Journalism or Espionage?

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No one can doubt that keeping state secrets is essential to national security. Whether the threats we face come from Islamic radicals intent on wreaking mayhem and murder or hostile regimes like North Korea and Iran intent on acquiring nuclear weapons, America and its allies depend on secrecy to observe our adversaries and obstruct their plans. Yet national-security secrets are now leaking from our government at a rate without precedent in our history. Indeed, when it comes to America’s protection of government secrets, the old order—in which leaks were seldom terribly damaging and were largely tolerated by the federal government—appears to be coming to an end. A new order is taking its place in which, on one side, aggressive journalists are joining with self-appointed “whistleblowers” to disseminate some of our government’s most sensitive secrets, and, on the other side, the government is forcefully cracking down.

The old order began to crumble under George W. Bush. He earned a reputation for running what his critics frequently called the most secretive administration in American history. And those critics were on to something: Responding to terrorist threats after September 11th entailed launching a host of secret initiatives. But the critics may not have adequately appreciated that, as details of the classified counterterrorism programs began to appear in the press, Bush and his subordinates responded with little more than words.

In 2005, President Bush personally warned the New York Times against publishing a story about the monitoring of terrorist communications by the National Security Agency, saying the paper would have blood on its
hands were another terrorist attack to occur. After the story appeared, his attorney general Alberto Gonzales vaguely indicated that the newspaper might have violated the law and that prosecution was being explored, but nothing came of the threat. In short order, the Times struck again with a major leak about another secret counterterrorism program. Once again there were no consequences other than bluster from the administration. Despite constant accusations that Bush was waging “a war on the press,” his Justice Department convicted only one leaker under the Espionage Act, and in a case that had nothing to do with any of the major breaches of classified information. The old order may have started to disintegrate under Bush’s watch, but a new one did not rise in its place.

That new order — both in terms of the flow of secrets into the public domain and of the government’s response to that flow — has emerged only during the Obama presidency. Barack Obama took office pledging to run the most transparent administration in history. Given the massive increase in the number of leaks during his presidency, he has perhaps achieved that goal, but hardly as he intended. Between 2005 and 2009, a period that roughly coincided with Bush’s second term in office, 183 leaks from intelligence agencies were reported to the FBI; under Obama, 375 leaks came under investigation in just one eight-month period between November 2011 and June 2012. If the figures for these two periods are commensurable (which is unclear, because they were themselves generated in secret by two separate agencies), they represent an impressive upward shift. But commensurable or not, such numbers would still actually underestimate the scale of a phenomenon that, with the appearance of mega-leakers like Bradley Manning and Edward Snowden, has assumed hitherto unthinkable dimensions.

No less striking is the Obama administration’s ferocious response to the leaking. While, as noted, only a single leak case was prosecuted under the Espionage Act in the Bush years, under Obama we have already seen seven such prosecutions, more than double the total for all previous presidents combined, and more indictments are reported to be in the works. The intensity with which the administration is cracking down is evident not only in the tally of leakers prosecuted, but also in the remarkably aggressive methods the administration has employed to ferret them out, including the use of search warrants and subpoena powers to obtain the internal communications of news organizations and to compel journalists to disclose their confidential sources.
These developments add up to an unprecedented set of circumstances. On the one hand, national-security secrets are hemorrhaging, hampering our efforts to counter terrorism and nuclear proliferation and causing significant damage to our country’s international standing. On the other hand, the government has initiated a crackdown on leakers that is more vigorous than any we have seen in our history, leaving many observers outraged that the First Amendment guarantee of freedom of the press is being imperiled. The imperatives of national security have collided head on with the imperatives of openness, and the consequences pose grave challenges that most Americans have yet to grasp.

A CULTURE OF LEAKS
In a democracy like ours, transparency is necessarily the default position for government. Secrecy sits awkwardly in the system our founders created. Although the drafters of our Constitution took it as a given that confidentiality was often essential in the conduct of affairs of state, the democracy they designed rests on informed consent. The very idea of informed consent means that information—especially information about the workings of government—must be freely available and freely exchanged. The First Amendment, with its guarantee of a free press, was the tangible expression of that view, and over the last two and a half centuries we have worked to extend the liberties enshrined in the Constitution with legislation like the Freedom of Information Act and the Presidential Records Act. Collectively, these have made America the most open society in the history of the world.

But our wide-open society is also a superpower, a status that brings with it imperatives that cut sharply against openness. The pressures that cause even ordinary bureaucracies to tend toward secrecy, as Max Weber famously showed, are augmented by the extraordinary requirements of securing a superpower from threats. The demands of defending America and the secrecy required to achieve security have become far more apparent and immediate in the post-9/11 era, and those requirements have brought into being a vast apparatus that does its work behind a curtain.

Nearly five million Americans now hold security clearances, and they generate hundreds of thousands of secrets a day. In 2012, federal agencies made exactly 95,180,243 “derivative classification decisions,” a term officially defined as “the act of incorporating, paraphrasing, restating, or generating in new form, information that is already classified.”
The ever-expanding volume of secrets and the huge number of workers who have access to them, along with the ease with which information can be shared, together act like a barrel that is being continuously filled with water: Leakage over the brim is inevitable and constant.

A critical avenue for slowing the leakage is declassification. But here, too, the system is broken and has been so for a long time. By law and executive order, and in conformity with our commitment to openness, nearly all government secrets (there are nine significant exceptions) must be declassified after 25 years. But that is only the theory. In practice, the rate at which new secrets are generated far outstrips that at which the old ones are undone. A backlog has developed and is growing. As of this year, some 58,000,000 pages of documents 25 years old or older at the National Archives have not yet been reviewed. Last year an army of declassification specialists reviewed 45 million classified pages, removing the secrecy stamp from approximately 20 million of them. In other words, before last year’s review was undertaken, there were, at a bare minimum, 20 million classified pages that, if leaked, would have done no harm at all.

The numbers are staggering in no small part because our intelligence and defense establishments operate in an electronic environment in which secrets are readily generated not only on paper, but in emails and instant messages, and on web pages, bulletin boards, and wikis. And the same technology that brings so many secrets into being enables their wide dissemination for both legitimate and illegitimate purposes. Before Daniel Ellsberg leaked the Pentagon Papers in 1971, he spent days laboring at a Xerox machine to make the copies he would hand over to the New York Times and other newspapers. Today, as the Manning and Snowden cases both vividly illustrate, modern computer and communications technology allow even those at the very bottom of the defense and intelligence hierarchies to gain broad access to sensitive materials and then spread them worldwide in an instant. The same advances in technology underpin online repositories for leaked materials, like WikiLeaks. Major news organizations, including the Wall Street Journal, the New Yorker, and Al Jazeera, have emulated Julian Assange’s concept and set up “drop boxes” where whistleblowers can use encryption software to deposit leaked materials while remaining anonymous.

While the increasing size of the security apparatus and the revolution in computer and communications technology are among the primary
explanations for the extraordinary increase in national-security leaks, equally significant is the collapse of consensus about the necessity of secrecy and about the policies that secrecy is meant to advance.

During World War II and at the height of the Cold War, national-security secrecy was broadly accepted by America’s elites, very much including journalists. But in the 1960s and ’70s, that acceptance began to dissipate under the pressure of the divisive war in Vietnam, the depredations of Richard Nixon during Watergate, and a torrent of revelations about the abuse of intelligence agencies for political purposes. Amid the tumult, the Pentagon Papers case was a seminal event, turning a leaker — Ellsberg — into a hero of the left, and discrediting government claims of damage from even such a large-scale disclosure of classified material. A pervasive skepticism about government (and especially about government claims about the necessity of secrecy) emerged in that era. It was particularly acute among members of the press, and it has never subsided.

To be sure, that skepticism was not entirely new, and neither were leaks of state secrets. In the 1940s and ’50s the press did occasionally publish classified material. Even as World War II was raging, and in the face of warnings from Secretary of State Edward Stettinius about the harm that would ensue, James Reston won a Pulitzer for reporting in the New York Times secret details of the 1944 Dumbarton Oaks security conference. But with a handful of prominent exceptions, the secrets that made their way into the newspapers in that distant era were generally “authorized” leaks or “plants,” designed to serve a governmental purpose—or at least the political or bureaucratic purposes of one or another arm of the government—as when Secretary of State John Foster Dulles arranged for a subordinate to convey the secret Yalta papers to Reston in 1955.

Such authorized leaks remain an integral and even necessary part of American national-security politics, but they are also highly problematic. Thus, even as the Bush administration denounced leaks, and even as the Obama administration has both denounced and prosecuted leakers, both White Houses leaked prodigiously from the top, as witnessed by the high quotient of classified material in Bob Woodward’s succession of books about the Bush and Obama presidencies.

Such semi-official disclosures often serve legitimate goals of government. But they also serve the less legitimate political needs of politicians.
Either way, the public cannot tell which is which and neither can the bureaucrats down the chain who are scrupulously obeying the rules. For them, such leaking can be maddening to observe—and perhaps, in some instances, a spur to disclosing classified information themselves. It all has the effect of bringing discredit on a secrecy system that, in addition to being bloated, is made to seem capricious.

secrets in the news
Changes in the culture of government secrecy have been accompanied by changes in the culture of national-security journalism. As respect for the secrecy system has waned, so too has regard within the press for protecting what the intelligence community regards as its crown jewels: details about the sources and methods of intelligence work. Today, even “top secret” material—defined by our government as information which, if disclosed, would “cause exceptionally grave damage to the national security”—appears with regularity in the pages of our leading newspapers.

The new willingness, even eagerness, of journalists to publish such sensitive information stems first and foremost from two cultural developments that have augmented the longstanding journalistic skepticism toward government justifications for secrecy. The first is the increasing prevalence of the libertarian notion—with adherents on both the left and right, and in both journalism and the federal bureaucracy—that “information should be free.” This ideology leaves room for almost no rationale for secrecy in government and is deeply skeptical of and angered by post-9/11 government surveillance practices.

The second development is the changing nature of the news business, with its fierce competition and intense pressure to be first to break a story. In deciding whether to publish leaked secrets in the face of government warnings to desist, news organizations seem to operate according to a logic reminiscent of Cold War nuclear strategy: If we don’t strike, one of our competitors will; the secret will be out in any event, so we might as well reap the rewards of launching first. Globalization has only added to the intensity of this competition. Foreign news organizations from a wide array of countries now have Washington bureaus staffed by journalists who are eager to break news by uncovering our government’s secrets. Their judgments about the effect of their stories on American security are, for obvious reasons, likely to differ significantly from the judgments of editors here at home.
These cultural developments have been accompanied by the appearance of new journalistic techniques in reporting national-security stories. The evidence for this is limited because, as one Washington Post reporter recently explained, there is “a widespread practice in the media industry of declining comment on reportorial methods.” Court documents from recent leak cases, however, along with some stray discussions in the press, offer a glimpse into reportorial tradecraft in the 21st century.

For one thing, the means by which the identity of journalistic sources are protected have become far more technologically sophisticated. In 2005 and 2006, Baltimore Sun reporter Siobhan Gorman maintained contact with her source Thomas Drake, a senior official of the National Security Agency, via Hushmail, an online service that employs state-of-the-art encryption technology for emails and for storing encrypted government documents on servers located abroad. More recently, Glenn Greenwald of the British newspaper the Guardian acknowledged that, before he began to receive any documents from NSA contractor and leaker Edward Snowden, “we had early conversations about setting up encryption, so we worked early on to set that up.” In both of these cases, it should be noted, it was the source who insisted on using encryption.

In the recent case of James Rosen of Fox News, by contrast, it was Rosen who suggested to alleged State Department leaker Stephen Jin-Woo Kim that they use aliases and a coded communication system. Their system was lower tech than those used by other leakers — according to Justice Department documents in the case, a single asterisk in an email was supposed to indicate that “previously suggested plans for communication [were] to proceed as agreed,” while emails containing two asterisks “mean[t] the opposite.” Rosen also gave his source an assignment, explaining to Kim precisely what kind of information he was seeking: “internal State Department analyses” and “what intelligence is picking up” about North Korea — both categories almost certain to be classified.

Such journalistic techniques and the sensitive information they unearth point to the most fraught aspect of the ongoing torrent of leaks: the disjunction between journalism as it is currently practiced and black-letter American law. It is this disjunction that has provided space for the Obama administration not only to prosecute leakers but to go after the press as well, including by means without precedent in our history.
To start, the Obama Justice Department has redoubled Bush-administration efforts to compel *New York Times* reporter James Risen to disgorge information about his confidential sources as part of an effort to gain evidence for the prosecution of Jeffrey Sterling, a former CIA officer who allegedly leaked information about operations designed to thwart Iran’s nuclear program. In July, the administration won a major victory on this score when a federal appeals court re-affirmed that the “reporter’s privilege” Risen had asserted in declining to testify had no foundation in law.

The Justice Department has also gone after the Associated Press in pursuit of information about the government source who revealed the successful penetration of an al-Qaeda cell in Yemen by a CIA informant. To this end, the administration covertly seized, through subpoenas issued to telephone-service providers, two months of call records for more than 20 office, personal, and cellular lines of individual reporters and an editor at the newswire.

In the case of Fox News reporter James Rosen, the Justice Department procured his telephone records, the badge-access data detailing his comings and goings to his press booth at the State Department, and the content of his personal emails. Because Rosen had requested specific information pertaining to intelligence from Kim, and because the two had communicated surreptitiously, the FBI concluded that Rosen “solicited and encouraged Mr. Kim to disclose sensitive United States internal documents and intelligence information” and was acting “[m]uch like an intelligence officer [running] a clandestine intelligence source.” It was on this basis that the affidavit filed in support of the warrant, personally approved by Eric Holder, named Rosen as “an aider and abettor and/or co-conspirator” in Kim’s alleged crime.

In the wake of the affair, Holder has stated that he has no intention of prosecuting Rosen for soliciting information from Kim, and the Justice Department has issued new rules that limit investigations into “ordinary newsgathering activities,” but the fact that Rosen was named a co-conspirator makes this story a watershed. The administration has forced an examination of the line at which leaking and “ordinary” journalism become spying on the U.S. government.

**Reporting or Spying?**

The government’s basic legal tool for combating leaks is the Espionage Act of 1917. Though “espionage” is in its title, the law includes provisions dealing with lesser transgressions, like negligently losing secret
government documents. One of its provisions criminalizes the unauthorized disclosure of national-defense information by government officials, or leaking, the crime that Bradley Manning was convicted of this summer.

But the Espionage Act also has a provision, added by Congress in 1950, that criminalizes the “unauthorized possession” of government secrets. While this provision does not specifically make it a crime to publish such secrets, it does provide for the punishment of whoever “willfully communicates, delivers, [or] transmits” such information “to any person not entitled to receive it,” and of any unauthorized person who “willfully retains” such materials. Quite clearly, some of these categories—retention, in particular—are preparatory activities that journalists necessarily engage in as they write their stories. As such, journalists covering national security would seem to engage in proscribed activity on a regular basis. This is not a controversial claim: In the definitive analysis of the espionage statutes, written in 1973 by noted legal scholars Benno Schmidt, Jr., and Harold Edgar, it was precisely these prohibitions that led them to conclude that the Espionage Act, especially as interpreted by the Supreme Court in the Pentagon Papers case, is a “loaded gun pointed at newspapers and reporters who publish foreign policy and defense secrets.”

But this loaded gun is one that, until quite recently, had rarely been fired and never successfully. In the more than nine decades since the Espionage Act became law, only two cases against news organizations have ever been set in motion—one against the Chicago Tribune during World War II for a story strongly suggesting that the U.S. had broken Japanese codes, and the other against the New York Times in 1971 for publishing the Pentagon Papers. Grand juries were empaneled in both instances, but in the end both cases were dropped before indictments could be handed down.

Noting the absence of prosecutions, Schmidt and Edgar explained that “[w]e have lived since World War I in a state of benign indeterminacy about the rules of law governing defense secrets.” That benign indeterminacy functioned well in no small part because there was “consensus about the desirable ends of foreign policy and the propriety of using force to accomplish them.” In the 40 years since Schmidt and Edgar published their study, and especially in the period following the attacks of September 11, 2001, the ambiguity surrounding the treatment of government secrets has begun to take on a malignant form.
The first sign of change was the indictment in 2005 of two lobbyists working for the American Israel Public Affairs Committee on charges of conspiring to violate the Espionage Act. The two had received classified information from a source in the Pentagon, which they then had allegedly passed on to Israeli officials, to colleagues in AIPAC, and to members of the media. This was the first time the statute was used against individuals outside of government who, like journalists, had received government secrets but were not “spies” as the term would normally be understood. The case collapsed in 2009 when the district court established high hurdles for successful prosecution. The AIPAC investigation began under the Bush administration, but, far from being driven by political appointees, the prosecution was the initiative of career prosecutors and FBI investigators; the White House gave a wide berth to the politically embarrassing case.

The Obama administration has been far more aggressive and deliberate. With two specific prosecutorial acts, it has taken steps that have far-reaching implications for the application of the Espionage Act in instances of leaking.

The first was the decision to charge Bradley Manning with a capital offense, not under the Espionage Act but under an article in the Uniform Code of Military Justice that punishes “aiding the enemy.” The article in question says that any person who “without proper authority, knowingly . . . gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly . . . shall suffer death or such other punishment as a court-martial or military commission may direct.” In bringing this charge, the prosecution’s theory hung entirely on the word “indirectly.” In disclosing hundreds of thousands of secrets for publication on WikiLeaks, Manning knew or should have known that those secrets could then be usefully read not only by ordinary people around the world, but also by America’s enemies, including al-Qaeda. Even though prosecutors were not asking that Manning should “suffer death” for his transgression, the charge of aiding the enemy dramatically raises the stakes by placing leaking on the same plane as outright treachery.

To be sure, Manning was occupying a position of trust in our armed forces when he committed his offense, and as a soldier he is subject to rules and regulations that place him in legal jeopardy of a sort that civilian leakers typically do not confront. However, it is pertinent to observe that
the aiding-the-enemy charge is one of only two offenses in the Uniform Code of Military Justice that applies not only to those serving in the armed forces but to “any person.” In other words, for the act of leaking intelligence, the charge of aiding the enemy could, under some circumstances, be brought against civilians as well as soldiers. It is also worth observing that what Manning did, if radically different in scale from every other leak before it, was in one noteworthy respect less damaging than almost all of the other highly publicized leaks of recent years. Although Manning held a “top secret” clearance, all the information he disclosed bore only the “secret” stamp. In contrast, almost all of the intelligence programs disclosed by the New York Times and other major newspapers in the period following September 11th were “top secret,” as was the material provided to the Guardian, the Washington Post, and other outlets by Snowden.

Yet because those same secrets — indeed, all sensitive leaked secrets that appear in our nation’s news outlets — can be usefully read by America’s enemies, all such leaking, under the administration’s reasoning in the Manning case, is comparable to aiding the enemy. If that charge cannot be brought against a perpetrator under the Uniform Code of Military Justice, the Espionage Act contains a provision that acts as its civilian equivalent. Section 794(a) of the statute provides for life imprisonment, and in certain cases the death penalty, for “[w]hoever… communicates, delivers, or transmits” national-defense information to “any representative, officer, agent, employee, subject, or citizen” of a foreign power, “either directly or indirectly” (emphasis added).

Such communication of a secret to a foreign power is precisely what a leak indirectly accomplishes when it appears in a newspaper. Though the stringent intent requirements in Section 794 might be barriers to successful prosecution, the statute does not distinguish between those with “authorized” and “unauthorized” possession of the secret. It criminalizes the same behavior by both. Section 794 has only been used hitherto to prosecute spies who have covertly delivered information to the enemy. But by the theory employed in the prosecution of Manning, it is potentially applicable not just to leakers in government but also to members of the press. It is thus fascinating to observe how an administration that promised an unprecedented degree of openness has managed to guide our secrecy regime in a truly draconian direction, raising the possibility that leaking and even the publication of leaked materials could be punishable by the death penalty.
The Obama administration’s second significant prosecutorial step was its decision to name reporter James Rosen as an unindicted co-conspirator in a leak investigation, declaring that “there is probable cause to believe that the Reporter has committed a violation” of the Espionage Act, and so in effect firing the loaded gun of that law not just at a leaker but the press itself. The administration’s critics in the press and among civil-liberties advocates contend that labeling Rosen a co-conspirator in a leak case tramples on the Constitution; the news gathering efforts of journalists, they say, are protected from prosecution under the espionage statutes by the First Amendment’s guarantee of freedom of the press. But this line of defense is problematic in two ways.

First, it is not obvious who exactly qualifies for protection from prosecution under the First Amendment. The “press” in the American constitutional system is a capacious term. Indeed, it is so capacious that it seems that any sentient individual can become a member of it at any time. In the canonical 1938 decision in *Lovell v. Griffin*, a unanimous Supreme Court put forward a sweeping judgment, written by Chief Justice Charles Evans Hughes for the Court:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its connotation comprehends *every sort of publication which affords a vehicle of information and opinion* (emphasis added).

Hughes’s last line makes it plain, as do subsequent Supreme Court decisions, that, in any serious First Amendment analysis, “every sort of publication” that conveys “information” or “opinion” must be counted as part of the press. In the internet age, this includes not only reporters at major news outlets like James Rosen of Fox News, but also bloggers whose work appears only on the internet and even those who write mere 140-character tweets on Twitter. More interesting, in our globalized world, it must also include those who work for foreign news outlets: Glenn Greenwald, for instance, must be included as an American citizen who lives in Brazil and conveys both “information” and “opinion” through a British newspaper. The press also includes Julian Assange,
an Australian citizen who disseminates “information” through his
foreign-based WikiLeaks website. It even comprises a newspaper like the
People’s Daily, published in Beijing by the central committee of China’s
communist party.

At first glance, it may seem outlandish that the foreign press, and even
the hostile foreign press, falls under the umbrella of our First Amendment.
But it does, and the reason for it is simple: The First Amendment extends
worldwide in this noteworthy respect because one of its primary purposes
is to ensure the American public’s ability to be informed about governmen
tal affairs. Foreign news sources are as vital to that end as domestic ones.
As one federal judge put it in a case involving a prohibition on importing
certain foreign magazines, the “essence” of the First Amendment right to
freedom of the press “is not so much the right to print as it is the right to read”
(emphasis added). Although the Supreme Court has upheld some content-
based restrictions on the importation of foreign reading materials, in the
borderless age of the internet, such prohibitions have become meaningless.
They certainly do not alter the fact that in defining the “press,” the First
Amendment reaches very far and incorporates virtually anyone, anywhere
who conveys “information” or “opinion.”

The second problem raised by the First Amendment defense is the
question of whether “freedom of the press” allows for the covert solicita
tion of closely held national-defense information from government officials
who have sworn an oath to protect such information, something that the
Espionage Act appears to forbid even when done overtly. Does the First
Amendment then protect journalists who gain unauthorized possession of
such materials? That it does allow these things is a deeply rooted assumption
among journalists. And for reasons of its own, it is an assumption that the
U.S. government, under both Democratic and Republican presidents, has
long tacitly accepted even though it has no foundation in our constitutional
history. By naming Rosen a co-conspirator in a plot to violate the Espionage
Act, the Obama administration has effectively launched the process of end-
ing the government’s acceptance of this assumption.

To journalists, this is a travesty. The New York Times editorialized that
by labeling Rosen a co-conspirator the administration was doing nothing
less than “threatening [the] fundamental freedoms of the press to gather
news.” The Washington Post’s Dana Milbank declared that “treat[ing] a
reporter as a criminal for doing his job—seeking out information the
government doesn’t want made public—deprives Americans of the First
Amendment freedom on which all other constitutional rights are based.” The Reporters Committee for Freedom of the Press, the leading legal-aid society for journalists, released a statement asserting that the administration’s decision to treat Rosen’s “routine newsgathering efforts as evidence of criminality is extremely troubling.” Facing sharp criticism from liberal allies, the Obama administration backed away. Even as it issued an affidavit depicting Rosen as taking an active part in a criminal conspiracy, it was at pains to explain that he would not face charges and that he was named a conspirator only to facilitate the issuance of a search warrant. In Senate testimony held after the Rosen affidavit came to light, Attorney General Holder explained that the goal of the investigation was merely “to identify and prosecute government officials who jeopardize government secrets,” adding that he would never prosecute a journalist who was just doing his job.

But Holder’s caveats raise another important question: How do foreign journalists fit into this picture? For example, can an employee of the Guardian—a paper that published a great many sensitive secrets that it received from the NSA defector Edward Snowden—freely engage in the kind of conduct that the Reporters Committee deems “routine” but that the FBI sees as resembling “an intelligence officer [running] a clandestine intelligence source”? Would the answer be the same if the reporter were from Al Jazeera or the People’s Daily? The Foreign Press Association of New York offers press credentials to anyone who pays its membership fee, describing it “as the best $100 value in Town.” It is indeed a highly attractive offer if it also comes complete with a fundamental right to assume an alias, communicate with U.S. officials in code or encrypted emails, and solicit secrets from them with impunity.

NECESSARY SECRETS

As the line between journalist and spy blurs, we seem to confront several undesirable options. The first is the natural destination of the course we are currently on, which effectively legalizes espionage. If anyone, anywhere can qualify as a journalist by publishing “opinions” or “information” in some medium, and if journalists are not at risk of prosecution for covertly soliciting and receiving our country’s most sensitive secrets—a practice now officially regarded by the Holder Justice Department as “ordinary” journalism—then spying on the United States will become a relatively simple matter. Such a policy—in other
words, the Obama administration’s current policy—is thoroughly untenable and cannot survive for long.

The other unattractive alternative is to have the U.S. government determine who is a legitimate journalist and who is not. We have already seen significant movement in that direction, if for quite different purposes. The Senate is now considering the enactment of a “shield law” to protect journalists from having to divulge their sources in court cases. Such a law would necessitate defining who exactly would qualify as a journalist and would therefore be eligible for protection. Senator Richard Durbin, an advocate of the law, has proposed a definition under which a journalist is someone who “gathers information for a media outlet that disseminates the information through a broadly defined ‘medium’—including newspaper, nonfiction book, wire service, magazine, news website, television, radio or motion picture—for public use.”

According to Durbin, his “broad definition covers every form of legitimate journalism.” But in an age when “opinion” and “information” are transmitted by millions of people through new media like Facebook and Twitter, his claim falls woefully short. What is more, his definition does not address the status of foreign journalists. It would therefore do nothing to prevent them from engaging in activities that look every bit like espionage but that the New York Times tells us are integral to the “fundamental freedoms of the press to gather news.” Under any licensing scheme, the government would thus not only have to decide who among America’s citizens is a genuine member of the press, it would also have to decide who among foreign journalists can be trusted enough to be allowed, just like American reporters, to violate the espionage statutes using the cover of the First Amendment.

Such an outcome, both impractical and anathema to our constitutional traditions, is unthinkable. Indeed, there may not be any satisfactory solutions to the dilemma we confront. The plain meaning of our laws clearly forbids behavior that is now commonplace. For nearly a century, we have lived with the mismatch between law and actual practice. This system worked well—indeed, it provided significant benefits to the public, keeping it informed about critical matters—until consensus about the necessity and aims of government secrecy began to collapse.

Today, the U.S. government is bleeding truly vital information to the press, harming our ability to thwart terrorists, counter the terrible risks
of nuclear proliferation, and conduct statecraft effectively. The classified CIA report evidently obtained by James Rosen was stamped “Top Secret/Special Compartmented Information,” the security designation for the most sensitive of all intelligence materials. Included in the story Rosen published on foxnews.com was the fact that the CIA had learned of an impending nuclear test not from overhead reconnaissance, as most observers would have assumed, but from “sources inside North Korea.” What possible benefits to the public from such a revelation could offset the potential risk of sending hard-won CIA sources in North Korea to their deaths?

In the face of such journalistic recklessness, it would seem that a crackdown is inevitable. Indeed, the most liberal president in a generation, a president who came into office promising unparalleled transparency, has seen the need for such a crackdown and has already set it in motion. More prosecutions are inescapable as national-security leaks continue and journalists seek to uncover every aspect of our intelligence activities. But in exposing vital secrets for our enemies to read, leakers within the government and the journalists who pursue and publish the information they possess have forced the hand of the Justice Department. These proponents of freedom of information have collectively struck a terrible blow against the very openness they purport to champion.