I have seen since the Nixon administration, has disregarded the First Amendment and intimidated a growing number of government sources of information—most of which would not be classified—that is vital for journalists to hold leaders accountable.”¹⁵⁴

Actually, there is strong evidence that the American press continues to be freer than that of most, if not all, other countries in the world.¹⁵⁵ Even amid Obama's “war on leaks,”¹⁵⁶ the press has regularly carried reports based on insider and classified information—including top-secret documents—and there is very little indication that their government sources have been scared into silence.¹⁵⁷ Forty-two percent of government officials that responded to a survey conducted by scholars at Harvard University stated that they “fe[lt] it appropriate to leak information to the press” at least once,¹⁵⁸ leading the architects of the survey to conclude that leaks “are a routine and generally accepted part of the policymaking process.”¹⁵⁹ The Senate Intelligence Committee analyzed eight prominent newspapers and found evidence of 147 unauthorized disclosures of classified information over a six month period.¹⁶⁰ Although these studies are dated, over the past decades the prevalence of leaks seems to be on

¹⁵² Margaret Sullivan, *Leak Investigations Are an Assault on the Press, and on Democracy, Too*, N.Y. TIMES (May 14, 2013, 5:40 PM), <http://publiceditor.blogs.nytimes.com/2013/05/14/leak-investigations-are-an-assault-on-the-press-and-on-democracy-too/>.

¹⁵³ See Jill Abramson on DOJ Investigations: ‘News Gathering Is Being Criminalized,’ HUFFINGTON POST (June 3, 2013, 12:03 PM), http://www.huffingtonpost.com/2013/06/02/jill-abramson-doj-eric-holder-meeting_n_3375035.html.

¹⁵⁴ Downie, *Obama's War*, *supra* note 69.

¹⁵⁵ Robert D. Epstein points to the United States' poor ranking on the Worldwide Press Freedom Index (57th out of 168 countries in 2006) as evidence that “freedom of the press in this country has drastically eroded in recent years.” Epstein, *supra* note 88, at 484. This conclusion ignores the fact that many of the “freer” countries, such as those in Northern Europe, do not face the same threat from terrorists as the United States, nor shoulder the responsibility for going after global terrorist networks. *Id.*

¹⁵⁶ See, e.g., Downie, *Obama's War*, *supra* note 69.

¹⁵⁷ See *supra* notes 95–128 and accompanying text.

¹⁵⁸ LINSKY, *supra* note 147, at 238.

¹⁵⁹ *Id.* at 197.

¹⁶⁰ See Mark Lawrence, *Executive Branch Leads the Leakers*, WASH. POST, July 28, 1987, at A13.

the rise. The media correctly reports that the Obama Administration has conducted more leak investigations than all previous administrations combined. However, the number of these investigations is six, which amounts to a tiny fraction of all of the illegal leaks!¹⁶¹

Moreover, very few leakers have been punished and no editor or media outlet has been penalized.¹⁶² Pozen reports that “the thousands upon thousands of” leaks over the decades “have yielded a total of roughly a dozen criminal prosecutions,” a “degree of ‘underenforcement’ [that] is stunning,” given that every president since at least Truman has considered leaks “a major threat to national security and good government.”¹⁶³ A generous estimate of the prosecution rate of leak-law violators is 0.3%, though, “[t]he actual rate is probably far closer to zero.”¹⁶⁴ Also, note that indictments and prosecutions do not necessarily result in convictions.¹⁶⁵

Hence it is not surprising that Washington continues to leak like a sieve. In the same month in which newspapers carried a considerable number of editorials and op-eds chastising the Obama Administration for the chilling effects of its “war on leaks,” two major national security programs were exposed in the media. On June 5, 2013, the *Guardian* published a top-secret Foreign Intelligence Surveillance Court order authorizing the NSA to collect the phone records of millions of Americans,¹⁶⁶ a document that contained detailed information about the program.¹⁶⁷ The next day, the *Washington Post* and the *Guardian* revealed that the NSA and FBI, under a top-secret program code-named PRISM, had partnered with nine of the biggest Internet companies to monitor foreign communications traffic.¹⁶⁸ Then, on June 20, the

¹⁶¹ See Downie, *Obama’s War*, *supra* note 69.

¹⁶² See LEONARD DOWNIE JR. & SARA RAFSKY, COMM. TO PROTECT JOURNALISTS, THE OBAMA ADMINISTRATION AND THE PRESS: LEAK INVESTIGATIONS AND SURVEILLANCE IN POST-9/11 AMERICA (2013), available at <http://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php>.

¹⁶³ Pozen, *supra* note 18, at 534–36.

¹⁶⁴ *Id.* at 536.

¹⁶⁵ See Jim Young, *State Dept. Contractor to Go to Jail Under Espionage Act for Tipping off Journalist*, REUTERS (Feb. 7, 2014, 8:46 PM), <http://rt.com/usa/stephen-kim-espionage-plea-104/>.

¹⁶⁶ See Jonathan Turley, *Obama’s Verizon Surveillance Reveals Massive Erosion of US Civil Liberties*, GUARDIAN (June 6, 2013, 11:01 AM), <http://www.theguardian.com/comment/isfree/2013/jun/06/obama-verizon-surveillance-erosion-liberties> (summarizing and interpreting the Verizon record seizure and identifying Judge Roger Vinson as having signed the order).

¹⁶⁷ *Id.*; *Verizon Forced to Hand over Telephone Data—Full Court Ruling*, GUARDIAN (June 5, 2013, 7:04 PM), <http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order>.

¹⁶⁸ See Barton Gellman & Laura Poitras, *U.S. Mines Internet Firms’ Data, Documents Show*, WASH. POST, June 7, 2013, at A1; Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, GUARDIAN (June 6, 2013), <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>.

Guardian published two top-secret documents that detailed NSA surveillance and data minimization procedures.¹⁶⁹ More leaks followed in rapid succession.¹⁷⁰

In short, it is hardly the case that the government is plugging the leaks and the press is left out to dry. One may argue that this is the way the balance should be tilted, but one cannot deny the direction in which it is leaning. Even if one reaches the conclusion that the leaks so far have caused little harm to national security and that investigations greatly undermine the ability of the press to do its job, all that follows still holds.

V. “THERE OUGHT TO BE A LAW”?

What is the current state of the law? Are there too many or too few legal measures to decrease harmful leaks and deter the irresponsible press from publishing them? In responding to these questions, three channels for enhancing government secrecy emerge: going after the leakers directly, investigating the press in order to find and punish the leakers, and stopping the press directly or deterring them from running by punishing those who publish classified information.

A. Investigating and Punishing the Leakers

Extensive administrative rules against leaking classified information are already on the books in most government agencies. Executive orders *require* “sanctions for every knowing, willful, or negligent disclosure of properly classified information to unauthorized persons,”¹⁷¹ and federal agencies have the authority “to conduct their own investigations into suspected leaks and to impose a wide range of sanctions, including removal, suspension without pay, and denial of access to classified information.”¹⁷² Government officials who leak “national defense” information to the press break the law and the terms of their employment,¹⁷³ and, in the words of former national security policy adviser Daniel J. Gallington, “the government clearly has the right—and even the obligation—to investigate.”¹⁷⁴ However, “numerous

¹⁶⁹ Glenn Greenwald & James Ball, *The Top Secret Rules That Allow NSA to Use US Data Without a Warrant*, *GUARDIAN* (June 20, 2013, 6:59 PM), <http://www.theguardian.com/world/2013/jun/20/fisa-court-nsa-without-warrant>.

¹⁷⁰ See *Timeline: Guardian Announces Leak of Classified NSA Documents*, *ALJAZEERA AM.* (June 5, 2013), <http://america.aljazeera.com/topics/topic/organization/nsa.html> (click and drag the timeline feature to view a visual chronology of the news stories detailing the Snowden leaks).

¹⁷¹ Pozen, *supra* note 18, at 540.

¹⁷² *Id.*

¹⁷³ See *infra* notes 176–83 and accompanying text.

¹⁷⁴ Daniel J. Gallington, Editorial, *There Is No Scandal in Tracking Down Leaks*, *U.S. NEWS & WORLD REP.* (May 20, 2013), <http://www.usnews.com/opinion/blogs/world-report/2013/05/20/obama-is-right-to-target-ap-national-security-leaks>.

agencies that work on national security— and foreign policy—related issues hardly ever impose such punishments.”¹⁷⁵

Contract law also provides an avenue for stemming the flow of leaks. Intelligence and national-security officials sign secrecy agreements as a condition of employment and access to sensitive information—a limitation on free speech repeatedly affirmed by the courts.¹⁷⁶ If an agency is alerted to a potential leak, it can go to court to have the contractual obligations enforced.¹⁷⁷ The CIA did exactly this when, in 1973, former employee Victor Marchetti sought to publish a book critical of the Agency.¹⁷⁸ Before the book was published the government obtained a court order temporarily enjoining publication, and Marchetti was forced to submit the manuscript to the CIA for redaction.¹⁷⁹ Of the 166 passages that the CIA sought to suppress, the U.S. Court of Appeals for the Fourth Circuit compelled Marchetti to remove twenty-six.¹⁸⁰ And in 1977, Frank Snepp, a former CIA analyst, published an account of the Agency’s involvement in Vietnam without submitting the manuscript for the contractually required review and approval.¹⁸¹ His case reached the Supreme Court, which sided with the government, ordering that the CIA receive all royalties from the book that profited at the Agency’s expense.¹⁸² But the book and the secrets had been published.¹⁸³

Moreover, though labeling leakers as spies has been criticized, the courts have affirmed the constitutionality of prosecuting government officials that disclose “national defense” information to the press under the Espionage Act of 1917.¹⁸⁴ Section 793 “prohibits the gathering, transmitting, or receipt of defense information with the intent or reason to believe the information will be used against the United States or to the benefit of a foreign nation.”¹⁸⁵ Other portions of the law criminalize

¹⁷⁵ Pozen, *supra* note 18, at 542 (noting that administrative punishments for leakers are rare).

¹⁷⁶ See GENELLE BELMAS & WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 65–67 (2013) (discussing CIA employment contracts that require employees to seek prior approval before publishing anything about their employment).

¹⁷⁷ *Id.* at 66.

¹⁷⁸ See *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972); see also BELMAS & OVERBECK, *supra* note 176, at 66.

¹⁷⁹ *Marchetti*, 466 F.2d at 1311; see also BELMAS & OVERBECK, *supra* note 176, at 66.

¹⁸⁰ See BELMAS & OVERBECK, *supra* note 176, at 66.

¹⁸¹ See *Snepp v. United States*, 444 U.S. 507 (1980); see also BELMAS & OVERBECK, *supra* note 176, at 66.

¹⁸² *Snepp*, 444 U.S. at 516; see also BELMAS & OVERBECK, *supra* note 176, at 66.

¹⁸³ See BELMAS & OVERBECK, *supra* note 176, at 66.

¹⁸⁴ See Pozen, *supra* note 18, at 534–35 & n.115 (citing *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006), *aff’d*, 557 F.3d 192 (4th Cir. 2009)).

¹⁸⁵ 18 U.S.C. § 793 (2006); see also JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41404, CRIMINAL PROHIBITIONS ON THE PUBLICATION OF CLASSIFIED DEFENSE INFORMATION 8 (2013) [hereinafter ELSEA, CRIMINAL PROHIBITIONS].

specific types of disclosures. Sections 795 and 797, for example, prohibit “unauthorized creation, publication, sale or transfer of photographs or sketches of vital defense installations or equipment as designated by the President.”¹⁸⁶

In the foundational case *United States v. Morison*,¹⁸⁷ the Fourth Circuit rejected Samuel Morison’s argument that the prohibitions of the Espionage Act “are to be narrowly and strictly confined to conduct represented ‘in classic spying and espionage activity’ by persons who . . . transmitted ‘national security secrets to agents of foreign governments with intent to injure the United States.’”¹⁸⁸ Rather, the “statutes plainly apply to ‘whoever’ having access to national defense information . . . ‘willfully communicate[d], deliver[ed] or transmit[ted] . . . to a person not entitled to receive it.’”¹⁸⁹ The court added that to invoke the freedom of speech to justify leaking classified information “would be to prostitute the salutary purposes of the First Amendment.”¹⁹⁰

Some legal scholars argue that the 1917 law is “notoriously vague.”¹⁹¹ According to Benjamin Wittes, “it contains no limiting principle in its apparent criminalization of secondary transmissions of proscribed material,”¹⁹² thereby suggesting that anyone who talks, tweets, or blogs about illegally disclosed information could be prosecuted under its provisions.¹⁹³ One remedy would be to more precisely define the ambiguous terms of the statute, including what falls under “information relating to the national defense”; who is considered a “person not entitled to receive”; and how to demonstrate that one had “reason to believe [that such information] could be used to the injury of the United States or to the advantage of any foreign nation.”¹⁹⁴ This vagueness, however, does not make it more difficult to charge leakers; on the contrary, it could make it too easy. That is, if the law were actually applied.

Later amendments to the Espionage Act and similar statutes can and have been used to prosecute leakers of specific categories of sensitive information. The Comint Act (Section 798 of the Espionage Act),¹⁹⁵ passed in 1950 in response to the wartime leak of U.S. code-breaking, applies to unauthorized disclosures of cryptographic systems or communications intelligence that are “in any manner prejudicial to the

¹⁸⁶ 18 U.S.C. §§ 795, 797 (2006); *see also* ELSEA, CRIMINAL PROHIBITIONS, *supra* note 185, at 11.

¹⁸⁷ 844 F.2d 1057 (4th Cir. 1988).

¹⁸⁸ *Id.* at 1063 (footnote omitted) (quoting Appellant’s brief).

¹⁸⁹ *Id.* (alterations in original) (quoting 18 U.S.C. § 793).

¹⁹⁰ *Id.* at 1070.

¹⁹¹ *E.g.*, *National Security Leaks and the Law*, *supra* note 134, at 14 (testimony of Nathan A. Sales, Assistant Professor of Law, George Mason University).

¹⁹² Benjamin Wittes, *Problems with the Espionage Act*, LAWFARE (Dec. 2, 2010, 7:21 AM), <http://www.lawfareblog.com/2010/12/problems-with-the-espionage-act/>.

¹⁹³ *Id.*

¹⁹⁴ 18 U.S.C. § 793(d)–(e) (2006).

¹⁹⁵ § 798.

safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States.”¹⁹⁶ Following the fatal Agee episode,¹⁹⁷ Congress passed the Intelligence Identities Protection Act of 1982,¹⁹⁸ which made disclosing “any information identifying” covert agents “to any individual not authorized to receive classified information” punishable with up to fifteen years in prison.¹⁹⁹ Under 18 U.S.C. § 1924, any government employee that knowingly removes classified documents or materials “without authority and with the intent to retain such documents or materials at an unauthorized location” is subject to a fine and up to a year in prison.²⁰⁰ And 18 U.S.C. § 1030 prohibits disclosing information obtained by knowingly accessing a “computer without authorization or exceeding authorized access . . . with reason to believe that such information so obtained could be used to the injury of the United States.”²⁰¹ In addition to the Espionage Act, Morison was convicted under 18 U.S.C. § 641, which prohibits the unauthorized theft or conversion of government property.²⁰²

Though not exhaustive, this sampling of relevant laws demonstrates that “there is ample statutory authority for prosecuting individuals who elicit or disseminate many of the documents at issue, as long as the intent element can be satisfied and potential damage to national security can be demonstrated.”²⁰³ Still, over the years lawmakers have introduced additional laws that specifically target the unauthorized disclosure of classified information that does not fit within the definition of traditional espionage. Thus, in 2001, Congress passed the Classified Information Protection Act,²⁰⁴ a provision of the Intelligence Authorization Act, which penalized the unauthorized disclosure of any classified national security information “regardless of whether the violator intended that the information be delivered to and used by foreign agents.”²⁰⁵ Instead of requiring the government “to prove that damage to the national security has or will result from the unauthorized disclosure”²⁰⁶ the bill aimed “to ease the government’s burden” in going after leaks by simply requiring

¹⁹⁶ § 798(a).

¹⁹⁷ See *supra* notes 99–103 and accompanying text.

¹⁹⁸ Intelligence Identities Protection Act of 1982, 50 U.S.C. § 3121 (1982) (formerly cited as 50 U.S.C. § 421).

¹⁹⁹ § 3121(a) (formerly cited as 50 U.S.C. § 421(a)).

²⁰⁰ § 1924(a).

²⁰¹ § 1030(a)(1).

²⁰² § 641.

²⁰³ ELSEA, CRIMINAL PROHIBITIONS, *supra* note 185, at 6.

²⁰⁴ H.R. 2943, 107th Cong. (1st Sess. 2001), available at <https://www.fas.org/sgp/congress/2001/hr2943.html>.

²⁰⁵ JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL33502, PROTECTION OF NATIONAL SECURITY INFORMATION 14 (2006), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl33502.pdf>.

²⁰⁶ See *id.* at 15 (quoting H.R. REP. NO. 106-969, at 44 (2000)) (internal quotation marks omitted).

the government to demonstrate that the information “is or has been properly classified.”²⁰⁷ Despite easily passing in the House (with over four hundred votes) and Senate (with a voice vote), after an “extremely well-timed media lobbying blitz,”²⁰⁸ the bill was vetoed by President Clinton, who worried that the provision might “create an undue chilling effect.”²⁰⁹

Nevertheless, a 2002 review by the Attorney General of existing anti-leak legislation concluded:

[C]urrent statutes provide a legal basis to prosecute those who engage in unauthorized disclosures, if they can be identified. It may be that carefully drafted legislation specifically tailored to unauthorized disclosures of classified information generally, rather than to espionage, could enhance our investigative efforts. The extent to which such a provision would yield any practical additional benefits to the government in terms of improving our ability to identify those who engage in unauthorized disclosures of classified information or deterring such activity is unclear, however.²¹⁰

In short, the main issue ultimately is not the absence of legal tools to curb the leaks, but rather their employment. One may argue whether leaks are harmful or vital, but it is clear that there are legal means to curb them, if this is what is called for and if there is the political will to proceed.

B. Investigating the Press to Find the Leakers

Much attention was paid by the media to the Department of Justice’s labeling of *Fox News* reporter James Rosen as “an aider, abettor and/or co-conspirator” for his role in the leak of classified information concerning North Korea by Stephen Jin-Woo Kim.²¹¹ *Fox News* issued a statement in his defense stating that it was “out

²⁰⁷ JENNIFER ELSEA, CONG. RESEARCH SERV., RL31245, PROTECTION OF NATIONAL SECURITY INFORMATION: THE CLASSIFIED INFORMATION PROTECTION ACT OF 2001, at 2 (2002), available at <http://stuff.mit.edu/afs/sipb/contrib/wikileaks-crs/wikileaks-crs-reports/RL31245.pdf>.

²⁰⁸ *Intelligence Authorization Act for Fiscal Year 2001*, NAT’L ARCHIVES (Dec. 6, 2000), <http://www.archives.gov/iwg/about/intelligence-authorization-act-2001.html>.

²⁰⁹ Press Release, White House Office of Press Sec’y, Statement by the President (Nov. 4, 2000), available at <http://www.fas.org/sgp/news/2000/11/wh110400.html>.

²¹⁰ Letter from John Ashcroft, U.S. Attorney Gen., to the Honorable J. Dennis Hastert, Speaker of the House, U.S. House of Representatives (Oct. 15, 2002), available at <http://www.fas.org/sgp/othergov/dojleaks.html>.

²¹¹ See, e.g., *DOJ Targets Fox News, Accuses Reporter of a Crime . . . and We Stand by James Rosen’s Right as a Member of the Free Press*, FOX NEWS (May 20, 2013), <http://>

raged to learn today that James Rosen was named a criminal co-conspirator for simply doing his job as a reporter,” and pledging to “unequivocally defend his right to operate as a member of what up until now has always been a free press.”²¹² However, claims that the administration is “criminalizing journalism”²¹³ rest on a misunderstanding of the law. Calling Rosen a “co-conspirator provides a probable cause for the judge to grant the warrant” for the government to collect his phone records²¹⁴—but does not make him the object of prosecution.

Many in the press have called on Congress to pass a federal media shield law that would greatly limit the investigation of reporters by requiring prosecutors to convince a judge “that they had no other way to find the leak, that they would not cast their net so widely as to intrude on other reporting operations, and that identifying the leak was more important than the public value of the story” before compelling journalists to identify their sources.²¹⁵

No such law has been enacted. However, the Justice Department’s internal guidelines grant journalists special standing and extra protections, and as a result, members of the press are *very rarely* subject to leak investigations.²¹⁶ Before subpoenaing evidence from the press, the Department must (1) “take all reasonable steps to attempt to obtain the information through alternative sources or means,”²¹⁷ and, in most cases, (2) alert the news organization of the subpoena so it may appeal the decision in court.²¹⁸ Additionally, the subpoena must be (3) “fashioned as narrowly as possible to obtain the necessary information in a manner as minimally intrusive and burdensome as possible,”²¹⁹ and (4) authorized by the Attorney General.²²⁰ According to former federal prosecutor Peter Zeidenberg, the process is so onerous that the government rarely tries to subpoena reporters’ records: “It takes an extremely

nation.foxnews.com/james-rosen/2013/05/20/report-doj-investigated-fox-news-reporter-2009-leak-probe.

²¹² *Id.* (quoting Michael Clemente, Fox News’ Executive Vice President of News).

²¹³ *See, e.g.*, Michael Calderone & Ryan J. Reilly, *DOJ Targeting of Fox News Reporter James Rosen Risks Criminalizing Journalism*, HUFFINGTON POST (May 20, 2013, 3:28 PM), http://www.huffingtonpost.com/2013/05/20/doj-fox-news-james-rosen_n_3307422.html.

²¹⁴ Pincus, *supra* note 35.

²¹⁵ Bill Keller, Op-Ed., *Secrets and Leaks*, N.Y. TIMES, June 3, 2013, at A21.

²¹⁶ *See, e.g.*, RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 596–602 (2008) (discussing the infrequency of investigative subpoenas issued by the Justice Department under the guidelines); *cf. Pozen, supra* note 18, at 534 (“[A]ll those thousands upon thousands of national security-related leaks to the media have yielded a total of roughly a dozen criminal prosecutions in U.S. history.”).

²¹⁷ U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL 9–13, 400, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.400.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* (however, prior authorization to interrogate or arrest a member of the news media is not necessary “in cases involving exigent circumstances”).

long time, and there's a lot of pushback. So to think that this is a rubber stamp, it couldn't be further from the truth."²²¹

The Supreme Court held in *Branzburg v. Hayes*²²² that “[t]he [First] Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens.”²²³ Thus, like any other citizen or third-party provider, “when crimes are being investigated, and journalists possess information about the crime, they are in many (but not all) circumstances obliged to obey subpoenas.”²²⁴

Some in the media point out that the Justice Department's own guidelines have not been observed in at least one instance. For instance, Steve Coll writes in the *New Yorker* that “Justice offered the A.P. no chance to appeal the action, and only by authoritarian twists of logic could a secret subpoena seeking such diverse records be construed as the narrowest course possible.”²²⁵ One can look beyond such rhetorical flourishes to recognize that, indeed, the internal guidelines may not have been heeded—but this is almost inevitable given how tightly they have been formulated. It also goes without saying that the Justice Department should abide by its own guidelines and that it misleads the press by implying that the internal rules put journalists' sources off-limits.

These guidelines, however, do not have the standing of a constitutional right or even a law enacted by Congress. What the Department has given, the Department can take away—if there is a stronger will to curb leaks.

C. Prior Restraint and State Secrets

So far we have seen that the government has ample legal foundations for deterring leakers—and for investigating the press in the government's pursuit of leakers. If, however, officials are alerted about an impending publication of national security secrets, under what circumstances, if any, can the government compel the press to not to publish leaked information? That is, what is the current status of the prior restraint doctrine? The American legal tradition draws on English common law in its strong presumption against prior restraint:

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon

²²¹ Carrie Johnson, *Why Shield Laws Don't Always Help Media's Position*, NPR (May 30, 2013, 4:00 AM), <http://www.npr.org/2013/05/30/187227982/why-shield-laws-don-t-always-medias-position> (transcript of NPR *Morning Edition* interview between Carrie Johnson and Peter Zeidenberg).

²²² 408 U.S. 665 (1972).

²²³ *Id.* at 691–92.

²²⁴ SCHOENFELD, *supra* note 89, at 235.

²²⁵ Steve Coll, *The President and the Press*, NEW YORKER, June 10, 2013, at 39.

publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press.²²⁶

The Supreme Court took up this issue in the 1931 case *Near v. Minnesota*.²²⁷ At issue was a gag law that allowed state officials to prevent the publication of “malicious, scandalous and defamatory” content by newspapers, magazines, and periodicals deemed to have created a “public nuisance.”²²⁸ The Court ruled in favor of *Near*, who wrote scandalous pieces about government officials (not issues of national security), but noted that “the protection even as to previous restraint is not absolutely unlimited,” though “the limitation has been recognized only in exceptional cases.”²²⁹ Thus, while the Court affirmed “the immunity of the press from previous restraint in dealing with official misconduct,”²³⁰ it also maintained that the “government could enjoin speech or press” in extreme cases involving “obscenity, incitement to violence, and opposition to the conduct of war.”²³¹

In the case of Victor Marchetti,²³² the former CIA agent who sought to expose the Agency’s secret inner workings, the Fourth Circuit upheld the government’s contractual secrecy agreements as one permissible ground for the application of prior restraint.²³³ However, the government has been unsuccessful at making the case for injunctions aimed directly at the press or private citizens. For instance, when the Nixon Administration sought to enjoin the publication of the Pentagon Papers in the *New York Times* and the *Washington Post*, the Supreme Court ruled that “[t]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.”²³⁴ Though the government failed to meet the “heavy burden of showing justification for the imposition of such a restraint,” the Court did not rule out the possibility of allowing prior restraint if a publication would “surely result in direct, immediate, and irreparable damage to our Nation or its people.”²³⁵

This extremely high standard for allowing prior restraint sets the United States apart from most democracies in the world. The United Kingdom, Canada, Israel, and

²²⁶ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *151–52.

²²⁷ 283 U.S. 697 (1931).

²²⁸ *Id.* at 701–02 (quoting Section 1 of the state statute).

²²⁹ *Id.* at 716.

²³⁰ *Id.* at 720.

²³¹ James L. Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 U. MICH. J.L. REFORM 497, 499 (1982).

²³² *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972).

²³³ *Id.* at 1316–17.

²³⁴ *N.Y. Times Co. v. United States*, 403 U.S. 713, 725–26 (1971) (Brennan, J., dissenting).

²³⁵ *Id.* at 730 (White, J., concurring).

most European countries have some version of an “official secrets act,” which makes it a crime to publish classified information.²³⁶ Though the United States never adopted a state secrets law, some argue that certain interpretations of the Espionage Act come close.²³⁷ While the Court rejected the government’s attempt to prevent the publication of the Pentagon Papers, Justice White, upon reviewing the legislative history of the Espionage Act, wrote that newspapers should be “on full notice” that the Court “would have no difficulty in sustaining convictions under these sections [of the Espionage Act] on facts that would not justify . . . the imposition of a prior restraint.”²³⁸ That is, while the Court did not enjoin the publication of the classified papers, “the editors of the newspaper had already opened themselves up to criminal prosecution.”²³⁹ In the wake of the *New York Times*’ 2005 exposé on the Bush Administration’s warrantless eavesdropping program,²⁴⁰ former Attorney General Alberto Gonzales stated that “[t]here are some statutes on the book which, if you read the language carefully, would seem to indicate that” prosecuting journalists who publish classified national security information “is a possibility.”²⁴¹ Doing so would have “[t]he effect of a de facto American Official Secrets Act on the press.”²⁴²

In conclusion, we have seen that (1) although each case is subject to different interpretations and assessments, the level of harm leaks cause seems considerable; (2) leaks are very common and there is very little evidence to support claims that these leaks have been “chilled” or that as a result of the leak investigations the press is unable to do its job; and (3) there are ample laws to provide for the prosecution of leakers, the investigation of reporters, and even for the imposition of prior restraint. These laws, however, are so rarely applied that leaking remains routine and the press solicits classified information with impunity.

Moreover, there is a strong normative consensus in the media, supported by leading public intellectuals and elected officials across much of the ideological spectrum, against applying these laws. (Polls show that the public at large is much more supportive of such an application.²⁴³) In other words, if the present circumstances call

²³⁶ See generally *Constitutional Provisions, Laws and Regulations*, RIGHT2INFO.ORG, <http://www.right2info.org/laws/#canada> (last updated Oct. 24, 2011, 4:30 PM) (click particular country of inquiry on the digital map for breakdown of pertinent official secrecy laws).

²³⁷ See, e.g., Epstein, *supra* note 88, at 508 (discussing the opinion of “[s]ome outspoken critics” on the use of the Espionage Act in the prosecution of Steven J. Rosen).

²³⁸ *N.Y. Times Co.*, 403 U.S. at 737–38.

²³⁹ SCHOENFELD, *supra* note 89, at 181.

²⁴⁰ See generally Risen & Lichtblau, *supra* note 109.

²⁴¹ Adam Liptak, *Gonzales Says Prosecutions of Journalists Are Possible*, N.Y. TIMES, May 22, 2006, at A14.

²⁴² Epstein, *supra* note 88, at 509.

²⁴³ According to a USA Today/Pew Research Center Poll conducted in June 2013, fifty-four percent of Americans believe NSA leaker Edward Snowden should be criminally prosecuted for sharing classified documents with the press. Susan Page, *Poll: Snowden Should Be Prosecuted for NSA Leaks*, USA TODAY (June 18, 2013, 8:04 AM), <http://www.usatoday>

for greater secrecy in matters of national security, such rebalancing between national security and the right of the public to know, the freedom of the press is not hindered by law but by the opposition of the media, supported by select public mavens, and lack of political will on the part of many key elected officials. In short, the press has never been stopped by the government even though the law allows for such action. Norms and politics are the media's strongest shield as it wields its sword.

VI. NARROWING THE GAP

There are several important reforms that can be introduced to significantly narrow the distance between those who hold that security is seriously harmed by unauthorized disclosures and those who believe that the freedom of the press is under attack. In other words, there are ways to alleviate—though not fully abate—the conflict between two core elements of the liberal communitarian equation, national security, and freedom of the press.

A. Declassification

Major voices in the media hold that one reason its representatives are soliciting leaks is that the excessive classification of information prevents the media from doing its job—an essential function in a democratic polity—of keeping the public informed.²⁴⁴ Stephen Vladeck, of the American University Washington College of Law, goes so far as to maintain that over-classification, not leaks, is the crux of the problem.²⁴⁵ The “elephant in the room” is that the federal government—either because of bureaucratic inertia, to advance a certain policy agenda, or to cover up misconduct—regularly labels information as top-secret “that should never have been classified in the first place.”²⁴⁶ One need not put the case that strongly to accept that the press cannot do its job of holding government officials accountable if much of the information that the public needs or has a right to know is classified. And one can find many examples of information that was classified without clear security reasons.²⁴⁷ However, the solution is not to tacitly condone illegal activity by treating

.com/story/news/politics/2013/06/17/americans-say-snowden-should-be-prosecuted-for-nsa-leaks-in-usa-today-poll/2430583/.

²⁴⁴ See, e.g., *National Security Leaks and the Law*, *supra* note 134, at 32–34 (testimony of Stephen I. Vladeck, Professor of Law and Associate Dean for Scholarship, American University Washington College of Law).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 34.

²⁴⁷ See, e.g., ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CENTER FOR JUSTICE, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY 1–2 (2011), available at <http://www.brennancenter.org/publication/reducing-overclassification-through-accountability> (listing three “notable examples”).

national security leaks as a necessary part of the trade.²⁴⁸ Rather, Congress should reform the classification system and provide the additional funds needed for an accelerated review of classified files.²⁴⁹ Classifiers should be required to “detail their reasons for classification, have those decisions audited, and face sanctions for severe or recurring overclassification.”²⁵⁰ In addition, senior-level managers should be held accountable for excessive classification, in particular when it is used for political benefit rather than protecting security.²⁵¹ Incentives could be offered to those who successfully challenge the improper or erroneous classification of information.²⁵² Such measures alone would not prevent national security leaks, but they would enable the press to report on many more subjects without seeking leaks and may help to convince members of the media as well as elected officials that “goad[ing]” government officials to hand over classified documents is neither in the public interest nor a sacred right of the press.²⁵³

B. Revised AUMF

We have seen that the search for the proper liberal communitarian balance between security and the freedom of the press must be undertaken “within history”—and that the September 11, 2001, attacks against the United States called attention to the need to strengthen the former. While there have been no major terrorist attacks against the United States since 2001, grave challenges remain. Al Qaeda has regrouped and established new affiliates in Africa, the Arabian Peninsula, and in other parts of the world;²⁵⁴ many thousands of people across the globe harbor strong anti-American sentiments and consider using violence against the United States an act of martyrdom;²⁵⁵ and Pakistan is unable or unwilling to combat terrorists within its borders and has experienced at least six serious terrorist attempts to penetrate its nuclear facilities.²⁵⁶ All of this suggests that the time has not come for the United States to declare “mission accomplished” or terminate its transnational counterterrorism

²⁴⁸ See generally Pozen, *supra* note 18 (examining, inter alia, the federal government’s vast tolerance of illegal national security leaks).

²⁴⁹ GOITEIN & SHAPIRO, *supra* note 247, at 43.

²⁵⁰ *Id.* at 33.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Sarah Chayes, *When Journalists Seek Secrets, Do They Grasp the Risks?*, WASH. POST, June 2, 2013, at B3.

²⁵⁴ Ashley Fantz, *Still out There and Growing—al Qaeda on the Rebound, Experts Say*, CNN (Dec. 28, 2013, 8:18 PM), <http://www.cnn.com/2013/12/28/world/meast/al-qaeda-growing/>.

²⁵⁵ *Id.*

²⁵⁶ See Shaun Gregory, *The Terrorist Threat to Pakistan’s Nuclear Weapons*, CTC SENTINEL (U.S. Military Acad., West Point), July 2009, at 3.

campaign.²⁵⁷ And during a *defined* period of heightened vigilance, greater energy and more resources should be dedicated to protecting sensitive national security information.

Defining this period may be accomplished through reissuing and revising the Authorized Use of Military Force (AUMF),²⁵⁸ a joint resolution passed by Congress on September 14, 2001, that granted the President the power “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”²⁵⁹ There are a variety of reasons, which need not be discussed here, that an updated authorization is called for. In the process of reauthorization, Congress should hold hearings to consider more vigorously protecting national security secrets for the duration of the sanctioned counterterrorism campaign.²⁶⁰ During such a campaign, as in wartime or a state of emergency, society may tolerate some limitations that it may not abide in more peaceful times. This does not require enacting more laws, which we have seen are quite strong (indeed, too strong, according to some), but rather, enhancing the level of enforcement and assigning higher priority to identifying and penalizing leakers. The revised AUMF would include a “sunset” clause so that, if not renewed, the enhanced enforcement policy would expire in, say, five years.²⁶¹

C. Classification Appeals Court (CAC)

The press often argues that it is asked to hold back a story not because the leaked information would “really endanger lives,” but “for reasons of policy, partisanship or embarrassment.”²⁶² It further holds that the government’s attempts to track down leakers by investigating the press are unwarranted, and, thus, seeks to protect reporters and records from such incursions.²⁶³ Rather than taking it upon themselves to decide whether or not a given governmental claim for secrecy is

²⁵⁷ In May 2013, President Obama stated that “[o]ur systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end. That’s what history advises. It’s what our democracy demands.” Peter Baker, *A Pivot from War*, N.Y. TIMES, May 24, 2013, at A1 (quoting President Obama).

²⁵⁸ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

²⁵⁹ *Id.*

²⁶⁰ Charles E. Berger, *AUMF: Rewrite and Renew*, NAT’L INTEREST (Dec. 13, 2013), <http://nationalinterest.org/commentary/aumf-rewrite-renew-9552>.

²⁶¹ The NSA surveillance program is already limited by such a defined period. See Scott Shane & Jonathan Weisman, *Debate on Secret Data Looks Unlikely, Partly Due to Secrecy*, N.Y. TIMES, June 11, 2013, at A1.

²⁶² Smolkin, *supra* note 62, at 26.

²⁶³ *Id.* at 25.

legitimate, editors should have an opportunity to appeal to a court, modeled after the Foreign Intelligence Surveillance Administration (FISA) court, composed of people with high-level security clearance, to sort out the matter.²⁶⁴ Like FISA, such a panel would need to be always “on call” because of time pressures. If this court rules against a news source, but the source proceeds to publish the story anyway, it may face informal censure (for example, loss of readership), sanctions (for example, denial of access to White House briefings), or more serious consequences, the nature of which cannot be spelled out until a new shared moral understanding is reached about such leaks.²⁶⁵ If the court rules against the government, the press would be free to proceed with publication and would not be required to reveal its sources.

There are some who hold that the FISA court acts as a rubber stamp for the government, and similar criticisms would likely be raised against a classification appeals court.²⁶⁶ According to one study, of the 8,591 applications submitted to FISA between 2008 and 2012, only two were rejected.²⁶⁷ However, defenders of FISA point out that the court is actually very demanding and that the low rejection rate is attributable to the extensive give-and-take between the judges and applicants before a request is submitted for final approval.²⁶⁸ Before an application reaches the court it is “signed by a high-ranking official in the executive branch, such as the director of the FBI, the secretary of defense, and then it’s signed by the attorney general.”²⁶⁹ Then, the judge may raise questions and concerns, allowing the executive authority to fine-tune the request for approval.²⁷⁰ In short, the FISA approval rate reflects a strong selection bias. Nevertheless, both FISA and a CAC would benefit from another layer of accountability, discussed next, to ensure that judges do not simply acquiesce to all government demands in the name of national security.

At a minimum, one should expect that the professional association of editors will form a panel to formulate what they consider the proper normative (not legal) guidelines to follow. One obvious guideline is to not endanger the lives of our agents overseas or their local collaborators. Another is not to divulge ongoing operations. In addition, editors struggling with the question of whether or not to publish a given state secret may wish to consult with this panel which should be composed of retired editors, select respected public intellectuals, and maybe a few former security

²⁶⁴ *Foreign Intelligence Surveillance Court*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html (last visited Apr. 15, 2014).

²⁶⁵ *See supra* Part I.

²⁶⁶ *See, e.g.*, Claire Cain Miller, *Secret Ruling Put Tech Firms in Data Bind*, N.Y. TIMES, June 14, 2013, at A1.

²⁶⁷ *Id.*

²⁶⁸ *See Interviews—James Baker: Spying on the Home Front*, PBS FRONTLINE (May 15, 2007), <http://www.pbs.org/wgbh/pages/frontline/homefront/interviews/baker.html> (edited transcript of an interview conducted March 2, 2007).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

officials. The editors could then draw on the panel's conclusions to help legitimate their decision when they face critics from the public or within their publication or profession, if the panel concurs with their preferences. Or—carefully reexamine their preferences if the panel urges that publication should be avoided.

Above all, the society of editors should determine who may legitimately claim to be the editor of a bona fide publication. Otherwise anybody with a Twitter account or a blog—including foreign agents—could claim they can publish state secrets with impunity.

Finally, one may wonder if editors who proceed to publish secrets and directly cause harm should be subject to post hoc (as distinct from prior restraint) accounting. For instance if the family of a CIA agent was shot after his name was revealed by a press, should he not have the right to sue for damages in a civil court?

D. Accountability Versus Transparency

In the wake of major leaks about the government collection of phone records of American citizens and surveillance of foreign Internet traffic, officials provided various justifications for these programs, including the claim that they comport with laws enacted by Congress, are supervised by congressional committees that are regularly briefed about the programs, and above all, that they have been instrumental in foiling more than fifty potential terrorist events in the United States and over twenty other countries since September 11.²⁷¹ Some strong critics have argued that these programs are unconstitutional on their face, because, among other reasons, they entail warrantless searches.²⁷² One federal judge and a civic review board found the NSA programs are in violation of the Constitution.²⁷³ More moderate critics and the media have asked for more details about the terrorist attacks that officials claim these programs have prevented.²⁷⁴

Something often called for in this context is “scrutiny.”²⁷⁵ This can be achieved in two major ways: by more transparency or by more accountability (and, of course,

²⁷¹ See Spencer Ackerman, *NSA Chief Claims ‘Focused’ Surveillance Disrupted More than 50 Terror Plots*, GUARDIAN (June 19, 2013, 3:05 AM), <http://www.theguardian.com/world/2013/jun/18/nsa-surveillance-limited-focused-hearing> [hereinafter Ackerman, *NSA Chief*].

²⁷² Laura K. Donohue, *NSA Snooping Is Legal. It Isn’t Constitutional.*, WASH. POST, June 23, 2013, at B1.

²⁷³ See, e.g., Josh Gerstein, *Judge: NSA Phone Program Likely Unconstitutional*, POLITICO (Dec. 16, 2013, 1:36 PM), <http://www.politico.com/story/2013/12/national-security-agency-phones-judge-101203.html>.

²⁷⁴ Spencer Ackerman, *Senators Press NSA Director for Answers on Secret Surveillance Program*, GUARDIAN (June 12, 2013, 6:06 PM), <http://www.theguardian.com/world/2013/jun/12/senate-nsa-director-keith-alexander> [hereinafter Ackerman, *Senators Press NSA Director*].

²⁷⁵ See, e.g., *Obama Vows More Transparency in Response to Scrutiny over Surveillance Programs*, PBS NEWSHOUR (Aug. 9, 2013), http://www.pbs.org/newshour/bb/white_house/July-dec13/obama_08-09.html.

by various combinations of the two). Transparency entails releasing more information to the press and, thus, the public. Accountability entails more oversight by elected representatives and trusted public figures. The first, in effect, assumes a direct democracy model: The public will know, judge, and either approve or reject the secret programs. The second assumes representative democracy in which the public will trust select members of Congress or other public authorities to review the programs and vote them up or down. The press naturally favors transparency over accountability because it sees its job as informing the public and not leaving the assessments at issue in the hands of closed bodies of representatives.

A high level of transparency has two serious problems. The first problem reflects the well-known difficulties associated with direct democracy. There are sharp limits to the capacity of the public, busy making a living and leading a social life, to learn the details of any government program and evaluate it—especially given that, in the end, they cannot vote for any particular program, but have only one “holistic” vote for their representative, based on all that he or she favors and opposes. Second, high transparency is, on its face, incompatible with keeping secret that which must be kept secret. Moreover, when the government responds to calls for more scrutiny with the release of more information—so as to demonstrate that the secret acts did, in fact, improve security—this release encounters several difficulties. First, each piece of information released potentially helps the adversaries.²⁷⁶ This is, in effect, the way intelligence work is often done: by piecing together details released by various sources.²⁷⁷ Thus, the publication of information about which past operations of terrorists the government aborted could allow those groups to find out which of their plots failed because of U.S. government interventions as opposed to those that failed because of technical flaws, the weakness of their chosen agents, or some other reason. Second, it is nearly impossible to spell out how these cases unfolded without giving away details about our sources and methods.²⁷⁸ Finally, however much information about specific cases the government releases, skeptics are sure to find details that need further clarification and documentation.²⁷⁹

Thus, following the uproar over the revelations that technology companies were handing over customer information to the government as part of a secret national security program, the companies sought to “reassure users” by releasing reports on the frequency of government data requests.²⁸⁰ The result, the *New York Times* reported,

²⁷⁶ See Ackerman, *Senators Press NSA Director*, *supra* note 274.

²⁷⁷ *See id.*

²⁷⁸ *See id.* That is, unless the government releases misleading details. But, sooner or later, some whistleblower would likely expose the ploy, undermining the whole enterprise, which is meant to build trust in government.

²⁷⁹ This is the reason public relations experts urge those whose misdeeds are under public scrutiny to “tell all” right from the start, a strategy that may serve well politicians who cheat on their spouses, but not those who deal with combating terrorism.

²⁸⁰ Vindu Goel & Claire Cain Miller, *More Data on Privacy, but Picture Is No Clearer*, N.Y. TIMES, June 18, 2013, at B1.

was that “rather than provide clarity, some of the disclosures have left many questions unanswered.”²⁸¹ When General Keith Alexander, Director of the NSA, released details about how the Agency’s surveillance programs had thwarted terrorist plots, the media immediately asked for more detailed information.²⁸² Also, there is no way for the media to determine whether the released cases are typical or were chosen because they reflect well on the government.

Instead, increased accountability should serve to reassure the public that leaks to the press are being curbed for valid reasons. Briefing many more members of Congress may not be the best way to proceed, as most members of Congress do not have the security clearance that members and key staffers of the congressional intelligence committees have, and many are known to be notorious leakers themselves.²⁸³ Rather, the public and the press would benefit from a regular review to be conducted by a new civilian review board. Such a review board would be composed of the kind of people who served on the September 11 Commission: bipartisan, highly respected by the public, able to work together, not running for office, and with security clearance.²⁸⁴ Although not everyone agreed with that Commission’s conclusions, they were well-respected and largely trusted.²⁸⁵

The new board would issue reports, possibly annually, that would state whether the government unduly withheld information, improperly investigated leaks, and pressured the press not to publish stories for political and not security reasons—or if leaks, in fact, caused considerable harm to national security and the press therefore acted irresponsibly by publishing classified information. However, instead of revealing detailed case studies, the civilian review board would provide statistics. For example, if it reported that there were a large number of cases in which serious threats were averted, such as the planned attack on New York City’s subway,²⁸⁶ the public would learn that the threats to national security warrant increased efforts to enforce anti-leak legislation. If, on the other hand, the board reported that many cases involve fairly minor threats, this would tilt the consensus the other way.²⁸⁷ If

²⁸¹ *Id.*

²⁸² See Ackerman, *Senators Press NSA Director*, *supra* note 274.

²⁸³ See Emma Roller, *Do Tell!*, SLATE (June 14, 2013, 5:28 PM), http://www.slate.com/articles/news_and_politics/explainer/2013/06/senate_intelligence_hints_at_prism_can_members_of_congress_be_tried_for.html.

²⁸⁴ See *Investigating Sept. 11*, PBS NEWSHOUR (Nov. 27, 2002), http://www.pbs.org/newshour/bb/terrorism/july-dec02/investigation_11-27.html.

²⁸⁵ See *id.*

²⁸⁶ See Ackerman, *NSA Chief*, *supra* note 271.

²⁸⁷ In 2001, six men from Buffalo, New York, took a trip to Pakistan for a spiritual retreat sponsored by Tablighi Jamaat—a group that, while associated with radicalism, was not designated as a terrorist organization. See JoAnn Wypijewski, *Living in an Age of Fire*, MOTHER JONES, Mar./Apr. 2003, at 66, 69. While there, however, the six men were accused of attending a terrorist training camp called Al Farooq and supposedly listened to a speech delivered by Osama bin Laden. *Id.* No evidence was presented of a forthcoming plot on their part. *Id.* There were no weapons found, no history of violence uncovered, nor was there any “clear

the current Civil Liberties and Privacy Protection Board would be properly staffed, funded, and its powers increased, it might serve in such a function.²⁸⁸

Those who trust neither the government nor independent commissions should fight for institutional changes, until they gain those they can trust. However, demanding that the government—which they do not trust—release more information just so that they can then question whatever information it does release makes sense only if one denies that security requires keeping some information from the public at large.

E. Protect True Whistleblowers

The media claims that the investigations of leaks and the “sweeping nature” of laws against leaking silence whistleblowers who seek to reveal government abuse or illegal activities.²⁸⁹ Whistleblower protections were first introduced in the Civil Service Reform Act (CSRA) of 1978,²⁹⁰ which established the Merit Systems Protection Board on the principle that federal employees “should be protected against reprisal for the lawful disclosure” of government misconduct.²⁹¹ The Whistleblower Protection Act of 1989 closed loopholes contained in the CSRA, for example, “changing protection of ‘a’ disclosure to ‘any’ disclosure” that the “applicant reasonably believes is credible evidence of waste, fraud, abuse, or gross mismanagement.”²⁹² In 2012, President Obama signed into law the Whistleblower Protection Enhancement Act,²⁹³ which protects federal workers from retaliation when they report government corruption or wrongdoing. While this bill does not cover national security officials, Obama later signed a Presidential Policy Directive that “prohibits retaliation against employees [in the Intelligence Community] for reporting waste, fraud, and abuse.”²⁹⁴ The Directive does not, however, protect those who leak legitimate national security secrets.²⁹⁵ This Directive itself may need to be expanded,

and convincing evidence” that the six men were planning any sort of terrorist act. *Id.* Yet they were still charged under the Antiterrorism and Effective Death Penalty Act with a possible fifteen years in prison and \$250,000 fine for their activities. *Id.*

²⁸⁸ See Larry Greenemeier, *Obama to Speak on NSA Surveillance Controversy*, SCI. AM. (Jan. 16, 2014), <http://www.scientificamerican.com/article.cfm?id=obama-to-speak-out-on-nsa-surveillance-controversy>.

²⁸⁹ Michael Calderone & Matt Sledge, *Obama Whistleblower Prosecutions Lead to Chilling Effect on Press*, HUFFINGTON POST (Apr. 16, 2013, 1:18 PM), http://www.huffingtonpost.com/2013/04/16/obama-whistleblower-prosecutions-press_n_3091137.html.

²⁹⁰ Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111.

²⁹¹ *Id.*

²⁹² 147 CONG. REC. 10,207 (2001).

²⁹³ Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465.

²⁹⁴ Presidential Policy Directive on Protecting Whistleblowers with Access to Classified Information (Oct. 10, 2012), *available at* <http://www.whitehouse.gov/sites/default/files/image/ppd-19.pdf>.

²⁹⁵ *See id.*

and it should be made into law by the Congress, because until then, as Tom Devine of the Government Accountability Project warns, “no one whose new rights are violated will have any due process to enforce them.”²⁹⁶

The whistleblower defense should be taken into account by judges or juries only if the leaker exhausted other reasonable means to address his or her concerns without revealing classified information. These may include appealing to superiors, the Inspector General, members of Congress with proper security clearance, or the FBI. For example, Daniel Ellsberg approached three senators with his concerns about the information contained in the Pentagon Papers, including George McGovern, who was sympathetic but demurred because of his presidential aspirations.²⁹⁷ Only “after months of frustration” working within official channels did Ellsberg leak the documents to the press.²⁹⁸ In contrast, both Manning and Snowden seem to have retrospectively invoked the whistleblower defense without showing that they did first try to correct the system according to established procedures.²⁹⁹

VII. NEEDED: A MORAL DIALOGUE

All of the above measures combined will not obviate the need for a moral dialogue about the principles the nation should embrace and the extent to which terrorism still constitutes a threat, although they may well facilitate the dialogue’s progress. For such a discussion to take place, both sides must stop engaging in one-sided advocacy, by which one side claims that the press is committing treason and the other that the government has killed the First Amendment. The dialogue would benefit from building on the liberal communitarian assumption that we face two legitimate claims, and seek a new balance, one that will take into account changes in technology and international security conditions.

Unlike the “cool,” reasoned deliberations that democratic theory envisions, moral dialogues have space for substantive convictions and foundational values, and tend to be passionate, emotionally engaging, and disorderly. These dialogues are often without a clear beginning or end, and can occur within small communities and nations as well as transnationally. Prevailing values are examined and challenged,

²⁹⁶ Joe Davidson, *Security Intelligence Workers Get Whistleblower Protection*, WASH. POST, Oct. 12, 2012, at B4.

²⁹⁷ See SCHOENFELD, *supra* note 89, at 174.

²⁹⁸ *Id.*

²⁹⁹ “Snowden could claim whistle-blower protection only if he took his concerns to the NSA’s inspector general or to a member of one of the congressional intelligence committees with the proper security clearances”—which he did not. Pete Williams, *Analysis: Why Edward Snowden Isn’t a Whistle-Blower, Legally Speaking*, NBC NEWS (June 18, 2013, 12:16 PM), http://usnews.nbcnews.com/_news/2013/06/18/19024443-analysis-why-edward-snowden-isnt-a-whistle-blower-legally-speaking?lite; see also Jeffrey Toobin, *Edward Snowden Is No Hero*, NEW YORKER (June 10, 2013), <http://www.newyorker.com/online/blogs/comment/2013/06/edward-snowden-nsa-leaker-is-no-hero.html>.

for instance, by arguments that they are inconsistent with other values the party holds or lead to normative conclusions the party could not possibly seek. When moral dialogues are successfully advanced, members of communities arrive at new shared normative understandings.³⁰⁰

Currently, the moral dialogue is hindered by a very unusual condition. While typically the press reflects (and feeds) the full array of different public views (albeit not necessary with equal voice³⁰¹), when it comes to covering the press and its rights and privileges, the press serves as judge, jury, and executioner, or as both plaintiff and jury, while giving little voice to the defense.³⁰² The voices which hold that leaks ought to be curbed are largely holding back, because the government finds it politically unwise and even futile to argue with the media about the media.³⁰³ Under these circumstances, the effort to gain a revised consensus is left to those not politically engaged—legal scholars, public intellectuals, and leaders willing to risk the wrath of the media—to call it the way they see it and to thus balance the moral dialogue.

The revised moral dialogue has to cover the following questions: First, does the nation—and the media—basically agree in principle to the liberal communitarian position that the public's right to know and the media's right to publish must be balanced with legitimate national security needs? That is, do we agree that there is no absolute right to publish anything and everything? If the response to this question is in the affirmative, the next step is to ask whether the current threat level from terrorists justifies some extra protections for the secrecy of anti-terrorism programs for as long as Congress regularly reaffirms that the said higher threat level is still in place. Next, do we agree that, currently, leaks are rampant, and that many cause harm to security—while the ample regulations and laws to better protect state secrets are very rarely enforced? And finally, do we agree that either the press has to restrain itself more, or that the enforcement of the laws that punish leakers and investigations of the press to find the leakers must be enhanced rather than curtailed? And are there any conditions in which prior restraint and deterring the press from irresponsibly disclosing classified information are justified? Should the United States follow other democracies and enact a state secrets act? Last but not least, are true whistleblowers, who reveal government illegality or abuse, sufficiently protected?

³⁰⁰ AMITAI ETZIONI, *FROM EMPIRE TO COMMUNITY: A NEW APPROACH TO INTERNATIONAL RELATIONS* 67–68 (2004).

³⁰¹ Conservative Fox News' primetime audience in 2011 was more than twice the size of that of liberal MSNBC—a median viewership of 1.9 million compared to 773 thousand. *See* JESSE HOLCOMB, AMY MITCHELL & TOM ROSENSTIEL, PEW RES. CTR. FOR EXCELLENCE IN JOURNALISM, *STATE OF THE NEWS MEDIA 2012: CABLE: BY THE NUMBERS* (2012), available at <http://stateofthemedias.org/2012/cable-cnn-ends-its-ratings-slide-fox-falls-again/cable-by-the-numbers/>.

³⁰² *See supra* notes 19–33 and accompanying text.

³⁰³ *See supra* notes 43–47 and accompanying text.