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AQ FEATURE

Squeeze Play

BY Kevin M. Goldberg

How the U.S. government is cracking down on whistleblowers.

From the high-profile cases of the Wikileaker U.S. Army Private Chelsea Manning (formerly Bradley) and the former National Security Agency (NSA) contractor Edward Snowden to a series of lesser-known cases, the U.S. government has increased the investigation and prosecution of officials who have leaked government information. In many of these cases, the recipient of the information has not been foreign governments but the media, including new Internet-based platforms such as Wikileaks. Despite the novelty of the platforms and the government's harsher response, the law under which leakers have been investigated and indicted (and journalists subpoenaed) is the 1917 Espionage Act.

The Espionage Act is, in many ways, one of the most misunderstood criminal laws in the United States. The law, under which those who engage in the unauthorized disclosure of classified or unclassified information that could harm national defense (more commonly referred to as those who "leak" information) can be prosecuted, is both incredibly simple and complex. The statute has managed to protect U.S. national security over nearly a century of wars and conflict, while still leaving intact the tradition of maintaining a vibrant and free press. But this delicate balance is on the verge of being disrupted.

The Espionage Act is actually multiple statutes. In its simplest (perhaps oversimplifi ed) terms, the series of statutes found in Sections 793–798 of Title 18 of the United States Criminal Code punishes two offenses: the disclosure of information relating to national defense to anyone not authorized to receive it, with the intent of harming the U.S. or aiding its enemies; and the disclosure of cryptographic or communications-related information, often referred to as "sources and methods," even if there is no intent to harm the U.S. or aid its enemies.

The first carries a penalty of up to 10 years if the information is disclosed to anyone other than a foreign government, with the possibility of life in prison for disclosing this information to a foreign government. The second is considered a more serious offense, since the disclosure of sources and methods can directly put individuals in danger, or reveal to enemies of the U.S. that their conversations are being monitored. (In fact, it is highly likely that, given the number of documents made public, the information that both Snowden and Manning revealed falls under both parts of the Act.)

At first blush, the statutes give broad leeway to the government to go after people who leak information. The ways in which the statute defines "information" and "intent" limits federal prosecutors far more than, say, the United Kingdom's Official Secrets Act, which criminalizes the release of classified information for any purpose. While the Espionage Act has also always limited to some extent the First Amendment guarantees of free expression under the U.S. Constitution, courts have tended to read the intent requirement very broadly, holding the government to a very high prosecutorial standard. In fact, there has never been a prosecution against a reporter under the Espionage Act.

Leaking across generations: Pentagon Papers whistleblower Daniel Ellsberg voices support for fellow leaker Pfc. Manning at a rally in Fort Meade, Maryland, on June 1,2013. Photo: Lexey Swall/Getty

Still, the U.S. government has been able to use the Espionage Act to punish the most serious unauthorized disclosures of information for the past century, without preventing journalists from reporting the news. Pressure Builds Until recently, the balance has worked. However, the increase in prosecutions of government employees for leaking classified information, along with growing pressure on reporters to identify sources of information, as well as calls from some in Congress and the Executive Branch to toughen the Espionage Act, is suddenly threatening to tip that balance.

Classified information has always leaked. According to a report prepared by Gary Ross and released by the National Intelligence University, "Who Watches the Watchmen?," there were as many as 500 unauthorized disclosures of classified information between 1979 and 1988, another 34 in 1999 alone, and an average of 37 unauthorized disclosures per year between 2005 and 2009.

But at a time when huge amounts of information can be stored on tiny flash drives and be electronically disseminated in seconds anywhere in the world, policy makers have become acutely aware that the threat of unauthorized disclosure has become harder to contain.

Nevertheless, investigations of security leaks have not sharply increased. Between 1978 and 1980, the FBI conducted 25 criminal investigations, and the number stayed roughly the same between 1981 and 1985, when there were 20 to 30 active investigations of cases of unauthorized disclosures. That number increased slightly between September 2001 and February 2008, when the FBI completed 85 investigations.

But the numbers don't reflect the dramatic change in the government's approach. There are now more actual indictments—the formal initiation of a criminal case—against government employees who have leaked classified information. According to a February 26, 2012, article by David Carr in *The New York Times*, under the first 43 presidents, there were only three indictments under the Espionage Act. In the

Barack Obama administration alone, however, at the time of the article, there had already been six indictments of government employees; and the number has, according to the independent online publication *ProPublica*, increased to seven with the charges leveled against Snowden.

The institution of formal criminal charges has both immediate and deterrent effects on future leakers. It increases the stress on the individual, costs significantly more in legal fees to defend a case and often results in the suspension of any salary and privileges during the trial. Due to the real possibility of jail time, there is also a tendency on the part of criminal defendants to accept lesser charges which, though they will not carry harsh penalties, will mean the loss of current and future earnings, as well as the potential loss of government pension in some cases.

An indictment, unlike an investigation, also makes the entire matter public, sending a clear warning message to those who might want to speak to the press and public about government waste or malfeasance.

But even the aggressive investigations that don't result in formal charges have negatively affected the public interest by disrupting the free flow of information from the government to the public. Especially worrying is the tactic of investigating journalists who publish what leakers and whistleblowers tell them, with the aim of getting the reporters to reveal their sources. This has resulted in the intimidation of journalists who, though they are spared the direct censorship and physical harassment (or jail) endured by their counterparts in other countries, are increasingly being put under the kind of surveillance and legal pressure that makes their sources less likely to talk.

Two of the six indictments brought by the Obama administration against government employees provide examples of the pressures felt by sources seeking to shine a light on government programs, or to blow the whistle on government waste. Although they have not attracted the kind of headline attention given to self-described whistleblowers Manning and Snowden, the cases of Thomas Drake and Jeffrey Sterling represent two troubling examples.

Drake, a former NSA employee, disclosed information that ended up in the media—even though it is not clear that he disclosed it directly to individual journalists. The revelations involved an early effort by the NSA to gather and analyze communications data to monitor terrorist networks, called "Trailblazer." The program was eventually cancelled, but the information demonstrated that it had violated individuals' personal privacy, misspent public funds and been severely mismanaged.

This case is actually a holdover from an investigation started in 2007 by the George W. Bush administration. That's when Drake's house was raided—for the first time—kicking off years of investigation of Drake, his family, his friends, and his coworkers, as well as of various journalists who were asked to talk about their contact with him and the stories on the subject.

Drake was indicted under the Espionage Act, and charged with obstruction of justice and making false statements to the FBI. In the end, however, all charges were dropped except for a misdemeanor charge of "exceeding authorized use of a computer," which resulted in a one-year probation. He no longer works for the government.

Jeffrey Sterling worked for the Central Intelligence Agency (CIA) and is thought to be the source of information found in a chapter of a book written by *The New York Times* reporter James Risen titled *State of War: The Secret History of the CIA and the Bush Administration*, which revealed that the CIA, in trying to feed false information, accidentally may have helped Iran develop its nuclear weapons program.

After Sterling was charged under the Espionage Act, Risen was subpoenaed to testify. The United States

Court of Appeals for the Fourth Circuit recently held that Risen could not invoke "reporter's privilege" to quash the subpoena because no such privilege exists in federal court proceedings and there is no recognition of such a privilege under common law. (Although approximately 40 states and the District of Columbia have "shield laws" codifying a protection for reporters against testifying about their sources in court, with at least eight others providing a judicially protected privilege, there remains no federal shield law.)

This underlines the real threat to First Amendment guarantees. Pressure applied to reporters like Risen to reveal their sources makes it increasingly unlikely that sources will talk to reporters. And the pressure goes beyond the direct route of subpoenaing the reporter to testify in court. Between April and May 2012, the U.S. Justice Department secretly seized two months' worth of phone records relating to the Associated Press and its reporters, in what was believed to be an attempt to determine who leaked information to the wire service about the CIA's successful effort to stop a bomb plot against an American airliner.

And more recently, the FBI labeled Fox News Reporter James Rosen as a possible co-conspirator with State Department employee Stephen Jin-Woo Kim, suspected of leaking information relating to U.S. intelligence on North Korea. In light of this case, one government official (speaking off the record) chillingly told reporters at a briefing on national security that the government doesn't need to subpoena reporters to testify in court because it has other methods of identifying leakers. It was a not-so-subtle message to other potential leakers that they would be found.

Where's the Check (and Balance)?

Adding to this already threatening climate, Congress is now pushing to further curtail conversations between reporters and sources. The fact is, the majority of leaks aren't a threat to national security. When truly harmful information is leaked, it's rarely published. This is a key component of national security reporting: conscientious reporters often check the information they receive with official government sources in a process that allows publications to balance potential harm with the public value of disclosure, and even to correct their own mistakes.

Ironically, Congress, which usually serves as a check on the executive, today seems inclined to disrupt this balance. The Fiscal Year 2013 Intelligence Authorization Act voted out of the Senate Intelligence Committee (though never approved because of the budget impasse) would have given the president and intelligence agencies even more power. While the Act did not propose any new criminal penalties, it did contain two sections that would have significantly affected reporters' ability to gather and publish information on national defense issues, even when there was no direct likelihood that classified information would be revealed.

One section of the Act would have prevented former government employees who had top secret clearance within the past three years and left the government within the past year from "entering into a contract or other binding agreement" with "the media" to help provide expert "analysis or commentary on matters concerning the classified intelligence activities" of the United States. The use of vague and overly broad terms lacking in any real definition appeared to restrict not only television appearances, but the ability to write op-eds or perhaps informally speak with editorial writers needing clarification for a column.

Another section would have prevented background or off-the-record intelligence briefings for the media by those intelligence staffers most informed on these issues. Under this section, only the director or deputy director, or public affairs personnel of a government agency would be empowered to give background briefings "regarding intelligence activities." The logical result of this would be more politically motivated, less substantive, and less informative discussions of national defense issues—in other words, holding

journalists captive to government spin. The penalties for violating these provisions included potential criminal sanctions and the loss of the individual's government pension.

When communication and trust between potential whistleblowers and reporters breaks down, the free flow of information stops and censorship begins. Reporters need to be able to actively reach out to government, freely discuss their stories with government sources, and publish even when they have been told there are dangers (either accurate or overstated) to making the information public.

Ultimately, it doesn't matter whether such pressures result in actual prosecutions. The implied threats of retribution, or loss of access to sources, can do equal damage to the principle of a free and unfettered press. Holding governments accountable and ensuring transparency, indeed freedom of expression itself, depend on the ability of journalists to investigate and reveal abuse and malfeasance—and to work with those who are willing to expose it. There is no such thing as "self-censorship." When government pressure disrupts the free flow of information in any way, directly or indirectly, it's just plain censorship.

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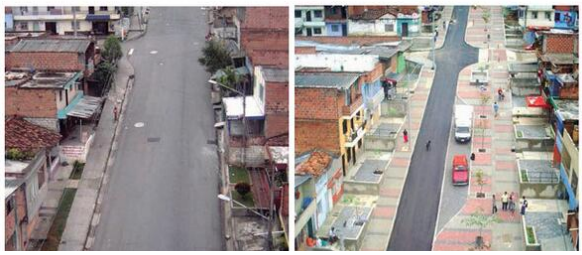

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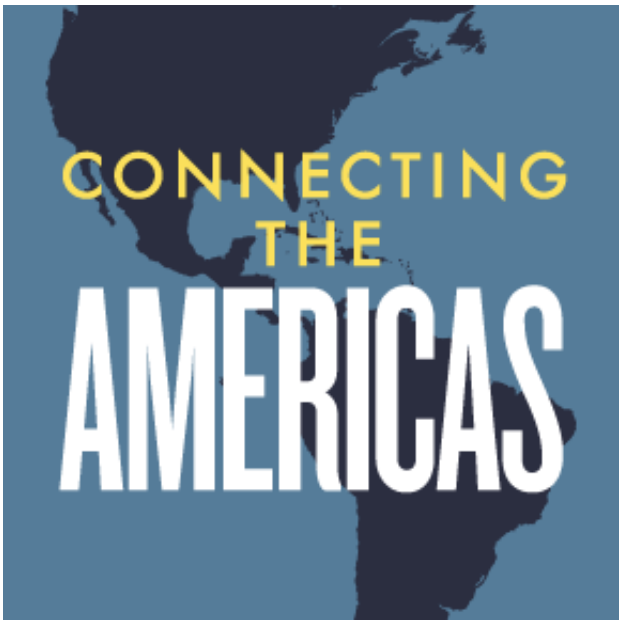

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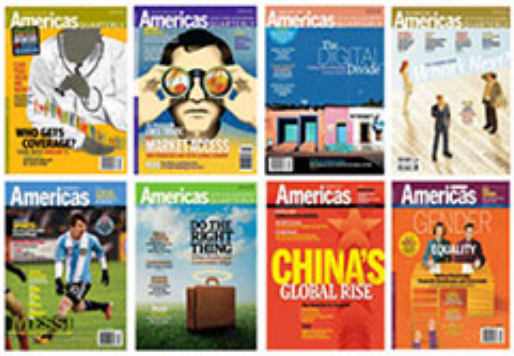

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