

Opinions

Leonard Downie: Obama's war on leaks undermines investigative journalism

By Leonard Downie Jr. May 23, 2013

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For the past five years, beginning with his first presidential campaign, Barack Obama has promised that his government would be the most open and transparent in American history. Recently, while stating that he makes [“no apologies”](#) for his Justice Department’s investigations into suspected leaks of classified information, the president added that “a free press, free expression and the open flow of information helps hold me accountable, helps hold our government accountable and helps our democracy function.” Then, in his National Defense University speech Thursday, [Obama said](#) he was “troubled by the possibility that leak investigations may chill the investigative journalism that holds government accountable.”

But the Obama administration’s steadily escalating war on leaks, the most militant I have seen since the Nixon administration, has disregarded the First Amendment and intimidated a growing number of government sources of information — most of which would not be classified — that is vital for journalists to hold leaders accountable. The White House has tightened its control over officials’ contacts with the news media, and federal agencies have increasingly denied [Freedom of Information Act requests](#) on the grounds of national security or protection of internal deliberations.

The secret and far-reaching subpoena and seizure of two months of records for 20 [Associated Press phone lines](#) and switchboards — used by more than 100 AP reporters in three news bureaus and the House of Representatives — is especially chilling for journalists and their sources. The effort was reportedly part of a Justice Department and federal grand jury investigation of an AP story from May 7, 2012, revealing the CIA’s success in penetrating a Yemen-based al-Qaeda group that had developed [an “underwear bomb”](#) to detonate aboard U.S.-bound aircraft.

At the request of the White House and the CIA, the AP held the story for five days to protect an ongoing intelligence operation. The AP’s discussions with government officials were similar to many I participated in with several administrations during my years as executive editor of The Washington Post, when I was weighing how to publish significant stories about national security without causing unnecessary harm.

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After the AP story appeared, Obama administration officials spoke freely about the operation. But when Republicans accused the administration of leaking classified information to boost the president's counterterrorism resume in an election year, the Justice Department began its wide-ranging investigation to find the story's unnamed sources — including secretly subpoenaing and seizing the AP's call logs earlier this year. Only after Justice finally notified the news agency of the seizure this month and the controversy exploded did Attorney General Eric Holder say that the AP story resulted from [“a very, very serious leak”](#) that “put the American people at risk.” But the administration has not explained how.

Such investigations are not unusual, especially in national security cases, but they have proliferated in the Obama administration. Six government officials have been prosecuted since 2009 under the 1917 Espionage Act for unauthorized disclosures of classified information, twice as many as in all previous U.S. administrations combined. One case involved a classic whistleblower: a senior executive of the National Security Agency who had told the Baltimore Sun about expensive government waste on digital data-gathering technology.

In another, investigators seized the phone records of Fox News reporter [James Rosen](#), searched his personal e-mails, tracked his visits to the State Department and traced the timing of his phone conversations with Stephen Jin-Woo Kim, a State Department security adviser. Kim was charged in 2010 as the suspected source of a Fox News report about North Korean nuclear weapon testing. Perhaps most disturbing, documents related to the secret search warrant for Rosen's phone and e-mail records cited him as a co-conspirator in the espionage case.

This appeared to journalists to put Rosen in unprecedented jeopardy for doing his job. Although the president said in his speech Thursday that “journalists should not be at legal risk for doing their jobs,” he was nevertheless adamant about pursuing government officials who he said “break the law,” presumably by discussing national security matters and other classified information with reporters, even if that scares off officials from becoming whistle-blowers or even having any contact with reporters.

In addition to these investigations and others believed to be underway, countless government officials have been subjected to accusatory interviews and lie-detector tests to ferret out leakers. And contacts with journalists have been routinely monitored. Not surprisingly, reporters tell me that more and more administration officials are afraid to talk to them.

Decades-old Justice Department guidelines restrict federal subpoenas for reporters or their phone records, saying they should be used only as a last resort in an investigation. Justice officials have contended that this was the case with the Associated Press leak. But while claiming that it first conducted hundreds of interviews and reviewed tens of thousands of documents, Justice has not explained why it needed to undertake what appears to be a menacing and unjustified fishing expedition.

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[The Justice guidelines](#) require that “the subpoena should be as narrowly drawn as possible,” that the targeted news organization “shall be given reasonable and timely notice” to negotiate the subpoena with Justice or to fight it in court, and that “the approach in every case must be to strike the proper balance between the public’s interest in the free dissemination of ideas and information and the public’s interest in effective law enforcement and the fair administration of justice.”

Only half a dozen AP journalists reported, wrote and edited the May 7, 2012, story, but “thousands upon thousands of news-gathering calls” by more than 100 AP journalists using newsroom, home and mobile phones are included in the records seized by Justice investigators, AP President Gary B. Pruitt said in an [interview](#) with CBS’s “Face the Nation.” In a [letter of protest](#) to Holder, Pruitt said that “these records potentially reveal communications with confidential sources across all of the newsgathering activities undertaken by the AP during a two-month period, provide a road map to AP’s newsgathering operations and disclose information about AP’s activities and operations that the government has no conceivable right to know.”

Without any official justification, such an indiscriminate intrusion into one of the most important American news organizations appears to be a deliberate attempt to intimidate journalists and their sources — or at least indicates a willingness to tolerate such intimidation as collateral damage of an investigation.

“I really don’t know what their motive is,” Pruitt said on “Face the Nation.” But, he added, “I know what the message being sent is: If you talk to the press, we’re going to go after you.”

By secretly serving the subpoena directly on phone companies without notifying the AP, the Justice Department avoided negotiations with the news agency or a court challenge over its scope. This is permitted as an exception to the Justice guidelines if prior notification and negotiations would “pose a substantial threat to the integrity of the investigation.” But there has been no explanation of what threat might have been posed in this case, when the preservation of the records by the phone companies was never in question and the news leak under investigation had occurred long before.

I can remember only one similar incident during my 17 years as executive editor of The Post. In 2008, FBI Director Robert S. Mueller [formally apologized](#) to me and the executive editor of the New York Times for the secret seizure four years earlier of the phone records of our foreign correspondents working in Jakarta, Indonesia — because the Justice guidelines had been violated and no subpoena had been issued. But I recall a number of instances in which other federal investigative requests were successfully negotiated in ways that fully protected our news-gathering independence in accordance with the guidelines.

In Thursday’s speech, Obama said he has raised the impact of federal leaks investigations on accountability journalism with Holder. The president said the attorney general “agreed to review existing Department of Justice

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guidelines governing investigations that involve reporters, and he'll convene a group of media organizations to hear their concerns as part of that review."

The president also called on Congress to revive and pass a federal ["shield law"](#) — similar to those in 40 states and the District — that would increase defenses, including judicial appeals, for journalists who face legal attempts to force them to reveal confidential sources and reporting contacts. It is unclear whether the legislation, which stalled in the last Congress after negotiations with the news media, would have prevented the Justice Department's sneak attack against the AP. Nevertheless, its passage would provide significant new protection for accountability journalism and government whistleblowing. White House support of the legislation had been lukewarm, so the timing and ardor of Obama's new embrace remains suspect, depending on the administration's future actions.

I can only speculate about the politics at play here. If 2012 had not been a presidential election year, would Republicans have characterized news reports and Obama administration announcements about successful counterterrorism operations as "leaks" endangering national security? Would the administration have decided that it was necessary to react by aggressively investigating leaks for which there is not yet public evidence that national security was seriously compromised? If not for the 2014 congressional elections, would Republicans now be hypocritically condemning the Justice Department's seizure of phone records in the AP case?

Hardly anything seems immune from constitutionally dangerous politicking in a polarized Washington. But that's no excuse for playing games with the First Amendment and the right and responsibility of the news media to keep Americans informed about what their government is doing in their name and for their protection.

After the 2001 terrorist attacks, the George W. Bush administration increased government secrecy in a variety of ways that Obama, as candidate and president, vowed to reverse. Soon after taking office, Obama and Holder issued [memos and directives](#) instructing government agencies to be more responsive to Freedom of Information Act (FOIA) requests and to make more government information public through Web sites and social media.

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On the plus side, more government information is now available online, much of it “big data” collected and generated by federal agencies. Some of it is potentially useful for consumers and businesses, such as student loan and grant information, resources for seniors, ways to do business with the government, federal jobs, volunteer opportunities, diet and medical information, assistance for farming and solar energy development, and much more. Some of the data about government spending and regulations also are useful for the news media and accountability reporting.

But there’s not nearly enough of what journalists and citizens need to hold the government truly accountable — whether information on national security, government surveillance and immigration policies, or specifics about stimulus spending and officials’ travel and other perks.

After some initial improvement by the Obama administration in fulfilling FOIA requests, delays and denials are growing again, according to journalists and studies by news organizations. An [AP analysis](#) published in March found that “more often than it ever has, [the Obama administration] cited legal exceptions to censor or withhold the material” and “frequently cited the need to protect national security and internal deliberations.” Some of the administration’s new open-information policies also contain broad and vague exceptions that could be used to hide records crucial to accountability reporting about such subjects as health-care payments, government subsidies, workplace accidents or detentions of terrorism suspects.

Every administration I remember has tried to control its message and manage contacts with the media. As a senior editor for more than a quarter-century, I frequently received complaints from administrations of both parties about coverage they considered unfavorable, along with occasional and mostly empty threats to cut off access. Journalists who covered the George W. Bush administration said they encountered arrogant attitudes toward the press but were usually able to engage knowledgeable officials in productive dialogue.

But reporters covering the Obama administration say more and more officials will no longer talk at all and refer

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them to uncommunicative or even hostile and bullying press aides. “The White House doesn’t want anyone leaking,” said one senior Washington correspondent who, like others, described a tight, difficult-to-penetrate inner circle that controls the administration’s decisions and micromanages its message. “There are few windows on decision-making and governing philosophy. There is a perception that Obama himself has little regard for the news media.”

Continuing what worked so successfully during two presidential election campaigns, Obama and his administration have instead engaged citizens directly through social media, friendly bloggers, radio and video. It amounts to the White House reporting on itself, presenting an appearance of greater openness while avoiding penetrating questions from journalists who have the knowledge and experience to do meaningful accountability reporting. The administration’s media manipulation extends even to photography: Professional photojournalists are banned from many White House events and presidential activities; only approved images of Obama taken by a White House photographer are supplied to the news media.

Most Americans may not care much about the Obama administration’s openness to the news media or the potential damage to the First Amendment and government accountability resulting from its aggressive war on leaks. But as the administration copes with second-term governing challenges, real national security threats and [darkening clouds of scandal](#), its credibility will become increasingly important to the president’s legacy. It is not too late for Obama’s actions to match his rhetoric.

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