

# Should the government prosecute journalists who publish classified information?

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## SUPPORTERS ARGUE

When reporters solicit government employees to leak sensitive classified information, they are involving themselves in a crime. The government must do everything in its power to protect national security by preventing leaks, and that includes prosecuting all those involved in leaking and publishing classified information. The First Amendment does not provide a defense against criminal activity.

## OPPONENTS ARGUE

By seizing journalists' phone and e-mail records, the government is infringing on the freedom of the press and in essence criminalizing the kind of investigative journalism that allows the media to serve as a watchdog of the state. Unbridled prosecution of leaks and investigations of journalists who report on those leaks chill journalists' ability to gather news and speak with government sources, stemming the free flow of information necessary for a functional democracy.



**Employees of the Associated Press (AP) walk through the company's headquarters in New York City.**

AP Photo/Mark Lennihan

In May 2013, the Associated Press (AP) reported that the Department of Justice had seized the phone records of more than 20 telephone lines used by AP journalists. The Justice Department seized the records as part of an investigation into a 2012 AP story that had revealed classified Central Intelligence Agency (CIA) information presumably leaked from a government source. The story involved CIA efforts to foil a Yemeni-based terrorist plot to bring down a U.S.-bound plane.

Several days after the AP reported the seizure of its journalists' phone records, the *Washington Post* reported that federal investigators at the Department of Justice had targeted Fox News journalist James Rosen for surveillance. The move was part of an investigation stemming from a 2009 report Rosen had written that contained classified information regarding U.S. intelligence sources in North Korea. Labeling Rosen a "co-conspirator" in the crime of leaking classified information, the Justice Department obtained a subpoena to monitor some of Rosen's personal e-mails and tracked his visits to the U.S. State Department in Washington, D.C.

Government employees who leak classified information, regardless of motive, are legally susceptible to prosecution for breaking their oaths of secrecy. The legal culpability of journalists who solicit and then publish that information, however, is an area of debate. In the wake of the AP and Rosen incidents, many observers have argued that pursuing journalists who investigate and publish leaked information is a potential violation of the First Amendment to the U.S. Constitution, which prohibits infringing on the freedom of the press. "It's one thing to go after officials who leak classified information to the press," *Slate* columnist Fred Kaplan observed. "However, it's something else entirely to go after a reporter who receives the leak."

Others, however, assert that classified information must be kept secret at all costs, even if it means pursuing some journalists. The Obama administration has not attempted to prosecute any news organizations for receiving or disseminating classified information, but the Justice Department's labeling of Rosen as a potential criminal co-conspirator has led to speculation that that could change.

The AP and James Rosen affairs have also raised questions about what the monitoring of journalists means for government transparency and freedom of information. Shortly after taking office in 2009, President Barack Obama (D) took several steps toward increasing government transparency, and he recently referred to his administration as the "most transparent... in history." His administration's aggressive approach toward government leaks, however, has many analysts questioning that assertion. [See [Government Transparency](#)]

Before the Obama presidency, the federal government had prosecuted a total of three individuals for leaking classified information under the Espionage Act—a 1917 law passed during World War I (1914–18) that made the disclosure of information that could threaten national security and aid enemy forces a punishable crime. By the end of Obama's first term, his administration had used the act to prosecute six people for leaking classified information, although some of those cases dated back to the administration of President George W. Bush (R, 2001–09).

The controversy over how the government should treat journalists who publish classified information has raised questions about the nature of a free press, and whether the government can or should prosecute journalists for doing what many observers assert is their job.

Should the government investigate and prosecute journalists who receive and publish leaked classified information, or would that undermine the freedom of the press?

Supporters of the Obama administration's investigation into recent leaks argue that journalists who actively solicit government officials to leak classified information, and then publish that information, are participating in a crime. In the interests of protecting national security, they argue, the government has a responsibility to investigate such leaks to the fullest extent, even if that means targeting journalists as well. The First Amendment, they note, cannot protect criminal activity.

Opponents, on the other hand, argue that the Obama administration has taken an unprecedentedly aggressive approach to investigating and prosecuting leaks, implicating journalists and endangering the First Amendment in the process. The press serves an invaluable role as a government watchdog, opponents argue, and essentially criminalizing the act of investigative reporting will impede that role. Recent seizures of journalists' records, opponents maintain, signal a dangerous shift in the relationship between the press and the government.

## **Courts Rule on Publishing Classified Information, Reporter Privilege**

In 1966, President Lyndon Johnson (D, 1963–69) signed the Freedom of Information Act (FOIA) into law. Designed to foster government transparency, the legislation provides a pathway for journalists and citizens to request records from government agencies, even if such records have never before been released. The law provided exceptions for material that could compromise national security, and, despite the law, media outlets often struggled to get government agencies to provide requested information.

In 1971, the relationship between the government and the press reached a crossroads with the publication of the Pentagon Papers, a secret, multi-volume history of the Vietnam War (1959–75) written by the U.S. Department of Defense that contained classified information. The papers showed that top U.S. officials—including U.S. presidents—had deceived the American people about U.S. involvement in the war. Seeking to disclose this information, U.S. military analyst Daniel Ellsberg leaked the papers to *New York Times* journalist Neil Sheehan. The administration of President Richard Nixon (R, 1969–74) attempted to block the publication of the papers, telling the *Times* that it would cause "irreparable injury to the defense interests of the United States." Historians later noted that the information contained in the papers posed more of an embarrassment to the U.S. government than a danger to national security. The papers revealed that, contrary to official claims, the U.S. military had launched operations in Laos, carried out bombing campaigns in Cambodia, and misled the public about other various aspects of the war.

The government's attempts to prevent the *Times* and other newspapers from publishing the Pentagon Papers resulted in a legal struggle that quickly reached the U.S. Supreme Court. Ruling 6–3 in *New York Times Co. v. United States* (1971), the Court blocked the government's effort to halt publication. As Justice Hugo Black wrote:

*In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people. ... In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.*

The Supreme Court's ruling in *New York Times Co.* "set a very high standard for preventing the press from publishing classified information," University of Denver assistant journalism professor Derigan Silver explained in 2009. "The Court held that any government attempt to prevent publication came to the Court with a heavy presumption of unconstitutionality."

In a concurring opinion in the case, Justice William O. Douglas noted an amendment added to the Espionage Act in 1950 stated that "Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press." Despite this resounding victory for freedom of the press, it is important to emphasize that the decision only stated that the government could not prevent the *New York Times'* publication of the pentagon papers. Left open was whether the government, in the future, could prosecute newspapers after they had published classified information.

The Nixon administration also tried to prosecute Ellsberg, marking the first time the government attempted to charge someone for leaking information under the Espionage Act. Revelations of government misconduct and illegal evidence gathering, however, resulted in a mistrial. Prosecutors initially also attempted to charge the *Times* with violating the Espionage Act, but the defense demonstrated that Congress had intentionally left the word "publish" out of the legislation to avoid the prosecution of journalists, and that charge was dropped.

In 1972, the Supreme Court ruled 5–4 in *Branzburg v. Hayes* that the First Amendment does not provide protection for reporters who refuse government orders to reveal their sources. The case revolved around *Louisville Courier-Journal* reporter Paul Branzburg, who refused requests from law enforcement agencies to reveal sources for an article he wrote on illegal drug use, and *New York Times* reporter Earl Caldwell, who refused to disclose his sources for a story on the Black Panthers, a radical black power group. The Supreme Court ruled that the First Amendment did not prevent the government from compelling journalists to testify before criminal grand juries. Justice Byron

White noted in the majority opinion, however, that authorities must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."

In response to the *Branzburg* ruling, many states passed so-called shield laws, attempting to protect reporters' right to refuse to testify on their news-gathering process, a concept known as reportorial privilege. In 1980, Congress passed the Privacy Protection Act, which attempted to protect journalists from government interference by requiring investigators to obtain a subpoena before searching the work documents of reporters and newsrooms.

Calls for greater transparency had grown louder in the mid-1970s after President Nixon resigned from office as a result of the Watergate scandal, in which the White House had covered up its connection to campaign workers who had been arrested for breaking into the offices of the Democratic National Committee at the Watergate Hotel in Washington, D.C. The *Washington Post* and other newspapers had played a critical role in uncovering the scandal. In 1974, Congress strengthened the FOIA, making it more difficult for government agencies to refuse FOIA requests. Nixon's successor, President Gerald Ford (R, 1974–77) vetoed the bill, but Congress overrode it and it became law.

In 1976, 1986, and again after the September 11, 2001, attacks on the United States, however, Congress expanded national security exemptions in the legislation. Since the passage of the FOIA, observers have often used the rate at which the government responds to FOIA requests as a key measure of that administration's commitment to transparency.

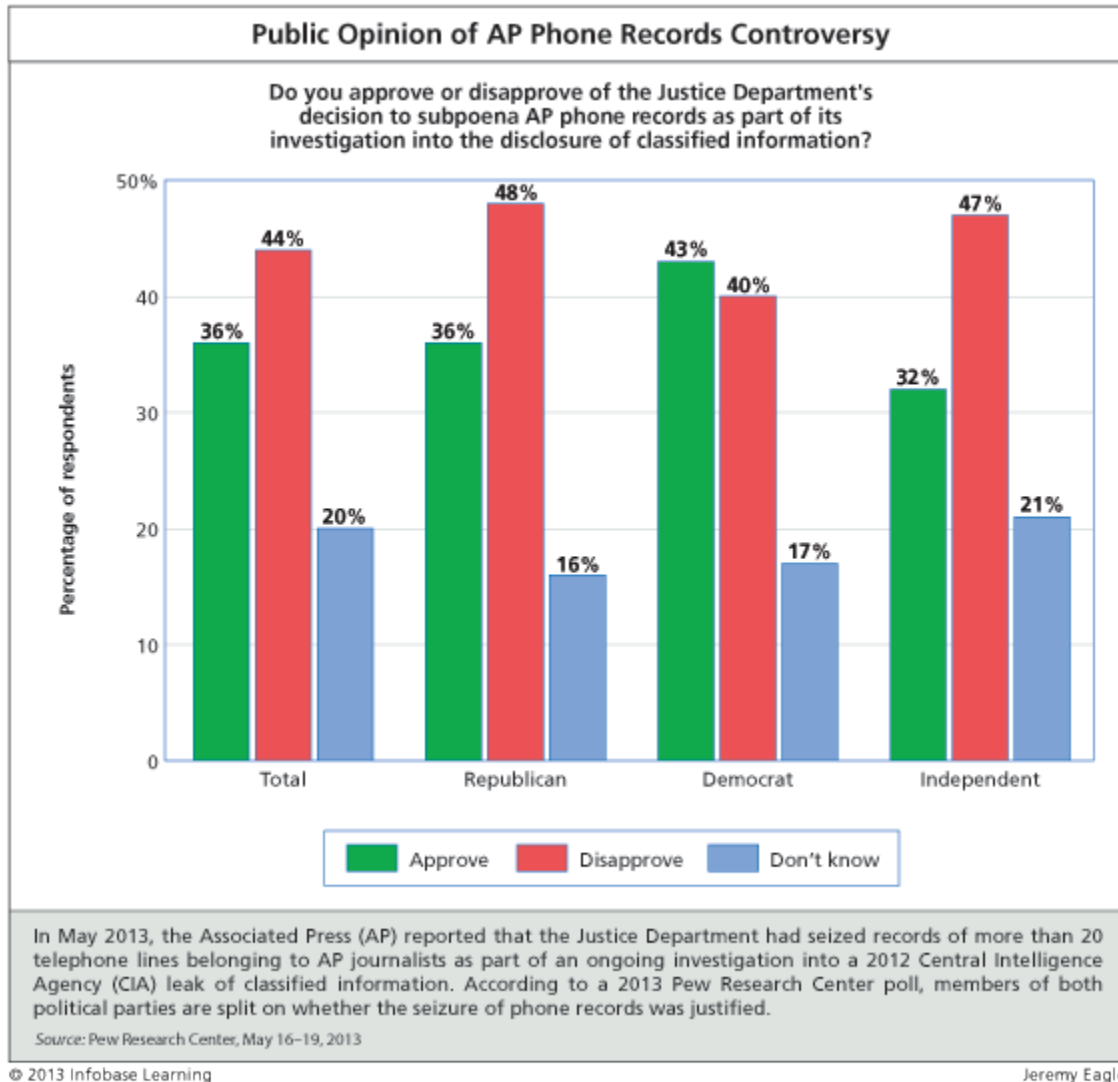
In 2001, the Supreme Court heard the case *Bartnicki v. Vopper*, which concerned the culpability of journalists who publish illegally gathered information. The case involved a Pennsylvania radio station's airing of a secretly taped conversation between a teachers' union president and the union negotiator. The union president sued the radio station and other media outlets that played the tape, arguing that the stations knew the conversation had been recorded illegally. The Supreme Court, however, ruled 6–3 that media outlets were not liable for reporting illegally gathered information. "It would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party," Justice John Paul Stevens wrote in the Court's majority opinion. "A stranger's illegal conduct does not suffice to remove the First Amendment shield from a speech about a matter of public concern." The majority opinion also emphasized that—unlike later leak cases such as Fox News reporter James Rosen's solicitation of classified information from a government employee—the media outlets sued in *Bartnicki* "played no part in the illegal interception" of information.

In 2005, the U.S. government indicted two lobbyists for the American Israel Public Affairs Committee (AIPAC), Steven Rosen and Keith Weissman, for passing classified information from the Department of Defense to a journalist (as well as to the Israeli embassy). The indictment marked the first time the government had used the Espionage Act to charge non-government employees. Though Rosen and Weissman themselves were not journalists, some observers worried that the use of the 1917 Espionage Act to criminalize their actions could have repercussions for reporters who received leaked information from a government official and passed it on to others, as the lobbyists had. The case against Rosen and Weissman was dropped in 2009 after their defense argued that, in order to prosecute them under the Espionage Act, the government would have to prove that they had intended to harm U.S. security interests when they passed along leaked information.

The publication of leaked information also played a major role in one of the biggest scandals to plague the administration of George W. Bush (R, 2001–09), when high-ranking government officials allegedly leaked the identity of undercover CIA agent Valerie Plame. Compromising the identity of an undercover CIA agent is a crime, and some observers believed that the Bush administration had leaked Plame's identity to retaliate against Plame's husband, U.S. diplomat Joseph Wilson, who had cast doubt on the administration's rationale for its 2003 invasion of Iraq.

In 2005, the U.S. District Court of Washington, D.C., held *New York Times* reporter Judith Miller and *Time* journalist Matthew Cooper in civil contempt after they refused to reveal their sources for reporting surrounding the leak of Plame's position. After the court ruled that the First Amendment did not protect reporter confidentiality, *Time* agreed to release Cooper's notes; Miller, however, continued to refuse to disclose her sources, and spent 85 days in

jail for contempt of court. She was released after her source, I. Lewis ("Scooter") Libby, a senior adviser to Vice President Dick Cheney (R), agreed to allow Miller to disclose his identity. Libby was ultimately convicted on obstruction of justice charges but his sentence was commuted by President Bush.



## Justice Department Seizes Journalists' Records in Government Leak Investigations

As a candidate for president in 2008, Barack Obama frequently stressed the importance of government transparency, criticizing the Bush administration for its lack of openness. On his first day in office, in 2009, President Obama issued a series of executive orders designed to make "transparency and rule of law the touchstones of this presidency."

In April 2009, the Obama administration released Bush-era memos that had authorized the use of "enhanced interrogation techniques," considered torture by many, on detainees held on suspicion of terrorism. The following month, however, President Obama blocked the release of photos of suspected terrorism detainees in U.S. custody. In a speech later that year, Obama said that though "our democracy depends upon transparency... some information must be protected from public disclosure for the sake of our security." This often entailed compromises between national security and openness in government, which, he said, required a "delicate balance."

Throughout 2010, WikiLeaks—a website founded by transparency advocate Julian Assange—published hundreds of thousands of leaked classified U.S. documents, including files containing sensitive and embarrassing information regarding U.S. diplomatic relations and military operations in Afghanistan and Iraq. In May, authorities arrested U.S. Army Private First Class Bradley Manning on suspicion of providing WikiLeaks with access to the leaked documents. [See [Prosecuting Government Whistleblowers](#)]

The documents leaked by Manning exposed numerous cases of U.S. authorities turning captives over to foreign authorities suspected of torturing prisoners, and featured video footage of American forces in Iraq killing civilians, including two Reuters journalists. They also revealed that, contrary to previous claims by the Department of Defense, the government was tracking civilian casualties in the Iraq War. While some condemned Manning as a traitor who had aided terrorists fighting the United States, others hailed him as a hero for exposing government wrongdoing. In 2011, prosecutors filed 22 charges against Manning, the most severe of which—aiding the enemy—are punishable by life imprisonment. In July 2013, a military court found Manning not guilty of aiding the enemy, but convicted him on 19 of the 22 charges against him. Manning awaits sentencing, and could receive up to 90 years in prison. According to some reports, meanwhile, the Justice Department has considered seeking charges against Assange for conspiring with Manning to leak information.

In May 2012, AP journalists learned of an undercover CIA plot to infiltrate and disrupt a Yemeni-based affiliate of the international terrorist network Al Qaeda, which was planning a terrorist attack on a U.S.-bound plane. At the request of the Obama administration, the AP refrained from publishing the story for about a week, but unveiled the information a day before an official government announcement was planned.

In an effort to identify the source of the CIA leak, federal investigators sought subpoenas for the home and cellular phone records of AP reporters and one AP editor. In a letter dated May 10, 2013, the Justice Department disclosed the seizure of these records to the AP, prompting the company's president and chief executive officer, Gary Pruitt, to denounce the move as "overbroad" and a "massive and unprecedented intrusion" into journalists' news-gathering process. Deputy Attorney General James Cole, who had been put in charge of the investigation after Attorney General Eric Holder recused himself, wrote Pruitt defending the seizure, asserting that the phone records were sought only when there were "reasonable grounds to believe that a federal crime had been committed and that the information sought by the subpoena is essential to a successful investigation." [See [Associated Press Protests Justice Department's Seizure of Reporter Phone Records \(sidebar\)](#)]

Many observers noted that the seizure of the AP phone records was unusual in that the Justice Department gave the news agency no prior notice, thereby preventing the AP from preemptively challenging the seizure in court. Standard Justice Department policy, furthermore, requires that subpoenas be "as narrowly drawn as possible." Critics claimed the department had failed to adhere to that policy in its seizure, which encompassed two months worth of phone records for more than 20 telephone lines. In a press conference at the White House on May 16, President Obama told reporters that he would "make no apologies" for investigating leaks of "information that might compromise" national security initiatives or endanger American lives.

Soon after the AP controversy broke, the *Washington Post* reported that the Justice Department had authorized surveillance of Fox News reporter James Rosen as part of a separate CIA leak investigation. In 2009, Rosen had reported on North Korea's internationally condemned nuclear weapons program, revealing that the CIA had an informant within the country. The following year, prosecutors charged former State Department security adviser Stephen Jin-Woo Kim with leaking details of a CIA report on North Korea to Rosen. As part of the investigation, authorities obtained a warrant to examine Rosen's e-mails.

In an affidavit filed by the Federal Bureau of Investigation (FBI) to obtain the subpoena for Rosen's e-mails, the FBI charged that Rosen was a possible "aider, abettor and/or co-conspirator in the case." Federal investigators charged Kim with violating the Espionage Act; citing e-mails in which Rosen had asked Kim to provide him with internal documents using secret aliases in what the Justice Department described as a "covert communications plan," investigators alleged that Rosen could be considered a co-conspirator, although Justice Department officials asserted that actually prosecuting Rosen under that charge was unlikely.

Though the Privacy Protection Act bars government searches of newsrooms and reporter documents, these protections are invalid if a reporter is suspected of criminal activity. "The DOJ [Department of Justice] specifically argued that by encouraging his source to disclose classified information," Glenn Greenwald of the British newspaper the *Guardian* explained in 2013, "Rosen himself broke the law." While the act of publishing classified information is not itself against U.S. law, Greenwald noted, the Justice Department was suggesting "that a journalist can be guilty of crimes for 'soliciting' the disclosure of classified information." Observers noted that federal investigators had followed a similar line of legal reasoning in pursuing Assange for his publication of classified documents through WikiLeaks, though the United States has not charged him with any crimes.

In response to public outcry over the AP and Rosen record seizures, President Obama in May ordered the Justice Department to complete a review of its press freedom guidelines. Press advocates, however, were discouraged to learn that Attorney General Holder, who been criticized for allowing the investigations of journalists, would head this review. Later in May, Obama addressed the AP and Rosen controversies while delivering a major speech on national security issues, acknowledging "that leak investigations may chill the investigative journalism that holds government accountable." He also, however, defended the Justice Department investigations. "[W]e must keep information secret that protects our operations and our people in the field," he said. "To do so, we must enforce consequences for those who break the law and breach their commitment to protect classified information."

President Obama also urged Congress to reconsider passing a federal shield law to protect journalists from government pressure to reveal their sources. Four years earlier, in 2009, Senators Charles Schumer (D, New York) and Arlen Specter (D, Pennsylvania) had introduced a federal shield law that would have required the Justice Department to inform media companies about any record seizures, so news outlets could fight such subpoenas in court. In order to procure records secretly, as it had done with the AP phone records, the Justice Department would have to convince a judge that the seizure was essential to preventing or mitigating a terrorist act or other imminent harm to national security.

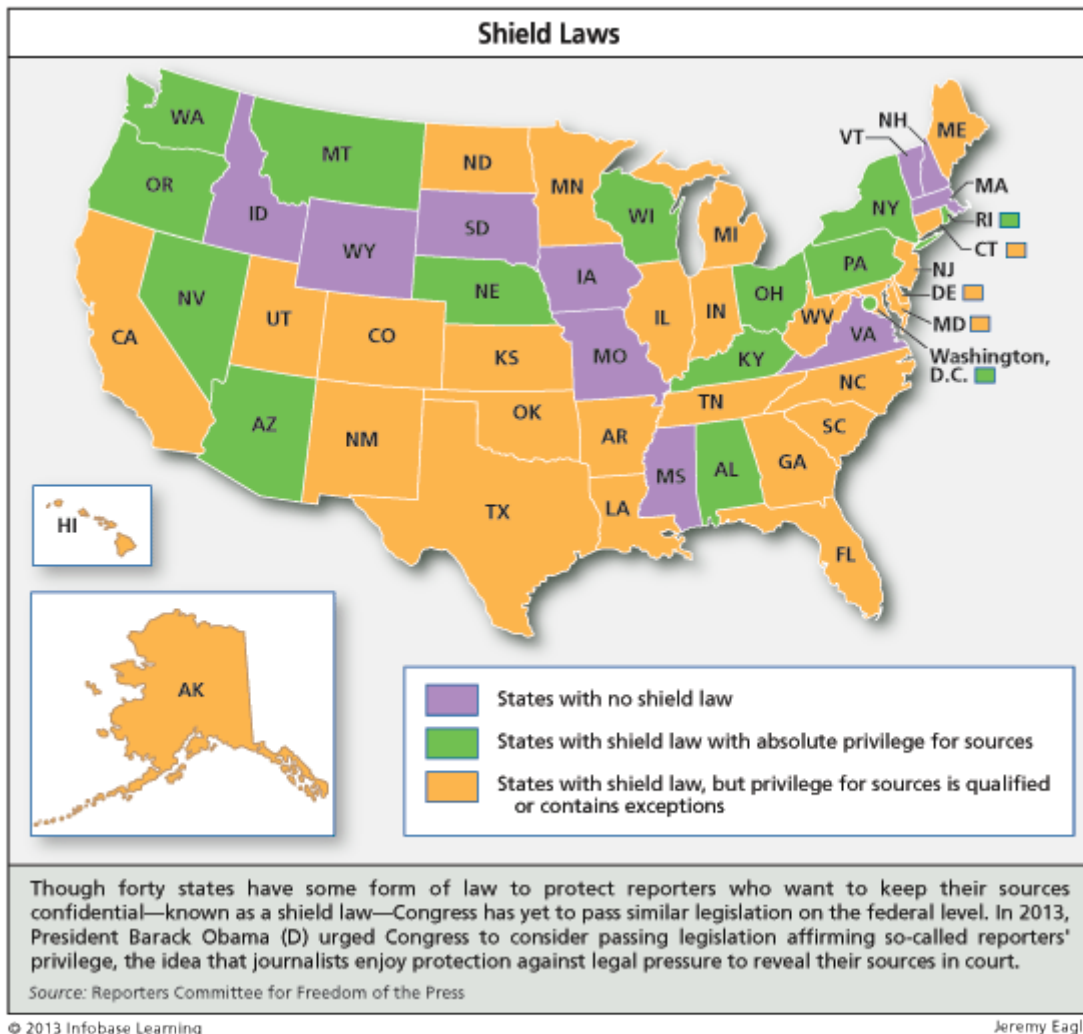
According to *New Yorker*, staff writer Margaret Talbot, however, while the legislation was under consideration the Obama administration "proposed major revisions to the bill that, in the view of its supporters, essentially gutted it" by creating too many exceptions for national security–related issues. The WikiLeaks controversy, observers noted, had further derailed political will for a federal shield law, as policymakers struggled to define whether nontraditional media outlets like WikiLeaks would also be protected under the legislation. Forty states currently have some form of shield law in place, and in most of the states that do not courts have set precedents protecting reporter privilege.

Transparency advocates have also criticized the Obama administration for increasingly invoking national security to refuse FOIA requests. According to a recent AP analysis, the government refused such requests 3,805 times in 2009, 4,243 times in 2011, and at least 5,223 times in 2012.

Citizens who are denied FOIA requests for national security reasons can appeal the decision in court, but, as the AP reports, "U.S. courts are loath to overrule the administration whenever it cites national security." In January 2013, for example, Judge Colleen McMahon of U.S. District Court in New York City denied a request for government records on drone attacks filed by the *New York Times* and the American Civil Liberties Union, writing, "I can find no way around the thicket of laws and precedents that effectively allow the executive branch of our government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret." [See [Judge Affirms Government's Rejection of FOIA Request on Drone Killings \(sidebar\)](#)]

In June 2013, *Guardian* journalist Greenwald came under fire after reporting on a secret National Security Agency (NSA) program that gathered phone records from millions of American citizens. Greenwald had received this information from Edward Snowden, a former CIA computer technician who leaked evidence of the program to the *Guardian*. Snowden fled to Hong Kong—and later Russia—fearing that U.S. authorities would charge him with espionage. Transparency advocates celebrated Snowden and Greenwald as heroes for exposing government wrongdoing: others denounced Snowden as a traitor and criticized Greenwald for publishing classified information.

In an interview on NBC's *Meet the Press*, host David Gregory asked Greenwald, "To the extent that you have aided and abetted Snowden...why shouldn't you...be charged with a crime?" Greenwald fired back in response, "I think it's pretty extraordinary that anybody that called themselves a journalist would publicly muse about whether or not other journalists should be charged with felonies." He added: "If you want to embrace that theory it means that every investigative journalist in the United States who works with their sources, who receives classified information, is a criminal. And it's precisely those theories, and precisely that climate that's become so menacing in the United States." The interview reignited debate over the legal culpability of journalists who publish classified information.



## Supporters Argue: Government Should Investigate Journalists Involved in Government Leaks

Supporters of the government investigating journalists who publish leaked information argue that reporters who encourage security officials to leak classified material should be considered just as culpable as those who leak the material. "Solicitation of crime, aiding and abetting crime by providing instrumentalities for the crime, and conspiracy to commit a crime are rightly punishable," University of California Los Angeles law professor Eugene Volokh argued in 2013. "And I don't think that the answer should be different when the crime is an illegal leak of information (however newsworthy that information might be)."

The publication of leaked classified material, supporters contend, should be deemed criminal. "If they willingly knew that this was classified information, I think action should be taken," Representative Peter King (R, New York) said in a June 2013 CNN interview amid the AP and James Rosen affairs. "[O]n something of this magnitude, there



is an obligation both moral but also legal, I believe, against a reporter disclosing something that would so severely compromise national security."

Supporters of the government's actions note that publishing leaked material often has potentially dangerous repercussions. "Members of the media are hardly disinterested judges of the balance between pursuing serious national security risks and the need to inform the public," former Central Intelligence Agency (CIA) director John Deutch argued in a 2013 *New York Times* article. "[M]y experience convinces me that the balance has been too permissive, at a time when the country faces terrorist threats, viral cyber intrusion, and the need to lower the risks of biological, chemical, and nuclear events."

Reporters must accept, proponents argue, that their actions have legal ramifications. "[J]ournalists at the AP and elsewhere know they could face scrutiny," *Washington Post* reporter Walter Pincus argued in 2013. "Like it or not, they are part of a crime. The leaker or leakers had taken an oath under the threat of prosecution to protect the information."

Previous government pursuits of leakers of classified information in the press, supporters argue, have done little to restrict reporting or make it harder for journalists to receive information. "[H]ow many times can the media claim such an action is 'chilling sources?'" Pincus asked. "That was the claim during the Valerie Plame case under the Bush administration and repeatedly invoked as the Obama Justice Department has pursued leakers. The risk of breaking the law apparently didn't chill those who leaked the information to the AP."

Freedom of speech, supporters argue, cannot be a catch-all defense for journalists revealing justifiably secret information and disclosing private matters. "If there's a First Amendment right to solicit, aid, and conspire in leaks of classified defense information," Volokh wrote. "Then there'd be such a right to solicit, aid, and conspire in leaks of tax return information, leaks of attorney-client confidences, leaks of psychotherapist-patient confidences, illegal interception of cell phone conversation...and so on."

Supporters argue that it is unreasonable to expect the government to do nothing in the face of repeated government leaks. "[T]he torrent of leaks about every aspect of U.S. military and intelligence operations has been vast, constant and unending," University of Chicago law professor Eric Posner contended in a 2013 *USA Today* editorial. "This suggests, at a minimum, that the threat to press freedoms, or Americans' right to know, has been overstated."

## **Opponents Argue: Government Should Not Investigate Journalists Involved in Government Leaks**

Opponents of the government investigating journalists who leak information argue that this violates the First Amendment to the U.S. Constitution and the public's right to know what the government is doing. By naming James Rosen a "co-conspirator" in violation of the Espionage Act, they contend, the government effectively penalized investigative journalism. "The government has now put itself in the position of setting standards for what reporters can and cannot do when they talk to those who have access to classified information," First Amendment lawyer James Goodale, who represented the *New York Times* in its decision to print the Pentagon Papers, wrote in the *Daily Beast* in 2013. "In short, the government has criminalized the news-gathering process."

The Obama administration, critics argue, has used the excuse of national security to obstruct the free flow of information between government, the press, and the public. "There's been very great tolerance that if the magic words... 'homeland security' are invoked, Congress has given the president virtually a free hand in deciding what information they will know as well as the public," Daniel Ellsberg, the military analyst who leaked the Pentagon Papers in 1971, told the *Washington Post* in 2013. "[T]here's no question that President Obama is conducting an unprecedented campaign against unauthorized disclosure."

In its effort to prevent leaks and keep information secret, opponents argue, the government is seeking to intimidate journalists and augment its own already vast power. The seizure of AP phone records "represents an all-too-familiar

and dramatic escalation of federal intrusion into the work of journalism under the guise of national security," Matthew Cooper, who faced contempt charges for refusing to reveal his sources during the 2005 Valerie Plame investigation, argued in 2013. "At a time of more or less permanent war, the federal government has shown little of its former hesitance to pursue journalists."

This punitive attitude toward news gathering, critics argue, will cripple the media's ability to function as a necessary watchdog of the state. "No doubt, the government does have an interest in—and an obligation—to protect government secrets," *Mother Jones* contributor Julian Sanchez wrote in 2013. "[B]ut an aggressive campaign that targets reporters and subjects them to broad and secret intrusions...will undermine a necessary check on government power and prevent the public from learning crucial information about what is done in its name."

Government secrecy threatens to go beyond truly essential national security secrets, opponents warn, to other areas of governance journalists should by rights be able to report on. The point of the Justice Department investigations, Sanchez argues, "is to ensure that government sources are too scared to talk to [the] press without approval. That might sound like a fine idea if at risk were only vital national security secrets whose publication would endanger the United States. But...[m]uch basic information, without which effective national security reporting would be impossible, is reflexively classified...and reporters routinely discuss such information with sources."

Other opponents predict that if the government targets journalists who publish leaked information, government whistleblowers will turn over their information to less responsible media outlets that might not delay the publication of sensitive national security information like established news sources often do. "What [the] 'stop the leaks' hardliners crowd will accomplish, if they succeed in making undetected leaks to journalists difficult enough, isn't stopping government employees from revealing classified information," *Atlantic* correspondent Conor Friedersdorf wrote in 2013. "Rather than passing information to a well-sourced security journalist...leakers will get their nuggets to Wikileaks, or Anonymous [a group of online hackers], or another transparency-inclined group that, for better or worse, won't solicit comment from the White House or delay publication until the sensitive operation is complete."

Government prosecution of journalists for publishing leaked information, opponents warn, will have a chilling effect on communication between government sources and journalists. "[N]o matter what a reporter is willing to do, if a government is willing to subpoena her phone records, then sources are going to be less willing to talk," *New Yorker* writer Margaret Talbot explains. "[I]t's the chilling effect... And it's an effect that can take hold deeply and perniciously in an atmosphere of national threat."

## **Congress Likely to Debate Shield Law**

In the wake of the AP and James Rosen controversies, Congress will likely reconsider proposals for a federal shield law. Some commentators, however, have noted that versions up for debate in Congress have so many national security exceptions for reporter privilege protections that it is not clear they would have prevented the Justice Department's treatment of either AP reporters or Rosen. Defining who constitutes a journalist and is deserving of shield protections in the age of WikiLeaks, furthermore, could be a challenge, according to many observers.

The debate over how the Obama administration and future administrations should balance the interests of government transparency, national security, and the freedom of the press, meanwhile, will continue.

## **Discussion Questions**

1) Should the publication of leaked classified material be illegal? Why or why not?

2) Do you agree with the Justice Department's actions against Associated Press (AP) reporters and Fox News journalist James Rosen? Explain your position.

- 3) How do you think the administration of President Barack Obama has balanced national security interests with interests of government transparency?
- 4) Some observers have called for the prosecution of journalists who solicit government officials to leak classified information. Do you agree with this position? Why or what not?
- 5) Pretend you are a newspaper editor and write an editorial expressing your opinion on the recent controversy concerning the seizure of AP phone records.

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## **Additional Sources**

*Additional information about censorship and freedom of information can be found in the following sources:*

Ross, Gary. *Who Watches the Watchmen?: The Conflict Between National Security and Freedom of the Press*. Washington, D.C.: National Intelligence College Press, 2011.

Sagar, Rahul. *Secrets and Leaks: the Dilemma of State Secrecy*. Princeton, N.J.: Princeton University Press, 2013.

## **Contact Information**

*Information on how to contact organizations that either are mentioned in the discussion of censorship and freedom of information or can provide additional information on the subject is listed below:*

Central Intelligence Agency  
Office of Public Affairs  
Washington, D.C. 20505  
Telephone: (703) 482-0623  
Internet: [www.cia.gov](http://www.cia.gov)

Committee to Protect Journalists  
330 7th Ave. 11th Floor  
New York, N.Y. 10001  
Telephone: (212) 465-1004  
Internet: [www.cpj.org](http://www.cpj.org)

Justice Department  
950 Pennsylvania Ave. N.W.  
Washington, D.C. 20530  
Telephone: (202) 514-2000  
Internet: [www.justice.gov](http://www.justice.gov)

## **Keywords**

*For further information about the ongoing debate over censorship and freedom of information, search for the following words and terms in electronic databases and other publications:*

Associated Press (AP) records scandal  
*Branzburg v. Hayes*  
James Rosen  
Freedom of Information Act  
Pentagon Papers

**Citation Information**  **MLA**  **Chicago Manual of Style**

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