

# Holding the Presidency Accountable: A Path Forward for Journalists and Lawyers

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## INTRODUCTION

Hardly a week went by in 2017 without President Donald Trump railing against the news media, calling for a crackdown on “leaks”<sup>1</sup> and smearing the press as the “enemy of the American people.”<sup>2</sup> As a candidate, Mr. Trump threatened to sue the *New York Times* in response to an article documenting allegations of sexual misconduct.<sup>3</sup> Following the election, Mr. Trump angrily criticized the news site *BuzzFeed*, calling it a “failing pile of garbage.”<sup>4</sup> As president, he refused to answer a question posed by CNN’s Jim Acosta during a press conference, labeling the network “very fake news,”<sup>5</sup> and has retweeted images<sup>6</sup> and videos<sup>7</sup> that appear to glorify violence toward CNN. Several documentation projects have emerged in response to this presidency to track attacks on the press.<sup>8</sup>

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<sup>1</sup> See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 5, 2017, 6:58 PM), <https://twitter.com/realdonaldtrump/status/893969438139191296> [<https://perma.cc/B62X-4ET9>]; Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 20, 2017, 7:02 AM), <https://twitter.com/realdonaldtrump/status/843779892776964097> [<https://perma.cc/3DBZ-CDGH>].

<sup>2</sup> See Michael M. Grynbaum, *Trump Calls the News Media the ‘Enemy of the American People’*, N.Y. TIMES (Feb. 17, 2017), <https://nyti.ms/2IsfEGX> [<https://perma.cc/FS5W-KY34>].

<sup>3</sup> See Alan Rappoport, *Donald Trump Threatens to Sue the Times Over Article on Unwanted Advances*, N.Y. TIMES (Oct. 13, 2016), <http://nyti.ms/2ILX262> [<https://perma.cc/QU8R-PZSM>].

<sup>4</sup> *Donald Trump’s News Conference: Full Transcript and Video*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/us/politics/trump-press-conference-transcript.html> [<https://perma.cc/H2DC-TUD4>].

<sup>5</sup> *Transcript: President Trump’s Exchange with CNN’s Jim Acosta*, CNN: MONEY (Feb. 16, 2017, 2:58 PM), <http://cnnmon.ie/2kZPYkc> [<https://perma.cc/3GVZ-EMEA>].

<sup>6</sup> See *Trump Tweets Cartoon of Train Hitting CNN Reporter*, BBC: US & CANADA (Aug. 15, 2017), <http://www.bbc.com/news/world-us-canada-40940044> [<https://perma.cc/6T4Q-KE3G>].

<sup>7</sup> See Michael M. Grynbaum, *Trump Tweets a Video of him Wrestling ‘CNN’ to the Ground*, N.Y. TIMES (July 2, 2017), <https://www.nytimes.com/2017/07/02/business/media/trump-wrestling-video-cnn-twitter.html> [<https://perma.cc/LFS8-QNNC>].

<sup>8</sup> See, e.g., *Frequently Asked Questions*, U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/frequently-asked-questions/> [<https://perma.cc/9C7D-YHWV>] (citing President Trump’s attacks on journalists and news media as a reason why U.S. Press Freedom Tracker began documenting attacks on the press at large); *Trump the Truth: Free Expression in the President’s First 100 Days*, PEN AMERICA (Apr. 27, 2017), [https://pen.org/wp-content/uploads/2017/04/PEN\\_Trump\\_Truth\\_v3\\_low-res.pdf](https://pen.org/wp-content/uploads/2017/04/PEN_Trump_Truth_v3_low-res.pdf) [<https://perma.cc/B3A2-FPIK>]; *The*

Although the adversarial relationship between the press and the White House is nothing new,<sup>9</sup> there is little doubt that the current rhetoric is remarkable in its harshness and vitriol. Some of the shock value generated by President Trump's statements may be an outgrowth of digitization. Modern media creates information overload that can desensitize both consumers and news outlets, which incentivizes the administration to make increasingly more outrageous comments to garner public attention. This theory is supported by the fact that many of the president's comments may have no teeth: for example, success in "open[ing] up the libel laws" seems unlikely.<sup>10</sup> The threat may be designed to communicate a sentiment to the base rather than a plan to the nation.

As gratuitous as the rhetoric may be, it puts into the public spotlight the inevitable—and perhaps even beneficial—structural tension between the fourth estate and the executive branch. Despite this adversarial tradition, this president's tone is deeply distressing because of its outright dismissal of a historically core tenet of American democracy: that an "informed public opinion is the most potent of all restraints upon misgovernment."<sup>11</sup> President Trump's construction of the press as an enemy therefore looks less like a continuation of a familiar conflict, thrust into the fore by the internet and social media, and more like an attempt to remove a check on presidential power.

This article explores the role of accountability journalists—i.e., journalists engaged in reporting designed to function as a check on the executive. The role of the press as a check on the executive is inextricably intertwined with broader issues of access and unauthorized disclosures to the news media, or leaks. President Trump has explicitly called for a leak crackdown, and statements by Attorney General Jeff Sessions suggest that this crackdown is already underway in the form of criminal leaks investigations, with the possibility of criminal prosecution.<sup>12</sup> This article posits that the threatened leak crackdown should be viewed as a transparency issue.<sup>13</sup> When authorized dis-

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*Trump Administration's War On The Press*, MEDIA MATTERS FOR AMERICA (Feb. 1, 2017), <https://www.mediamatters.org/trumps-war-on-the-press> [<https://perma.cc/LGA6-3PNG>].

<sup>9</sup> See Reid Cherlin, *The Presidency and the Press*, ROLLING STONE (Aug. 4, 2014), <http://www.rollingstone.com/politics/news/the-presidency-and-the-press-20140804> [<https://perma.cc/3T2Q-A283>] (noting that some "dismiss the idea of a worsening trend line, pointing to the deeply rancorous relationship under Clinton even before Lewinsky, for example"); see also Emma Best, *In Internal Memo, CIA Inspector General Portrayed the Media as Agency's 'Principle Villains'*, MUCKROCK (Aug. 1, 2017), <https://www.muckrock.com/news/archives/2017/aug/01/cia-ig-bm> [<https://perma.cc/6HLQ-XGKM>].

<sup>10</sup> See Adam Liptak, *Can Trump Change Libel Laws?*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html> [<https://perma.cc/QZ5G-TFZT>] (explaining that President Trump discussed "open[ing] up libel laws" on the campaign trail).

<sup>11</sup> *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

<sup>12</sup> See Charlie Savage & Eileen Sullivan, *Leak Investigations Triple Under Trump, Sessions Says*, N.Y. TIMES (Aug. 4, 2017), <https://nyti.ms/2urCzCO> [<https://perma.cc/B7GJ-YGES>].

<sup>13</sup> The tension that exists between the executive branch and the news media in the realm of transparency and access is nothing new. It is important to remember that the Obama administration, which promised transparency, was criticized for failing to fully deliver on that promise.

closure of information to the press—in the form of press briefings, source documents, and news media events—is stifled, the press is forced to rely on unauthorized disclosures to hold the executive branch accountable. Simultaneously, a lack of transparency can lead to a legitimacy crisis within the executive branch, in which government decision-making loses its authority and internal actors are more prone to leak. Reporting based on anonymous sources may also result in its own legitimacy crisis because the public could find itself doubting the truthfulness of news stories, no matter how carefully a news organization vets the claims in the story prior to publication. In some sense, then, decreased transparency results in compounded legitimacy crises. An executive branch that shrinks authorized access for reporters, seeks to prosecute unauthorized disclosures, and then maligns the press for using anonymous sources threatens its own support as well as the popular support for the free press.

In other words, a leak crackdown is a way for the executive branch to give full effect to steps taken to decrease authorized access. This interplay between diminished access and increased prosecution for unauthorized access is one of the greatest challenges to accountability journalists. Although this administration is not unprecedented in terms of trying to control access, and certainly is not the first to prosecute a leak, the level of overt intimidation designed to discourage contacts with reporters is capable of creating a new kind of transparency crisis.

In this article, we attempt to identify trends that have affected the ability of the press to function as a check on the presidency and consider ways in which the press can respond to these constraints. First, we survey the current state of the First Amendment and conclude that even as it expands in some areas, it has stagnated in the areas that matter most to the accountability functions of the press. Second, we evaluate the current administration's record on transparency and authorized disclosures and suggest that a golden age for press power as an assertive, "offensive" check against the executive has stalled in some respects, turning the tables and putting the press on the "defensive" against an ever-growing surveillance state. Third, we consider the role of unauthorized disclosures and accountability leaks as a response to closed government and antagonism between the executive and the press. As part of this analysis, we evaluate the most pressing threats in the contemporary legal landscape for journalists, including surveillance and prosecution under the Espionage Act. Finally, we offer practical solutions, grounded in litigation, for journalists to keep the executive accountable. These include civil claims to combat retaliatory measures taken by government officials to punish accountability journalists; constitutional and common law claims to promote access to government and court records that can be useful for reporters; and defenses against potential prosecution of journalists for publishing national security information. The proposed litigation solutions can

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*See, e.g.,* Ted Bridis, *Obama's Final Year: US Spent \$36 Million in Records Lawsuits*, ASSOCIATED PRESS (Mar. 14, 2017), <https://www.ap.org/ap-in-the-news/2017/obamas-final-year-us-spent-36-million-in-records-lawsuits> [<https://perma.cc/8ZBN-7WRN>].

serve as a starting point for attorneys who represent journalists during this critical moment in which the press's role as a check on the executive branch is being challenged in profound ways.

## I. THE STATE OF FIRST AMENDMENT JURISPRUDENCE

The problems journalists face today in covering the Trump administration arise in an era when First Amendment freedoms for the news media are no longer expanding. The great run for the press beginning with *New York Times Co. v. Sullivan*<sup>14</sup> has lost its momentum. Despite this, free press jurisprudence has put the news media in a favorable position to withstand today's threats.

In the past fifty years, case law has settled in favor of protecting journalists' ability to publish information about the government. For example, prior restraints—i.e., muzzling speech before it occurs—are subject to a dauntingly high standard and a “heavy presumption against [their] constitutional validity,”<sup>15</sup> even in the context of national security cases.<sup>16</sup> In the area of libel law, too, courts continue to follow precedent that makes it very difficult for public officials—such as those in the executive branch—to win libel suits, and this law is unlikely to change, notwithstanding threats from President Trump to “open up our libel laws.”<sup>17</sup> Even in the recurring category of the internal Department of Justice guidelines that constrict the government's ability to obtain information (such as confidential sources) from the news media,<sup>18</sup> protection for free press has garnered modest achievements in the past few years, as explained further in Part III.E.

First Amendment rights are expanding in some areas, but not in the area of free press. In fact, the U.S. Supreme Court has not heard a single case

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<sup>14</sup> 376 U.S. 254, 280 (1964) (establishing the “actual malice” standard for a libel suit brought by a public figure); see also *New York Times Co. v. United States* (*Pentagon Papers*), 403 U.S. 713, 714 (1971) (overturning injunctions barring the *New York Times* and the *Washington Post* from publishing classified papers on U.S. involvement in Vietnam).

<sup>15</sup> *Pentagon Papers*, 403 U.S. at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)); see also REPORTERS COMM. FOR FREEDOM OF THE PRESS, THE FIRST AMENDMENT HANDBOOK 41–42 (Gregg P. Leslie ed., 7th ed. 2011), <https://www.rcfp.org/rcfp/orders/docs/FAHB.pdf> [<https://perma.cc/Y6J2-6CD5>] (explaining that the Supreme Court has repeatedly found that prior restraints on the media are presumptively unconstitutional); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) (stating that “it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment] guaranty to prevent previous restraints upon publication”).

<sup>16</sup> See, e.g., *Pentagon Papers*, 403 U.S. at 714 (holding that the *New York Times* and *Washington Post* could publish leaked defense papers because the federal government did not prove the reports would impact national security under the high standard and against the heavy presumption).

<sup>17</sup> See Liptak, *supra* note 10.

<sup>18</sup> See Memorandum from Attorney Gen. Eric Holder to all Justice Dep't Emps. (Jan. 14, 2015), <https://www.justice.gov/file/317831/download> [<https://perma.cc/PV9M-VT37>] (discussing updates to department guidelines about seeking news media records).

directly involving news media rights in the past sixteen years.<sup>19</sup> In 2001, the Court held in *Bartnicki v. Vopper*<sup>20</sup> that a radio station was not liable under wiretapping laws for broadcasting a tape that was improperly obtained by a third party, so long as the radio station did nothing illegal to obtain the tape and the information was a matter of public concern.<sup>21</sup> Though protective of publishers' rights, *Bartnicki* marked the end of an era—at least for now—wherein the Supreme Court expanded First Amendment rights for journalists.<sup>22</sup> Whether or not First Amendment case law involving the press resumes at some point in the future, what is clear now is that the current, settled First Amendment doctrine does not answer all the legal questions that can and likely will be raised by modern accountability journalism.

This stagnation of First Amendment case law regarding free press in the twenty-first century is particularly pronounced when viewed alongside the expansion of First Amendment protections in other areas of the law. For example, recent Supreme Court case law has generally shown a strong trend toward protecting First Amendment expressive rights. Most recently, in two 2017 Supreme Court decisions—*Matal v. Tam*<sup>23</sup> and *Packingham v. North Carolina*<sup>24</sup>—the Court unanimously ruled in favor of First Amendment rights. In *Matal*, the Court held that a federal law prohibiting registration of “disparaging” trademarks violated the First Amendment,<sup>25</sup> and in *Pack-*

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<sup>19</sup> Similarly, the Supreme Court has not heard a media libel case since 1991, when it held in *Masson v. New Yorker*, 501 U.S. 496, 524 (1991), that inaccuracies in someone's quote could be libelous if the inaccuracy materially altered the meaning of the statement.

<sup>20</sup> 532 U.S. 514 (2001).

<sup>21</sup> *Id.* at 518–19, 535.

<sup>22</sup> *See, e.g., Sullivan*, 376 U.S. at 280 (establishing an actual malice requirement for defamation claims brought by public officials); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 164 (1967) (extending *Sullivan*'s holding to include public figures like celebrities); *Pentagon Papers*, 403 U.S. at 714 (holding that newspapers could publish leaked defense papers because the federal government did not meet the “heavy burden” of a prior restraint); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (holding that a private person who establishes liability under a less demanding standard than the actual malice standard may recover compensation only for actual injury); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (holding unconstitutional a gag order on press coverage of a criminal trial and stating that “prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment Rights”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (holding that the press and the public have a constitutional right to attend criminal trials); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (in the context of a state law that required newspapers to give political candidates who were criticized in editorials the right of reply, holding that state governments cannot control the content of the press by placing parameters on proper coverage). Compare this line of cases to the Supreme Court's more recent denial of certiorari in other cases involving the rights of the news media, particularly reporters' privilege. *See, e.g., James Risen, v. United States*, 724 F.3d 482 (4th Cir. 2013), *cert. denied*, *Risen v. United States*, 134 S. Ct. 2696 (2014); *Vanessa Leggett v. United States*, 535 U.S. 1011 (2002) (denying certiorari to an unpublished 5th Circuit opinion in a case in which a reporter was incarcerated for refusing to disclose newsgathering research to a federal grand jury); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, *Miller v. United States*, 545 U.S. 1150 (2005).

<sup>23</sup> 137 S. Ct. 1744 (2017).

<sup>24</sup> 137 S. Ct. 1730 (2017).

<sup>25</sup> 137 S. Ct. at 1748.

ingham, it held that a state law prohibiting sex offenders from creating profiles on social media and other websites violated the First Amendment.<sup>26</sup> The soaring language in *Matal* further confirmed the Court's endorsement of a broad reading of the First Amendment:

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.<sup>27</sup>

Other Supreme Court cases from the past decade show a pattern of consistent support for the First Amendment, perhaps more so than any other constitutional right.<sup>28</sup> None of these cases, however, specifically involved the press.<sup>29</sup>

And although the Supreme Court has taken a robust approach to the First Amendment when it comes to incitement<sup>30</sup> or defamation,<sup>31</sup> it has often stopped short when the question of speech is couched in the context of national security.<sup>32</sup> In *Holder v. Humanitarian Law Project*,<sup>33</sup> for example, the Court was willing to uphold a restriction on political speech under a strongly speech-protective standard, affirming legislation aimed at prohibiting the provision of material support to foreign terrorist organizations.<sup>34</sup> Lower courts follow suit: when national security is invoked, courts are generally reluctant to choose free speech.<sup>35</sup>

<sup>26</sup> 137 S. Ct. at 1737.

<sup>27</sup> *Matal*, 137 S. Ct. at 1769 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>28</sup> See, e.g., *United States v. Stevens*, 559 U.S. 460, 470 (2010) (holding 8-1 in the context of "crush videos" that government couldn't create new ad hoc exceptions to the First Amendment by "balancing" public interests against free speech rights); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366 (2010) (holding that campaign spending regulations infringed upon corporations and other organizations' free speech rights); *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) (holding 8-1 that "intentional infliction of emotional distress" couldn't be used to punish commentary such as that in the Westboro Baptist Church funeral protests); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (unanimously striking down a local law prohibiting political signs on entire subjects even if the regulation was viewpoint-neutral).

<sup>29</sup> Although these expansions in First Amendment protection were not media related, they may, in fact, be an indirect result of constitutional developments in the area of free press seen in the last half of the twentieth century. Some experts have proposed that when legal protections for the press expand, those cases can kick off an extension of other First Amendment freedoms. See Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 937 (1992) (speculating that *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), which upheld protections against prior restraint on publication, resulted in free speech expansion more broadly).

<sup>30</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>31</sup> *Sullivan*, 376 U.S. 254 (1964).

<sup>32</sup> See *Brandenburg*, 395 U.S. at 447; *Sullivan*, 376 U.S. at 271; see also Anthony Lester, *Two Cheers for the First Amendment*, 8 HARV. L. & POL'Y REV. 177, 183 (2014).

<sup>33</sup> 561 U.S. 1 (2010).

<sup>34</sup> See *id.* at 39.

<sup>35</sup> See Lester, *supra* note 32, at 178.

As the Fourth Circuit recognized in 1986, “History teaches us how easily the specter of a threat to ‘national security’ may be used to justify a wide variety of repressive government actions.”<sup>36</sup> The twentieth-century trend of expanding First Amendment jurisprudence to promote press freedoms seems to be slowing as the definition of national security is expanding. These trends are related because although not all journalists cover national security, journalists seeking to hold the executive branch accountable often must rely on classified information or information related to national security. As the definition of national security information expands, so too does the subcategory of journalists who encounter national security information as part of their reporting on the executive. Although the Supreme Court has not answered the question of whether a journalist can be punished for publishing truthful information related to national security,<sup>37</sup> an open question is far from comforting, especially when courts tend to give deference to the executive branch in the realm of national security. And unfortunately, when reporters seek to hold the executive accountable by reporting on matters central to executive branch governance—such as diplomatic affairs, military conduct, homeland security, or even certain types of domestic law enforcement policies such as government surveillance—national security is quickly invoked. While there are significant ways in which First Amendment rights expanded to help journalists in the twentieth century, beginning with *New York Times Co. v. Sullivan*<sup>38</sup> and its progeny, First Amendment jurisprudence touching on the ability of a free press to hold the executive branch to account has, in the past fifteen years, languished.

## II. TRANSPARENCY THROUGH OFFICIAL CHANNELS

Journalists seeking to hold the presidency accountable first and foremost need access to truthful information about the executive branch. Unfortunately, the current administration’s record on transparency is bleak.

### A. *Trump and Transparency*

Shortly after President Trump came into office, publicly available data on government websites began to vanish. Much of the content of the website the Obama administration had launched to increase transparency—[open.whitehouse.gov](http://open.whitehouse.gov)<sup>39</sup>—was taken down without any notice.<sup>40</sup> Circulars on technology and privacy policies were removed from the Office of Manage-

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<sup>36</sup> *In re Wash. Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986).

<sup>37</sup> See *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001); *Pentagon Papers*, 403 U.S. at 714.

<sup>38</sup> 376 U.S. 254 (1964).

<sup>39</sup> To view this website in archive form, see OBAMA WHITE HOUSE ARCHIVES: OPEN WHITE HOUSE, <https://open.obamawhitehouse.archives.gov/> [<https://perma.cc/PJ87-KR3G>].

<sup>40</sup> See Tracie Mauriello, *Government Watchdogs Criticize Trump’s Removal of Open Data Sets*, GOV’T TECH.: DATA (Feb. 22, 2017), <http://www.govtech.com/data/Government-Watchdogs-Criticize-Trumps-Removal-of-Open-Data-Sets.html> [<https://perma.cc/YN4N-T84P>].

ment and Budget website,<sup>41</sup> and other agencies also deleted content from their websites.<sup>42</sup> The removed documents may be available through Freedom of Information Act (FOIA) requests,<sup>43</sup> but the FOIA process is limited and lengthy, as described below in Part II.B, and may not be successful. The administration has also been embroiled in controversy surrounding the White House's decisions to keep its visitor logs secret and President Trump's tax returns private.<sup>44</sup>

President Trump has also broken with tradition when it comes to holding press conferences. Since as early as 1976, presidents-elect often held a news conference within three days of the election.<sup>45</sup> President Trump waited until February 16 and then railed against the news media for purportedly being “so dishonest,” “[speaking] for the special interests and for those profiting off a very, very obviously broken system,” and “trying to attack [his] administration.”<sup>46</sup> Since then, President Trump has held fewer press conferences than his contemporary predecessors<sup>47</sup> and the White House temporarily suspended on-camera press briefings in the summer.<sup>48</sup> This lack of transparency extends to other members of the Trump administration, including Secretary of State Rex Tillerson, who speaks to the media less frequently than his predecessors<sup>49</sup> and has not traveled with a full press corps.<sup>50</sup>

This lack of transparency in the current administration has rightfully been described as a “self-inflicted wound” because of the criticism it engen-

<sup>41</sup> *Compare Circulars*, WHITE HOUSE: OFF. MGMT. & BUDGET, <https://www.whitehouse.gov/omb/information-for-agencies/circulars#special> [<https://perma.cc/R4F2-6PHP>], with *Information Policy*, OBAMA WHITE HOUSE ARCHIVES: OFF. MGMT. & BUDGET, [https://obamawhitehouse.archives.gov/omb/inforeg\\_infopoltech#pg](https://obamawhitehouse.archives.gov/omb/inforeg_infopoltech#pg) [<https://perma.cc/TAG3-QL27>].

<sup>42</sup> See Karin Brulliard, *USDA Abruptly Purges Animal Welfare Information from its Website*, WASH. POST (Feb. 3, 2017), <http://wapo.st/21YjxTF> [<https://perma.cc/WLS5-FGJ8>].

<sup>43</sup> See *Updates to APHIS' Website Involving Animal Welfare Act and Horse Protection Act Compliance Information*, U.S. DEP'T AGRIC. (last modified Feb. 15, 2017), [https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa\\_by\\_date/sa-2017/sa-02/awa-hpa-compliance](https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2017/sa-02/awa-hpa-compliance) [<https://perma.cc/3RT3-X798>].

<sup>44</sup> See Nolan D. McCaskill, *Trump's White House on Defensive over Transparency*, POLITICO: WHITE HOUSE (Apr. 17, 2017, 7:09 PM), <http://www.politico.com/story/2017/04/donald-trump-transparency-privacy-237297> [<https://perma.cc/7GG5-SX6U>].

<sup>45</sup> See Tom Kludt, *Still No News Conference from President-Elect Trump*, CNN MEDIA: TRANSITION POWER (Nov. 18, 2016, 10:21 AM), <http://cnnmon.ie/2gGXm1y> [<https://perma.cc/5P76-UEHA>].

<sup>46</sup> See *Trump's Thursday Press Conference, Annotated*, NPR (Feb. 16, 2017, 2:37 PM), <http://n.pr/2kuREn6> [<https://perma.cc/A5G7-QCBK>].

<sup>47</sup> See Carrie Dann, *Trump Lags Predecessors in Press Conferences*, NBC NEWS (June 20, 2017, 5:54 PM), <https://www.nbcnews.com/politics/first-read/trump-lags-predecessors-press-conferences-n774881> [<https://perma.cc/8RKT-2AT9>].

<sup>48</sup> See Jordan Fabien, *Sanders, Fox Reporter Exchange Jabs Over Off-Camera Briefings*, HILL (July 18, 2017, 3:07 PM), <http://thehill.com/homenews/administration/342565-sanders-fox-reporter-exchange-jabs-over-off-camera-briefings> [<https://perma.cc/94HP-DWJE>].

<sup>49</sup> See Alan Yuhas, *Rex Tillerson Defends Blocking Reporters from Diplomatic Trip to Asia*, GUARDIAN (Mar. 18, 2017, 1:53 PM), <https://www.theguardian.com/us-news/2017/mar/18/rex-tillerson-blocks-press-travel-asia> [<https://perma.cc/67AC-XLEJ>].

<sup>50</sup> See Hadas Gold, *Press Corps Blasts Tillerson for Cherry-Picking Reporters*, POLITICO (Mar. 15, 2017, 7:09 PM), <https://www.politico.com/story/2017/03/rex-tillerson-reporters-asia-state-236109> [<https://perma.cc/6RSW-TA67>].



ders.<sup>51</sup> But this characterization should not detract from the wound caused to the public when the press is cut off from valuable information. As the Sunlight Foundation found in its report on the Trump administration's record on open government, the conclusion is "inescapable: this is a secretive administration, allergic to transparency, ethically compromised, and hostile to the essential role that journalism plays in a democracy."<sup>52</sup> Lack of transparency, then, is the first major hurdle journalists must overcome to report on this executive.

### B. *The Limits of FOIA*

When reporters are blocked from press briefings and source documents posted on websites are taken down, reporters may instead rely on FOIA, which permits reporters to submit letters to executive branch agencies seeking specific unclassified documents for public review. Investigative journalists make good use of FOIA to write stories that prompt substantive policy change in the government.<sup>53</sup> Due in part to the passage of FOIA, the middle of the twentieth century led to the "rise of the right to know" in the United States.<sup>54</sup>

And yet, after fifty years of experimenting with FOIA, its shortcomings remain considerable. To journalists seeking breaking news that will keep the executive accountable in real-time, FOIA has been less than the speedy and comprehensive tool that was promised—journalists wait months or years for records, which are then often heavily redacted or incomplete. The failure of FOIA is evidenced both by the delay of agencies' responses to FOIA requests, and by agencies' overuse of its set of nine statutory exemptions, which can shield critical information under sweeping secrecy laws.<sup>55</sup> For example, the seventh statutory exemption shields information compiled for law enforcement purposes, with limited exceptions, and this exemption is frequently invoked to withhold information that would be useful to a national security journalist. And as the *New York Times*'s David McCraw recognized, FOIA is "deeply flawed": where there should have been "restorative judicial intervention," there were instead "broadly worded exemptions that gave

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<sup>51</sup> Jeremy Venook, *The Trouble with Trump's Uneven Approach to Transparency*, ATLANTIC (May 25, 2017) <https://www.theatlantic.com/business/archive/2017/05/trump-uneven-approach-transparency/528165/> [<https://perma.cc/6UWV-GPQR>].

<sup>52</sup> *On Trump, Transparency and Democracy*, SUNLIGHT FOUND. (July 20, 2017, 11:20 AM) <https://sunlightfoundation.com/2017/07/20/trump-administration-open-government-record/> [<https://perma.cc/4GRV-73QB>].

<sup>53</sup> See JAMES T. HAMILTON, *DEMOCRACY'S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM* 153–60 (2016).

<sup>54</sup> MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY 1945–1975*, at 28–63 (2015).

<sup>55</sup> See David McCraw, *FOIA Litigation Has Its Own Rules, But We Deserve Better*, JUST SECURITY (Mar. 15, 2016, 11:55 AM), <https://www.justsecurity.org/29974/foia-litigation-rules-deserve/> [<https://perma.cc/ETX6-MELU>].

the agencies wide latitude to shield records” and deny requests.<sup>56</sup> Mr. McCraw suggests the blame for this failure ultimately lies with the courts, which he claims “have effectively institutionalized [misuse] as legal and proper.”<sup>57</sup> Whatever its virtues, FOIA is not the solution to tackling access issues that cripple journalists’ ability to engage in accountability journalism.

### III. TRANSPARENCY THROUGH ACCOUNTABILITY LEAKS

Even under a perfectly transparent government, journalists would rely on independent investigation and anonymous sources to confirm facts. As the Supreme Court has stated, “[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information.”<sup>58</sup> Especially when the government does not supply any information and instead strips the press of authorized access to the executive, journalists are forced to rely more heavily on unauthorized access. Journalists focused on holding the executive accountable will be particularly dependent on “accountability leaks”—i.e., disclosures specifically aimed toward shedding light on abusive, systemic government practices.<sup>59</sup> The reliance on leaks leaves journalists with relatively little control over the flow of information, compared to affirmative government obligations to supply information. Such reliance on leaks also threatens to entangle journalists in criminal leaks investigations, as explained below.

#### A. *The Environment for Accountability Leaks*

A general consensus seems to have emerged since the 2016 presidential election that unauthorized disclosures to the news media, or leaks, are occurring at a more rapid pace than ever before.<sup>60</sup> The Republican staff of the Senate Committee on Homeland Security and Governmental Affairs released a report in July 2017 (the “Senate leaks report”) that attempted to map individual news stories containing leaks and concluded that leaks were

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<sup>56</sup> David E. McCraw, *The “Freedom From Information” Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 *YALE L.J. F.* 232, 234 (2016), [https://www.yalelawjournal.org/pdf/McCrawMacroed\\_bdpwrc38.pdf](https://www.yalelawjournal.org/pdf/McCrawMacroed_bdpwrc38.pdf) [<https://perma.cc/8JFQ-WYLT>]; see also David E. Pozen, *Transparency’s Ideological Drift* (unpublished manuscript) (on file with Harvard Law & Policy Review) arguing that “journalists play a more marginal role than was anticipated” in FOIA and that, instead, business enterprises and their representatives benefit from the use of FOIA).

<sup>57</sup> *Id.*; see also David E. Pozen, *Transparency’s Ideological Drift*.

<sup>58</sup> *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 104 (1979).

<sup>59</sup> See Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 *HARV. L. & POL’Y REV.* 281, 303 (2014).

<sup>60</sup> See Michael M. Grynbaum & John Koblin, *After Reality Winner’s Arrest, Media Asks: Did ‘Intercept’ Expose a Source?*, *N.Y. TIMES* (June 6, 2017), <https://nyti.ms/2sQHAVs> [<https://perma.cc/KYL4-UA9J>] (“Journalism in the Trump era has featured a staggering number of leaks . . .”).

occurring at an average rate of one per day.<sup>61</sup> The Senate leaks report has been criticized for its conclusions and methodology,<sup>62</sup> and it fails to distinguish accountability leaks—which expose government conduct and potential corruption—from other leaks, such as revelations of embarrassing information, or “trial balloon” leaks<sup>63</sup> planted by authorized, anonymous government sources in the news media to gauge the public’s reaction to a proposed policy change. Despite the report’s lack of meaningful nuance, its underlying premise—that leaks are increasing—is largely unchallenged by the public, the press, and other congressional representatives. The acceptance of this conclusion is notable because the report provides limited evidence demonstrating a stark increase in leaks in the past year, and it is very difficult, if not impossible, to accurately and empirically measure the number of leaks in any given timeframe.<sup>64</sup> Indeed, leaks have always been part of the fabric of journalism in the nation’s capital, and are even routinely used by government officials to promote the administration’s agenda.<sup>65</sup> Why has this perception of a spike in leaks under the Trump administration emerged? And if, in fact, there are more leaks, what might account for that increase?

In examining national security leaks, Professor Patricia Bellia in a *Yale Law Journal* article suggested four interrelated factors that “shape the environment for leaks”: “the sheer volume of defense-related information available,” “the problem of ‘overclassification’ that contributes to that volume,” “the broad range of access” to defense-related information, and “the ease of compactly reproducing such information.”<sup>66</sup>

The first two factors can be collapsed into one explanation centered on definitions. Rather than understanding the uptick as an objective increase in leaks, this approach argues that the definition of leaks itself is expanding. Over time, the government generates more documents overall, and the percentage of those documents marked as classified increases in tandem. Ample literature examines this problem of overclassification.<sup>67</sup>

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<sup>61</sup> See Rebecca Savransky, *Senate Republicans: Leaks Harming National Security*, HILL (July 6, 2017, 8:32 AM), <http://thehill.com/homenews/senate/340789-senate-homeland-security-republicans-leaks-harming-national-security> [https://perma.cc/A49J-HFCB].

<sup>62</sup> See Alexandra Ellerbeck, *US Senate Report on Leaks and National Security is Deeply Flawed*, COMM. TO PROTECT JOURNALISTS (July 10, 2017, 12:39 PM), <https://cpj.org/x/6d87> [https://perma.cc/E46Y-P4TA].

<sup>63</sup> See Martin Arnold, *The News ‘Leak’: A Washington Necessity*, N.Y. TIMES (Oct. 8, 1973), <https://nyti.ms/2BCUhrO> [https://perma.cc/9GFU-UZVF].

<sup>64</sup> See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 528–30 (2013) (surveying evidence and noting at 528 n.74 that national security journalists stated “any effort to systematically isolate ‘leak-based stories’ through objective, observable criteria is destined to fail”).

<sup>65</sup> See generally *id.*

<sup>66</sup> Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1518–19 (2012).

<sup>67</sup> See, e.g., Elizabeth Goitein & J. William Leonard, *America’s Unnecessary Secrets*, N.Y. TIMES (Nov. 7, 2011), <https://nyti.ms/2zp5CK9> [https://perma.cc/2QGU-MGA7]; Elizabeth Goitein & David M. Shapiro, *Reducing Overclassification Through Accountability*, BRENNAN CENTER FOR JUSTICE (2011), [http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan\\_Overclassification\\_Final.pdf](http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan_Overclassification_Final.pdf) [https://perma.cc/Z3DS-ESKH]; Tom Blanton,

The second two factors can likewise be collapsed into one explanation centered on technology. Over time, technology makes it easier for information to be reproduced and shared widely—both within the government and without, as information is passed on to journalists. The internet also makes it easier for journalists to share these leaks with a broader audience, increasing the perception that leaks are pervasive. Relatedly, though the number of print publications has shrunk in recent years, the shift of news media to the internet has increased the sheer number of published news stories. A greater number of news stories overall could lead to a larger number of articles based on leaks, even if leaks-based coverage remains the same as a percentage of stories overall.<sup>68</sup> And as explained further below in Part III.D, reliance on technology in the newsgathering process also makes it easier for prosecutors and the FBI, through electronic surveillance, to identify and build a case against individual leakers, putting those leaks in the spotlight.

The problem with these explanations today is that they do not account for two trends in the Senate leaks report: first, the apparent uptick in leaks under the Obama administration, and second, the more dramatic spike under the Trump administration. In 2014, Professor Yochai Benkler recognized that technology could not account for the increase in accountability leaks in the prior decade and observed that the increase mirrored an increase during the Vietnam War era.<sup>69</sup> He observed that leaks during these uptick eras purported to expose “a systemic need for accountability” and suggested that they resulted from “legitimacy crises,” or a loss of legitimacy of government decisions as perceived by individual actors within the government.<sup>70</sup> These legitimacy crises coincide with moments of national security overreach during the Vietnam War and in post-9/11 government practices, when there exists a threat of unchecked emergency powers, human and civil rights violations, and expansion of the national security establishment, reflecting “the government’s need to shield its controversial actions from public scrutiny and debate.”<sup>71</sup> As Professor Benkler explains, secrecy in response to national security threats only results in flawed “self-reinforcing internal or-

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*America classifies way too much information — and we are all less safe for it*, WASH. POST (July 31, 2015), [https://www.washingtonpost.com/opinions/the-united-states-is-not-safer-when-its-citizens-are-left-in-the-dark/2015/07/31/641b53fa-36e2-11e5-b673-1df005a0fb28\\_story.html?utm\\_term=.ee7bca0c745b](https://www.washingtonpost.com/opinions/the-united-states-is-not-safer-when-its-citizens-are-left-in-the-dark/2015/07/31/641b53fa-36e2-11e5-b673-1df005a0fb28_story.html?utm_term=.ee7bca0c745b) [<https://perma.cc/PXEZ-VVBX>]. A leak can consist of nonpublic, unclassified information, see Pozen, *supra* note 64, at 534 n.114 (discussing the prosecution of Jonathan Randel for leaking sensitive but unclassified Drug Enforcement Agency information), and not every disclosure of classified information is an unlawful leak under the Espionage Act, see Bellia, *supra* note 66, at 1518. There is, however, a strong correlation between the two because a confidential classification is typically one of several factors that must be present before the Justice Department will investigate a leak. In other words, leaks as used in this paper often, but not always, involve classified information.

<sup>68</sup> See Robinson Meyer, *How Many Stories Do Newspapers Publish Per Day?*, ATLANTIC (May 26, 2016), <https://www.theatlantic.com/technology/archive/2016/05/how-many-stories-do-newspapers-publish-per-day/483845/> [<https://perma.cc/RFD6-SVBY>].

<sup>69</sup> See Benkler, *supra* note 59, at 283.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 284.

ganizational dynamics” that cannot be corrected by external scrutiny.<sup>72</sup> He provides the example of post-9/11 torture—a human rights violation that persisted due to secrecy and which, he says, failed to make America safer from terrorism.<sup>73</sup>

This analysis raises the possibility of a third explanation for leaks that might account for the spike—if one exists—under the Obama administration and, later, the Trump administration: an apparent increase in leaks is a direct response to decreased transparency. This is not to say that leaks themselves are necessarily increasing; it is plausible that journalists in a previous era relied on leakers to confirm the truth of the facts they cited, but chose to reference in their stories only the underlying source documents, official statements, and similar authorized disclosures, rather than their anonymous sources. Or perhaps Professor Benkler is correct that secrecy provides insiders with limited opportunities to challenge abusive government practices, and leaks are a safety valve driven by conscience in an environment where transparency leads to a legitimacy crisis.<sup>74</sup> Or, alternatively, it is possible that the current administration represents an unprecedented threat to the rule of law, leading principled insiders who do not trust authorized whistleblowing procedures to respond with a wave of leaks to the press. It is therefore possible that leaks are, indeed, increasing—and without robust and reliable empirical evidence, we may never know. But either way, the important phenomenon is the very tangible, immediate, and indisputable decrease in executive branch transparency—that is the root of any leaks problem, real or perceived.

### B. *The Chilling Effect of a Leak Crackdown*

Under recent presidential administrations, the noose around leakers has been slowly closing. In the George W. Bush administration, then-Attorney General John Ashcroft determined that the best way to handle leaks was to engage in “rigorous investigation” and tougher enforcement of existing laws.<sup>75</sup> Under the Obama administration, the Justice Department stepped up prosecution of people for leaking to the news media. In total, the Obama Justice Department brought nine cases—more than all prior administrations combined.<sup>76</sup> While the “war on leaks” has existed in some form for the past

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<sup>72</sup> *Id.*

<sup>73</sup> *See id.*

<sup>74</sup> *See id.* at 302–05.

<sup>75</sup> Letter from John Ashcroft, Attorney Gen., Dep’t of Justice, to J. Dennis Hastert, Speaker of the House, U.S. House of Representatives (Oct. 15, 2002), <https://fas.org/sgp/othersgov/dojleaks.html> [<https://perma.cc/QT8L-5AG9>]; *see also* Walter Pincus, *Senator May Seek Tougher Law on Leaks*, WASH. POST (Feb. 17, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/16/AR2006021602186.html> [<https://perma.cc/EEC6-X2DD>].

<sup>76</sup> *See* Greg Price, *Obama’s ‘War on Leakers’ was More Aggressive Than Trump’s So Far*, NEWSWEEK (Aug. 4, 2017, 2:09 PM), <http://www.newsweek.com/obama-leaks-trump-sessions-646734> [<https://perma.cc/Q7ZX-B3SH>]. It is important to note that there are a variety of ways to count leak prosecutions. *See, e.g.*, Pozen, *The Leaky Leviathan*, *supra* note 64, at 534. This paper adopts the general consensus view that the Obama administration’s leak prosecution

couple decades, it seems to have increased in intensity and seriousness with each new administration. The Obama Justice Department brought on average slightly more than one leak prosecution per year; thus far, the Trump Justice Department initiated one leak prosecution just months into its term,<sup>77</sup> and claims to be pursuing others.<sup>78</sup> Although it is too early to know for sure whether the Trump Justice Department will prosecute more leaks than the prior administration, it would be no surprise to see an uptick in leaks investigations and prosecutions, and certainly more aggressive rhetoric.

Building off the last administration's dogged crackdown, the current administration has repeatedly called for law enforcement to investigate leaks of information to the news media from within the government.<sup>79</sup> Officials from the Trump administration have particularly criticized news stories that rely on anonymous sources, including one by the *New York Times* about contacts between members of the Trump campaign and Russia.<sup>80</sup> The White House Chief of Staff at the time, Reince Priebus, called the report "total baloney" and stated that the *New York Times* did not have "a single source on the record saying that [the Trump] campaign had constant contacts" with Russian intelligence officials.<sup>81</sup>

After the FBI reportedly refused to provide public support for Mr. Priebus's claim that ties between the Trump campaign and Russia were "fake news," President Trump tweeted: "[F]ind the leakers within the FBI itself. Classified information is being given to media that could have a devastating effect on U.S. FIND NOW."<sup>82</sup> President Trump has also paradoxically called such leaks "real" while simultaneously labeling the news stories that

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tally landed at nine (Thomas Drake, Shamai Leibowitz, Chelsea Manning, John Kiriakou, Donald Sachtleben, Stephen Jin-Woo Kim, Jeffrey Sterling, Edward Snowden, and James Cartwright), with two of those prosecutions (Drake and Sterling) resulting from investigations that began during the Bush presidency.

<sup>77</sup> See Cleve R. Wootson Jr., *Trump Rages About Leakers. Obama Quietly Prosecuted Them*, WASH. POST (June 8, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/06/08/trump-rages-about-leakers-obama-quietly-prosecuted-them/?utm\\_term=.504a7a1808b9](https://www.washingtonpost.com/news/the-fix/wp/2017/06/08/trump-rages-about-leakers-obama-quietly-prosecuted-them/?utm_term=.504a7a1808b9) [<https://perma.cc/9V68-BRQZ>].

<sup>78</sup> See Charlie Savage & Eileen Sullivan, *Leak Investigations Triple Under Trump, Sessions Says*, N.Y. TIMES (Aug. 4, 2017), <https://nyti.ms/2urCzCO> [<https://perma.cc/SDZK-3EEQ>].

<sup>79</sup> See Dorothy Samuels, *The Trump-Sessions Leak Crackdown*, AM. PROSPECT (Aug. 17, 2017), <http://prospect.org/article/trump-sessions-leak-crackdown> [<https://perma.cc/5Y4Y-5SBK>].

<sup>80</sup> See Michael S. Schmidt et al., *Trump Campaign Aides Had Repeated Contacts with Russian Intelligence*, N.Y. TIMES (Feb. 14, 2017), <http://nyti.ms/2kQXcac> [<https://perma.cc/2WMZ-P5Q6>].

<sup>81</sup> Kailani Koenig, *Reince Priebus Denies FBI Spoke with Anyone Else In White House*, NBC NEWS (Feb. 19, 2017, 11:00 AM), <http://nbcnews.to/2lJMDuX> [<https://perma.cc/2C5H-V3T7>] (containing a video interview with Reince Priebus entitled "Vice President is in the Loop on Everything" in which Mr. Priebus begins speaking on this subject after the six-minute mark).

<sup>82</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 24, 2017, 4:36 AM), <http://bit.ly/2lDjScG> [<https://perma.cc/9524-BYY6>].

report them “fake”: “The news is fake because so much of the news is fake,” he said at a press conference at the White House.<sup>83</sup>

One major concern about the threatened leak crackdown is that the focus seems to sweep more broadly than even the few national security leaks that might, ostensibly, contain damaging national defense information (NDI). Although Attorney General Sessions in his statements has focused on the harm of leaks to national security,<sup>84</sup> the aforementioned Senate leaks report conflated national security stories with those that were simply embarrassing to the administration, such as a Reuters piece reporting “on how the National Security Council puts [President Trump’s] name in briefings so he will keep reading.”<sup>85</sup> Although these stories may cause reputational damage, they involve no national security concerns. As the Supreme Court recently reiterated: “It is well established that, as a general rule, the Government ‘may not suppress lawful speech as the means to suppress unlawful speech.’”<sup>86</sup> A broad crackdown on all leaks does precisely that.

The threatened crackdown in response to a perceived leak spike should therefore be viewed as the latest step in a campaign against transparency. At best, the threat discourages sources from speaking with reporters, blocking information necessary to hold the executive branch accountable. This chilling effect is well documented.<sup>87</sup> At worst, the rhetoric coming from President Trump should trouble reporters because it hints at his potential willingness to take the unprecedented step of prosecuting not just sources under the Espionage Act for disclosing information, as the Obama administration did, but also reporters for publishing truthful information, as no administration ever has.

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<sup>83</sup> See March Hensch, *Trump: Leaks are Real, News is Fake*, HILL (Feb. 16, 2017, 2:18PM), <http://bit.ly/2lA2eJq> [<https://perma.cc/EM5T-VMKN>].

<sup>84</sup> See, e.g., Josh Gerstein, *Sessions’ Broad Attack on Leaks Aimed at an Audience of One: Trump*, POLITICO: WHITE HOUSE (Aug. 4, 2017, 6:53 PM), <http://www.politico.com/story/2017/08/04/trump-jeff-sessions-leaks-media-241334>, [<https://perma.cc/L5HN-LXJG>] (noting that Attorney General Sessions stated during a press conference that “[w]e must balance the press’ role with protecting national security and the lives of those who serve in the intelligence community and all law-abiding Americans”).

<sup>85</sup> Rebecca Savransky, *NSC Officials Include Trump’s Name as Often as Possible so He Reads Memos: Report*, HILL (May 17, 2017, 9:31 AM), <http://thehill.com/homenews/administration/333788-nsc-official-include-trumps-name-as-often-as-possible-so-he-reads> [<https://perma.cc/4DMG-ZXXZ>].

<sup>86</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002)).

<sup>87</sup> See generally PEN AM., GLOBAL CHILLING: THE IMPACT OF MASS SURVEILLANCE ON INTERNATIONAL WRITERS (2015), [https://pen.org/sites/default/files/globalchilling\\_2015.pdf](https://pen.org/sites/default/files/globalchilling_2015.pdf) [<https://perma.cc/VF84-S9VR>]; HUMAN RIGHTS WATCH, WITH LIBERTY TO MONITOR ALL: HOW LARGE-SCALE U.S. SURVEILLANCE IS HARMING JOURNALISM, LAW AND AMERICAN DEMOCRACY (2014), [https://www.hrw.org/sites/default/files/reports/usnsa0714\\_ForUpload\\_0.pdf](https://www.hrw.org/sites/default/files/reports/usnsa0714_ForUpload_0.pdf) [<https://perma.cc/58BZ-3C4V>].

### C. *The Emerging Threat of Prosecution for Publishing*

There has never in U.S. history been a criminal prosecution of a journalist based on the publication of national security information,<sup>88</sup> and the closest the Supreme Court has come to ruling on such an issue was in *New York Times Co. v. United States*,<sup>89</sup> better known as the *Pentagon Papers* case. That 1971 case involved the question of whether President Richard Nixon could force the *New York Times* and *Washington Post* to suspend publication of classified information. The Court's opinion invalidating the injunctions was fractured, but as David McCraw put it, "[T]he consensus that has emerged over these past 45 years [is] that the press cannot be stopped from publishing secrets. That is what the *Pentagon Papers* case has come to stand for, no matter what it actually said."<sup>90</sup>

The problem with the *Pentagon Papers* case is that it falls short of a full-throated defense of press rights. Justice White in his concurrence directly discussed prosecuting a journalist after publication.<sup>91</sup> Indeed, the current understanding, taking the *Pentagon Papers* case into account, seems to be that while the press cannot be stopped *ex ante* from publishing secrets, the *ex post* imposition of punishment for publication could be permissible.<sup>92</sup> The most commonly cited law that threatens to be used to prosecute journalists is the Espionage Act, a law passed one hundred years ago shortly after the United States declared war on Germany.<sup>93</sup> While the application of this law to journalists for publishing truthful information has not yet been legally tested, the Justice Department has not ruled out the possibility that it could apply to journalists,<sup>94</sup> and several legal experts have stated that they are con-

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<sup>88</sup> See HLPB: *Can Journalists Be Prosecuted for Publishing Classified Information?*, AMERICAN CONSTITUTION SOCIETY BLOG (Feb. 8, 2007), <https://www.acslaw.org/acsblog/hlpr-can-journalists-be-prosecuted-for-publishing-classified-information> [<https://perma.cc/K9NL-ZZW3>] (quoting an article by University of Chicago Law Professor Geoff Stone, who wrote that the "United States has made it through more than two hundred years without ever finding it necessary to prosecute a journalist for soliciting a public employee to disclose confidential national security information"); Alison Frankel, *Journalists and the Espionage Act: Prosecution risk is remote but real*, REUTERS (June 24, 2013), <http://blogs.reuters.com/alison-frankel/2013/06/24/journalists-and-the-espionage-act-prosecution-risk-is-remote-but-real/> [<https://perma.cc/9MYL-6PS8>] ("No journalist has so far been prosecuted under the Espionage Act for a story that reveals sensitive information . . .").

<sup>89</sup> 403 U.S. 713 (1971).

<sup>90</sup> David McCraw, *Looking Back on the Pentagon Papers Decision*, JUST SECURITY (June 30, 2016, 9:50 AM), <https://www.justsecurity.org/31747/45th-anniversary-pentagon-papers-decision/> [<https://perma.cc/U2K5-L6RA>].

<sup>91</sup> See *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 733–40 (1971) (White, J., concurring).

<sup>92</sup> See, e.g., McCraw, *supra* note 90.

<sup>93</sup> See Sam Lebovic, *Want to End the Wars on Whistleblowers? Revise the Espionage Act*, WASH. POST (Aug. 1, 2017), [https://www.washingtonpost.com/news/made-by-history/wp/2017/08/01/want-to-end-the-war-on-whistleblowers-revise-the-espionage-act/?tid=sm\\_tw&utm\\_term=.4d940fd8801a](https://www.washingtonpost.com/news/made-by-history/wp/2017/08/01/want-to-end-the-war-on-whistleblowers-revise-the-espionage-act/?tid=sm_tw&utm_term=.4d940fd8801a) [<https://perma.cc/6ZP6-D7ZU>].

<sup>94</sup> See, e.g., Peter Sterne, *Obama Used the Espionage Act to put a Record Number of Reporters' Sources in Jail, and Trump Could be Even Worse*, FREEDOM PRESS FOUND. (June 21, 2017), <https://freedom.press/news/obama-used-espionage-act-put-record-number-reporters-sources-jail-and-trump-could-be-even-worse/> [<https://perma.cc/GBK5-42YC>] (noting that At-



cerned that it may be the biggest threat to journalists under the Trump administration.<sup>95</sup>

When the Espionage Act was passed, Congress rejected proposals to prohibit the press from publishing information relating to the national defense during wartime.<sup>96</sup> Legislative history indicates that the congressional intent behind the law was to punish what it was named for: spying.<sup>97</sup> The typical Espionage Act case accuses a defendant of operating as a mole inside the U.S. government, secretly passing on national defense information to a foreign sovereign power to bolster that power's interests to the detriment of U.S. interests. But the law has also been used to prosecute people who are not classic spies, such as leakers, who pass information to the press and the public rather than to a foreign power, and may be motivated by the belief that public scrutiny of the disclosed information will help rather than harm U.S. interests. In *United States v. Morison*,<sup>98</sup> for example, the Fourth Circuit affirmed the conviction of a naval intelligence officer under the Espionage Act who leaked photographs of a Soviet aircraft carrier to a news publication called *Jane's Defence Weekly*.<sup>99</sup> The Fourth Circuit found that because the terms of the statute were clear, there was "no reason or warrant for looking to the legislative history" of the Espionage Act, and, in any event, the legislative history indicated that the Espionage Act's provisions 793(d) and (e) were intended to criminalize the disclosure of national defense information to anyone "not entitled to receive it," even beyond classic spying.<sup>100</sup> Although the defendant sought to alert the public about a Soviet naval buildup by speaking to the press, the Fourth Circuit held that there were no First Amendment rights implicated in the case, noting that the statute "unques-

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torney General Sessions did not rule out the possibility that a prosecution of WikiLeaks under the Espionage Act could be used as precedent against other news organizations).

<sup>95</sup> See Alexandra Ellerbeck, *How US Espionage Act can be Used Against Journalists Covering Leaks*, COMM. TO PROTECT JOURNALISTS (May 20, 2017, 8:30 AM), <https://cpj.org/x/6cce> [<https://perma.cc/KBG9-7UL5>]. It is not unprecedented for journalists to be prosecuted under the Espionage Act for publishing information unrelated to leaks and national defense information. In fact, one of the first people to be prosecuted under the Act was Victor L. Berger, a newspaper editor and socialist politician who was convicted in 1919 for publicizing anti-militarist views (a prosecution of a pacifist that would not succeed today). See Andrew Glass, *Victor Berger, First Socialist in Congress, is Born, Feb. 28, 1860*, POLITICO (Feb. 27, 2016), <https://www.politico.com/story/2016/02/this-day-in-politics-feb-28-1860-219726> [<https://perma.cc/E54E-4MKG>]. The conviction was later overturned by the Supreme Court, which found that the lower court judge had improperly presided over the case even though an affidavit had been filed alleging his prejudice against the defendants. See *Berger v. United States*, 255 U.S. 22, 36 (1921). Although the conviction was overturned, the case demonstrates that an Espionage Act prosecution of a journalist is not without precedent, but an Espionage Act prosecution of a journalist for publishing leaked national security information is. See *id.*

<sup>96</sup> *Pentagon Papers*, 403 U.S. at 721 (Douglas, J., concurring).

<sup>97</sup> See Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 939–42 (1973).

<sup>98</sup> 844 F.2d 1057 (4th Cir. 1988).

<sup>99</sup> See *id.* at 1060–61.

<sup>100</sup> *Id.* at 1066.

tionably criminalize[s] such conduct by a delinquent governmental employee . . . .”<sup>101</sup>

The applicability of the Espionage Act to one who is not a governmental employee and merely *receives* national defense information is one step further removed from a classic spy case. This scenario was tested just over ten years ago in *United States v. Rosen*.<sup>102</sup> Defendants Keith Weissman and Steven Rosen, lobbyists for the American Israel Public Affairs Committee, were the first individuals ever charged under the Espionage Act who were not agents of foreign powers or bound by oath to keep government secrets.<sup>103</sup> This attempted expansion of the Espionage Act in the post-9/11 era supports the theory that moments of national security crisis spur more aggressive restrictions on speech and transparency. According to *The Washington Post*, a lawyer familiar with the case speculated that Justice Department officials wanted the case “as a precedent so they can have it in their arsenal” as “a weapon that can be turned against the media.”<sup>104</sup>

The government ultimately dropped the four-year, multimillion-dollar prosecution in *Rosen* because the district court judge required prosecutors to show that the defendants knew they were disclosing national defense information and that their actions could potentially harm national security, and the government decided not to try to make that showing at trial.<sup>105</sup> The judge imposed this heightened scienter requirement to ensure that the prosecution—which was unusual for targeting non-government employees—complied with the Constitution.<sup>106</sup> Though the case was dropped, ever since *Rosen*, there has emerged a seeming consensus that the government could at least try to prosecute a journalist under the Espionage Act for receiving and publishing national defense information. Even the threat of unsuccessful prosecution is sobering for journalists who seek to hold the executive to account.

If the government can show that the journalist knew the disclosure could harm national security, or if a different judge finds that a showing of heightened scienter is not required, the prosecution could be successful. Without the constitutionally-mandated protections imposed by the district court in *Rosen*,<sup>107</sup> the government could build its case against a journalist based solely on the publication itself. But even with *Rosen*’s scienter requirement, journalists are vulnerable: As technology advances, electronic communication records such as emails, phone calls, and text messages could be relevant to a journalist’s knowledge of the national security risks at stake. In

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<sup>101</sup> *Id.* at 1068–70.

<sup>102</sup> 445 F. Supp. 2d 602, 607–10 (E.D. Va. 2006), *amended by* No. 1:05cr225, 2006 WL 5049154 (E.D. Va. 2006), *aff’d*, 557 F.3d 192 (4th Cir. 2009).

<sup>103</sup> *See* Pincus, *supra* note 75.

<sup>104</sup> *Id.*

<sup>105</sup> *See* Alan Z. Rozenshtein, *An Explainer on the Espionage Act and the Third-Party Leak Prosecutions*, LAWFARE (May 22, 2013, 1:00 PM), <https://www.lawfareblog.com/explainer-espionage-act-and-third-party-leak-prosecutions> [<https://perma.cc/75WL-3ZWW>].

<sup>106</sup> *See* *Rosen*, 445 F. Supp. 2d at 625.

<sup>107</sup> *See id.*

addition, surveillance could lead to identification and prosecution of the source; knowledge of this possibility has had a demonstrated chilling effect on reporter-source communications.<sup>108</sup> Accordingly, in order to understand the threats to journalists and the obstacles to accountability journalism, it is critical to understand law enforcement's surveillance tools.

#### D. Surveillance Vulnerabilities

The modern journalist “is the proverbial one-man band with a cell phone for an instrument.”<sup>109</sup> Newsrooms increasingly rely on cloud storage to share documents among global teams, reporters interview over video-chat services, and news consumers turn to cutting-edge technologies to learn about breaking important news. These changes have revolutionized the news industry, making it easier for citizen journalists to participate in content creation and, in a sense, democratizing the industry. These technologies, however, come with an increased risk of surveillance by arms of the executive branch—the very people whom the press is tasked with holding accountable.

These surveillance tools are far-reaching and sometimes available to the government with little or no judicial oversight.<sup>110</sup> Warrantless surveillance tools include location-tracking information,<sup>111</sup> transmittal information such as the to/from and subject lines of emails, and even, arguably, contents of communications held in storage.<sup>112</sup> The use of these tools affects tens of thousands of individuals each year, many of whom are not targets of any probe let alone subjects of an indictment and who may never learn that their

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<sup>108</sup> See, e.g., Julie Posetti, *The Eroding State of Source Protection*, GLOBAL INVESTIGATIVE JOURNALISM NETWORK (May 29, 2017), <https://gijn.org/2017/05/29/the-eroding-state-of-source-protection/> [<https://perma.cc/EM9R-5LKC>] (summarizing studies that tracked practices of investigative journalists and quoting editors who stated that increased risk of surveillance is deterring sources from sharing information with journalists); HUMAN RIGHTS WATCH, *supra* note 87; Anthony Mills & Katharine Sarikakis, *Reluctant Activists? The Impact of Legislative and Structural Attempts of Surveillance on Investigative Journalism*, 3 BIG DATA & Soc'y, July–Dec. 2016, at 1.

<sup>109</sup> Brief for Reporters Comm. for Freedom of the Press et al. as Amici Curiae Supporting Petitioner, *Carpenter v. United States*, 137 S. Ct. 2211 (Aug. 4, 2017) (No. 16-402), 2017 WL 3530966, at \*7.

<sup>110</sup> See Hina Shamsi & Alex Abdo, *Privacy and Surveillance Post-9/11*, AM. BAR ASS'N (2011), [https://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol38\\_2011/human\\_rights\\_winter2011/privacy\\_and\\_surveillance\\_post\\_9-11.html](https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_winter2011/privacy_and_surveillance_post_9-11.html) [<https://perma.cc/T2DS-LTWC>] (explaining that some surveillance programs “have operated not within the rule of law, subject to judicial review and political accountability, but outside of it . . .”).

<sup>111</sup> See Brief for Reporters Comm. for Freedom of the Press et al. as Amici Curiae Supporting Petitioner, *Carpenter v. United States*, 137 S.Ct. 2211 (Aug. 4, 2017) (No. 16-402), 2017 WL 3530966, at \*14–15. The Supreme Court is currently reviewing the practice of warrantless acquisition of historical cell location information in *Carpenter v. United States*, 137 S.Ct. 2211 (June 5, 2017).

<sup>112</sup> 18 U.S.C. § 2703 (2012) (containing statutory language suggesting that content in storage for more than 180 days can be obtained without a warrant). At least one appellate court, however, has held that the Fourth Amendment demands a probable cause showing to obtain content, notwithstanding the text of the Stored Communications Act. See, e.g., *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010).

information was obtained.<sup>113</sup> Evidence exists that the use of these tools is increasing exponentially each year.<sup>114</sup>

Even when the government is held to the higher standard of showing probable cause and obtaining a criminal warrant from a judge—the highest level of judicial oversight on law enforcement surveillance—prosecutors can push their powers to the detriment of First Amendment freedoms. For example, in May 2013 it came to light that in 2010 the FBI had successfully obtained a search warrant requiring Google to provide it with emails from the personal email account of *Fox News* reporter James Rosen in connection with an investigation of a suspected leak of classified information.<sup>115</sup> According to news accounts, Mr. Rosen was unaware of the warrant's existence until it was reported in *The Washington Post*.<sup>116</sup> Troublingly, the search warrant materials included a supporting affidavit in which an FBI Special Agent represented that there was “probable cause to believe”<sup>117</sup> that Mr. Rosen had violated the Espionage Act as “an aider and abettor and/or co-conspirator” by allegedly receiving information from a source.<sup>118</sup> More recently, though it did not involve the news media specifically, the government sought a warrant compelling an internet-hosting company, DreamHost, Inc., to release the internet address information of more than one million visitors to the website for a Washington, D.C.-based political organization DisruptJ20.<sup>119</sup> Although the court in that case eventually narrowed the scope of the warrant,<sup>120</sup> the government's ongoing efforts to expand and test the limits of

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<sup>113</sup> See Stephen W. Smith, *Gagged, Sealed & Delivered: Reforming ECPA's Secret Docket*, 6 HARV. L. & POL'Y REV. 313, 315, 322 (2012); see also DEP'T OF JUSTICE, REPORT ON THE USE OF PEN REGISTERS AND TRAP AND TRACE DEVICES BY THE LAW ENFORCEMENT AGENCIES/OFFICES OF THE DEPARTMENT OF JUSTICE FOR CALENDAR YEAR 2011 (2011), <https://www.justice.gov/sites/default/files/criminal/legacy/2013/05/16/2011penreg-anlrpt.pdf> [<https://perma.cc/89PP-4G74>].

<sup>114</sup> See Spencer Hsu, *Court: Warrantless Requests to Track Cellphones, Internet Use Grew Sevenfold in D.C. in Three Years*, WASH. POST (July 18, 2017), [https://www.washingtonpost.com/local/public-safety/court-warrantless-requests-to-track-cellphones-internet-use-grew-sevenfold-in-dc-in-three-years/2017/07/18/b284ac32-6b36-11e7-9c15-177740635e83\\_story.html?utm\\_term=.b36f47b11792](https://www.washingtonpost.com/local/public-safety/court-warrantless-requests-to-track-cellphones-internet-use-grew-sevenfold-in-dc-in-three-years/2017/07/18/b284ac32-6b36-11e7-9c15-177740635e83_story.html?utm_term=.b36f47b11792) [<https://perma.cc/5NHC-CCRG>].

<sup>115</sup> See Ann E. Marimow, *A rare peek into a Justice Department leak probe*, WASH. POST (May 19, 2013), [https://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4-a479289a31f9\\_story.html?utm\\_term=.76794684b61b](https://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4-a479289a31f9_story.html?utm_term=.76794684b61b) [<https://perma.cc/6VW9-MQXS>] (reporting for the first time about a warrant and affidavit that concerned Mr. Rosen).

<sup>116</sup> See Ryan Lizza, *How Prosecutors Fought to Keep Rosen's Warrant Secret*, NEW YORKER (May 24, 2013), <https://www.newyorker.com/news/news-desk/how-prosecutors-fought-to-keep-rosens-warrant-secret> [<https://perma.cc/B3BQ-A9W9>].

<sup>117</sup> Reginald B. Reyes Aff. in Supp. of Appl. for Search Warrant at 4–5, *In re App. for Search Warrant for E-Mail Account [redacted]@gmail.com*, No. 1:10-mj-00291-AK (D.D.C. Nov. 7, 2011), [http://www.dmlp.org/sites/dmlp.org/files/11.7.11\\_Affidavit-in-Support-of-Search-Warrant-for-James-Rosens-email.pdf](http://www.dmlp.org/sites/dmlp.org/files/11.7.11_Affidavit-in-Support-of-Search-Warrant-for-James-Rosens-email.pdf) [<https://perma.cc/3XGL-MAXK>].

<sup>118</sup> *Id.* at 39–40.

<sup>119</sup> See *Coalition: Justice Department's Demand for Protest Website Data Raises Privacy and Civil Liberty Concerns*, OPEN THE GOV'T (Aug. 24, 2017), <https://www.openthegovernment.org/node/5581> [<https://perma.cc/2XJU-S47M>].

<sup>120</sup> See Laurel Wamsley, *Judge Limits DOJ's Warrant for Records from Anti-Trump Site*, NPR (Oct. 11, 2017, 7:53 PM), <http://www.npr.org/sections/thetwo-way/2017/10/11/557222814/enter-title> [<https://perma.cc/E3UE-K5YG>].

domestic surveillance powers affect all citizens, including journalists and their sources.

Both sources and journalists have stated that bulk surveillance coupled with increased investigation of leaks have made them more reluctant to communicate with each other, and this chilling effect is manifest even where the information is not classified.<sup>121</sup> Surveillance therefore poses a threat to robust accountability journalism for at least two reasons: first, it chills the willingness of sources to speak with reporters, and, second, it could aid prosecutors in satisfying any heightened scienter requirement imposed by courts should the government seek to charge journalists under the Espionage Act, see *supra* Part III.C. The potential for surveillance grows exponentially in tandem with technological developments and jeopardizes journalists' ability to report on the president and hold the executive accountable.

### *E. The Importance and Limits of the News Media Guidelines*

In order to understand the surveillance powers of the government and law enforcement's ability to investigate leaks, it is important to also understand the Department of Justice's internal guidelines regarding the use of legal demands (such as subpoenas) and surveillance tools (such as pen register/trap and trace devices) to obtain information from, or records of, the news media.<sup>122</sup> These guidelines were revised in recent years in response to concerns raised by news media organizations and others.<sup>123</sup> Even with the significant revisions, however, these guidelines, as internal department policies, are not legally binding, and they do not apply to all types of surveillance. In addition, current and future administrations can scale back these safeguards.<sup>124</sup>

During his confirmation hearing, Attorney General Jeff Sessions stated that he had "not studied" the Justice Department media subpoena guidelines<sup>125</sup> that, among other things, generally allow federal prosecutors to obtain testimony of reporters and production of their newsgathering material

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<sup>121</sup> See Leonard Downie Jr., *Leak Investigations and Surveillance in Post 9-11 America*, COMM. TO PROTECT JOURNALISTS (Oct. 10, 2013), <https://cpj.org/x/5729> [<https://perma.cc/V2G7-2PJY>].

<sup>122</sup> See Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 28 C.F.R. § 50.10 (2015).

<sup>123</sup> See *Amending the Department of Justice Subpoena Guidelines*, REPORTERS' COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/attorney-general-guidelines> [<https://perma.cc/KET8-CGBV>].

<sup>124</sup> Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 80 Fed. Reg. 2819, 2819 (Jan. 21, 2015) (codified at 28 C.F.R. pt. 50) (explaining why the guidelines are not subject to notice and comment procedures, despite being codified in the Code of Federal Regulations).

<sup>125</sup> *Attorney General Confirmation Hearing, Day 1 Part 1*, at 3:06:45, C-SPAN (Jan. 10, 2017), <http://cs.pn/2meq90c> [<https://perma.cc/A8UB-EF4P>].

only as a last resort.<sup>126</sup> He identified one specific situation in which he would be in favor of subpoenaing a member of the news media: where “unlawful intelligence is obtained.”<sup>127</sup> Since his confirmation, Attorney General Sessions has announced his intent to crack down on leaks.<sup>128</sup>

In general, Attorney General Sessions’s record in the Senate shows strong support for surveillance and opposition to protections for journalists. He opposed the USA Freedom Act, which terminated the National Security Agency’s bulk collection of Americans’ phone records.<sup>129</sup> As a member of the Judiciary Committee, he disapproved of a proposed federal shield bill that would protect reporters’ privilege, stating that it would “protect[ ] those who use the media to illegally expose America’s national security secrets . . . by creating a federal court privilege that can prevent the enforcement of government subpoenas aimed at finding the leakers of confidential information.”<sup>130</sup> As he said: “Really, the matter is about the leaker. This presumptively is a crime. The information that the leaker has provided to a reporter is a crime that’s supposed to be enforced by the Department of Justice.”<sup>131</sup> Sessions would put the onus on a journalist to be willing to identify and testify against a source if the source disclosed harmful information and was what Sessions deemed “a cold-blooded traitor.”<sup>132</sup>

#### IV. CHECKING THE PRESIDENT: PROPOSED SOLUTIONS THROUGH LITIGATION

Public scrutiny of executive action is at the core of democratic values. “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing . . . .”<sup>133</sup> For this reason, openness is indispensable to our govern-

<sup>126</sup> See Department of Justice Report on Review of News Media Policies 2 (July 12, 2013), <https://www.justsecurity.org/wp-content/uploads/2017/08/doj-news-media-2013.pdf> [https://perma.cc/9DCS-VBZJ] (stating that “the Department views the use of tools to seek evidence from or involving the news media as an extraordinary measure” that should be used “only as a last resort”); see also 28 C.F.R. § 50.10(a)(3) (stating that subpoenas or court orders issued to obtain information from, or records of, members of the news media should be used only “after all reasonable alternative attempts have been made to obtain the information from alternative sources”).

<sup>127</sup> Attorney General Confirmation Hearing, *supra* note 125, at 3:07:34.

<sup>128</sup> See Zeke Miller, *The Trump Administration Pledges to Crack Down on Leaks*, TIME (updated Aug. 5, 2017, 9:00 AM), <http://time.com/4887864/trump-leaks-crackdown/> [https://perma.cc/D6W8-JLXK].

<sup>129</sup> See Natasha Duarte, *Sessions on Surveillance: Confirmation Hearing Confirms Concerns*, CTR. FOR DEMOCRACY & TECH. (Jan. 19, 2017), <https://cdt.org/blog/sessions-on-surveillance-confirmation-hearing-confirms-concerns/> [https://perma.cc/KE8Z-HU8R].

<sup>130</sup> Jeff Sessions, *My Turn: Shield Law Protects Americans’ Lives*, TUSCALOOSA NEWS (Dec. 16, 2009, 10:23 AM), <http://www.tuscaloosaneews.com/news/20091216/my-turn—sen-jeff-sessions-shield-law-protects-americans-lives> [https://perma.cc/8637-TARD].

<sup>131</sup> *A Report on Attorney General Nominee Jeff Sessions on Issues that Affect the News Media*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/sessions-report> [https://perma.cc/QPV9-UGUP].

<sup>132</sup> *Id.*

<sup>133</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

ment.<sup>134</sup> The relationship between the press and the government, while historically and necessarily adversarial, can and should be “referee[d]” by courts.<sup>135</sup> Timothy Dyk, U.S. Circuit Judge of the United States Court of Appeals for the Federal Circuit, persuasively argues that “courts should intervene when the potential for government abuse is greatest: where government departs from the rules that government itself has established—when it discriminates in granting access, denies access that has traditionally been allowed, or, in some circumstances, where it grants access in an arbitrary and selective manner.”<sup>136</sup> And indeed, the judiciary may have more opportunities to referee the adversarial relationship over time if a leak crackdown brings more press cases to the courts. Of course, courts cannot address issues that are not brought before them, so journalists and media lawyers need to be creative in looking for ways to expand the law when neither the administration nor Congress is supporting their agenda.

### A. *Litigation to Promote Access*

#### 1. *A Constitutional Retaliation Claim*

A civil claim brought by a journalist against a government official for retaliating against the journalist’s exercise of First Amendment rights will typically require something more than evidence of mere rhetoric, verbal intimidation, or indirect threats by the government.<sup>137</sup> If a reporter can show, however, that she published stories that were disliked by the defendant government official and the official took tangible, concrete steps to deny access or interfere with publication, a retaliation claim may be successful.<sup>138</sup>

42 U.S.C. § 1983 provides a tort remedy against a state or local official acting “under color of any [state] statute, ordinance, regulation, custom, or usage” to deprive parties of constitutional “rights, privileges, or immunities.”<sup>139</sup> Although § 1983 claims are limited to state and local actors, the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau*

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<sup>134</sup> See, e.g., *id.* at 569 (discussing the importance of public access to trials).

<sup>135</sup> Dyk, *supra* note 29, at 960.

<sup>136</sup> *Id.*

<sup>137</sup> See *Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9th Cir. 1998) (“Mere threats and harsh words are insufficient.”).

<sup>138</sup> See NEWSGATHERING COMM., MEDIA LAW RES. CTR., MODEL BRIEF ON ACCESS TO THE EXECUTIVE BRANCH (Aug. 2017), <http://mlrc.informz.net/z/cjUucD9taT02ODYwNTAzJnA9MSZlPTewMTA4NTc0MjImbGk9NDY4MDMxNDc/index.html> [<https://perma.cc/BF7T-Q7FB>] (providing a resource for defense counsel on potential legal claims to assert to promote access, including an evaluation of the strength of constitutional retaliation claims).

<sup>139</sup> 42 U.S.C. § 1983 (2012); see also *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (discussing Congress’s intent to provide legal remedies against officials for civil right deprivations with § 1983); *Robinson v. Davis*, No. 4:15-cv-00040, 41, 2015 WL 9581867, at \*5 (W.D. Va. Dec. 30, 2015) (providing a summary of the various tests courts use to determine whether an action may fairly be attributed to the state).

of *Narcotics*<sup>140</sup> created an analogous cause of action for violations by federal officials.<sup>141</sup>

“The First Amendment prohibits not only direct limits on individual speech but also governmental action against an individual in retaliation for the exercise of protected speech activities.”<sup>142</sup> A constitutional retaliation claim is typically subject to a three-part test requiring the plaintiff to show: (1) she “engaged in constitutionally-protected activity”; (2) the government responded with retaliation or injury “that would chill a person of ordinary firmness from continuing to engage in that protected activity”; and (3) the retaliation was motivated by the protected activity.<sup>143</sup> Under these claims, a reporter can seek monetary damages, but there are strategic reasons to also, or alternatively, seek nonmonetary injunctive relief.<sup>144</sup>

For a journalist facing retaliation in the form of withdrawn access to the executive branch, her biggest legal challenges will be showing that the harm was sufficiently serious—that is, something more than “*de minimis* or trivial” retaliation<sup>145</sup>—and demonstrating the link between her reporting and the retaliatory action. This determination is a fact-intensive, case-by-case inquiry “that focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the nature of the retaliatory acts.”<sup>146</sup>

As part of the inquiry, courts will look to whether the retaliation has in fact chilled reporting.<sup>147</sup> For example, the Fourth Circuit in *Baltimore Sun*

<sup>140</sup> 403 U.S. 388 (1971).

<sup>141</sup> *Id.* at 395–97 (applying the cause of action in the context of a Fourth Amendment violation). The recent Supreme Court case *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), limited the scope of these *Bivens* lawsuits. In *Ziglar*, the Court found that it is no longer appropriate to imply private rights of action into statutes to effectuate their goals, and that any application of *Bivens* to a “new context” faces additional hurdles in the form of examining “special factors counseling hesitation”—i.e., “sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong.” *Id.* at 1857–58. Accordingly, a *Bivens* claim for retaliation against the press will be most successful if one can tie it to prior cases recognizing such a right.

<sup>142</sup> *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002) (citing *Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir. 1999)); see also *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005) (stating that the First Amendment right of free speech includes the right to be free from retaliation by a public official for exercise of that right).

<sup>143</sup> See *Keenan*, 290 F.3d at 258.

<sup>144</sup> “The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal.” *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc). It is the plaintiff’s burden to demonstrate the inapplicability of the defense by showing that the official violated a statutory or constitutional right that was clearly established at the time of the conduct. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). But qualified immunity will not be a bar to injunctive, or nonmonetary, relief. See *City of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); see also *Pearson v. Callahan*, 555 U.S. 223, 243–42 (2009).

<sup>145</sup> *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000); see also *Sharp v. City of Houston*, 164 F.3d 923, 933 (5th Cir. 1999) (“Although the Supreme Court has intimated that the First Amendment protects against trivial acts of retaliation, this Court has required something more than trivial.”).

<sup>146</sup> *Suarez*, 202 F.3d at 686.

<sup>147</sup> See *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 415–16 (4th Cir. 2006) (explaining the chilling effect requirement and stating, “[t]he determination of whether government conduct or speech has a chilling effect or an adverse impact is an objective one. . . .”).



*Company v. Ehrlich*<sup>148</sup> held that “[h]aving access to relatively less information than other reporters on account of one’s reporting is so commonplace that to allow [*The Sun*] to proceed on its retaliation claim addressing that concern would ‘plant the seed of a constitutional case’ in ‘virtually every’ interchange between public official and press.”<sup>149</sup> The court there held that a gubernatorial directive telling state officials not to talk to two reporters was de minimis because the *Baltimore Sun* continued to publish news from the governor’s office.<sup>150</sup> In the case of a major newspaper that continues to report news despite access concerns, then, it might be difficult to succeed in proving a constitutional claim of retaliation. On the other hand, some courts have taken the approach that “since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable.”<sup>151</sup> Accordingly, reporters raising constitutional retaliation claims should point out that even seemingly limited obstacles to the exercise of First Amendment rights are not trivial.<sup>152</sup>

Theories for successful constitutional retaliation claims by the press are well established. In *El Dia v. Rossello*,<sup>153</sup> for example, a newspaper brought a § 1983 action against the Governor of Puerto Rico and members of his administration for withdrawing substantial government advertising in retaliation for critical articles.<sup>154</sup> Specifically, the newspaper alleged that after it reported on waste and fraud in the government, “eighteen government agencies . . . terminated advertising contracts with the newspaper,”<sup>155</sup> and defendants offered to renew the advertising deals “if the newspaper wrote favorable editorials” about the administration.<sup>156</sup> The First Circuit affirmed the district court’s denial of the motion to dismiss on qualified immunity grounds, finding that qualified immunity did not apply because “[c]learly established law prohibit[ed] the government from conditioning the revocation of benefits on a basis that infringes constitutionally protected interests . . . .”<sup>157</sup> The opinion additionally stated that it seemed “obvious that using government funds to punish political speech by members of the press and to attempt to coerce commentary favorable to the government would run afoul of the First Amendment.”<sup>158</sup> This case shows that a journalist can succeed on a § 1983 claim for executive branch retaliation against the press.<sup>159</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 418 (quoting *Connick v. Myers*, 461 U.S. 138, 149 (1983)).

<sup>150</sup> *See id.* at 419.

<sup>151</sup> *Keenan v. Tejada*, 290 F.3d 252, 259 (5th Cir. 2002).

<sup>152</sup> *See Elrod v. Burns*, 427 U.S. 347, 372 (1976) (3-2-4 decision) (Brennan, J., for the plurality) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

<sup>153</sup> 165 F.3d 106 (1st Cir. 1999).

<sup>154</sup> *See id.* at 108.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 110.

<sup>158</sup> *Id.* at 109.

<sup>159</sup> *See also* TIM WU, KNIGHT FIRST AMENDMENT INST.: EMERGING THREATS SERS., IS THE FIRST AMENDMENT OBSOLETE? 21–22 (David Pozen ed., 2017), <https://knightcolumbia.org/sites/default/files/content/Emerging%20Threats%20Tim%20Wu%20Is%20the%20First%20>

Another strong precedent can be found in *Rossignol v. Voorhaar*,<sup>160</sup> where local law enforcement officials orchestrated a mass purchase of a newspaper that had been critical of them on the night before a local election.<sup>161</sup> The Fourth Circuit opinion focused on the fact that the defendants attempted to stifle public criticism of their official policies and performance.<sup>162</sup> The court held that the § 1983 elements were satisfied and noted that “[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.”<sup>163</sup>

Members of the executive branch, however, maintain significant discretion to “evaluate reporters and choose to communicate with those whom they believe will deliver their desired messages to the public.”<sup>164</sup> Now more than ever, it is critical that media lawyers consider § 1983 claims when evaluating their clients’ legal options, so that additional jurisprudence surrounding retaliation for the exercise of core First Amendment rights can be developed in the courts.

## 2. *Right of Access Claims*

While constitutional claims under § 1983 or *Bivens* can be on point in many circumstances, they may not be as helpful when the government limits access to all reporters without an evident retaliatory motive. To obtain government records that are shielded from public scrutiny, or to gain admittance to government spaces that should be open to the public, reporters can instead turn to First Amendment access litigation.

In determining whether a plaintiff has a First Amendment right of access, courts apply an “experience and logic” test, i.e. (1) “whether the place and process have historically been open to the press and general public,” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.”<sup>165</sup> Although the press is not granted a right of access above and beyond that held by the public at large, “[a]s a practical matter . . . the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the ‘agent’ of interested citizens, and funnels information . . . to a large number of individuals.”<sup>166</sup>

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Amendment%20Obsolete.pdf [https://perma.cc/S963-6GRT] (discussing retaliation cases and listing scenarios—such as the president suggesting that certain members of the press should be punished—that “might support a finding of state action and a First Amendment violation”).

<sup>160</sup> 316 F.3d 516 (4th Cir. 2003).

<sup>161</sup> *See id.* at 519–521.

<sup>162</sup> *See id.* at 520.

<sup>163</sup> *Id.* at 522 (quoting *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974)).

<sup>164</sup> *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 417–18 (4th Cir. 2006); *but see Davison v. Loudoun Cty. Bd. of Supervisors*, No. 1:16cv932, 2017 WL 3158389, at \*12 (E.D. Va. July 25, 2017) (holding that a First Amendment retaliation claim existed when Facebook page tied to a campaign for public office blocked a Facebook user for twelve hours).

<sup>165</sup> *Press-Enter. Co. v. Superior Court of California for Riverside Cty.* (*Press-Enterprise II*), 478 U.S. 1, 8 (1986).

<sup>166</sup> *Richmond Newspapers v. Virginia*, 448 U.S. 555, 586, n.2 (1980) (Brennan, J., concurring).

The seminal case on this issue, *Richmond Newspapers, Inc. v. Virginia*,<sup>167</sup> concerned the closure of a criminal trial, but the Court relied on broader principles that apply with equal force to the executive branch.<sup>168</sup> The experience and logic test has been applied in several contexts outside of cases seeking access to judicial proceedings.<sup>169</sup> A district court in Georgia, for example, applied the test to hold that there is a First Amendment right of access to White House press pool coverage.<sup>170</sup> There, the court relied on two guiding principles laid out by Justice Brennan in *Richmond Newspapers*:

First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. . . . Second, the value of access must be measured in specifics. . . . what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.<sup>171</sup>

The court went on to find that there exists “a history of pool coverage of presidential activities” that benefits both the president and the public, and allows the public to evaluate “the adequacy of the President’s performance.”<sup>172</sup> The court did not find that there were any direct governmental interests served by excluding television media from limited coverage of White House events, and balancing that against the overwhelming public interest in access, the court granted a preliminary injunction against totally excluding the television media while allowing for the White House to place “some burden” on the press for pool participation, short of total exclusion.<sup>173</sup> Although this was a modest win for the press, some cases have limited the constitutional right of access, particularly where the press seeks access to sensitive areas such as prisons beyond what is afforded to the general public.<sup>174</sup>

Once a plaintiff has established a First Amendment right of access to a record, place, or event, the defendant bears the burden of satisfying strict scrutiny—i.e., showing a compelling governmental interest in closure, and

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<sup>167</sup> *Id.*

<sup>168</sup> *See id.* at 584 (Stevens, J. concurring) (“[T]he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch.”) (emphasis added); *N.J. Media Grp. v. Ashcroft*, 308 F.3d 198, 208 (3d Cir. 2002) (explaining that *Richmond Newspapers* was not limited to proceedings in the judicial branch).

<sup>169</sup> *See, e.g., Leigh v. Salazar*, 677 F.3d 892, 898–900 (9th Cir. 2012) (request to view round-up of horses on Bureau of Land Management land); *Philadelphia Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 366–73 (M.D. Pa. 2012) (request to view execution unobstructed).

<sup>170</sup> *See CNN, Inc. v. ABC, Inc.*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981).

<sup>171</sup> *Id.* at 1244 (quoting *Richmond Newspapers*, 448 U.S. at 588).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1246.

<sup>174</sup> *See, e.g., Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) (holding that the news media has no constitutional right of access to a county jail to interview inmates).

showing that closure is narrowly tailored to serve that interest.<sup>175</sup> Moreover, “[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.”<sup>176</sup> Lawyers representing the news media should embrace right-of-access cases because courts have demonstrated a willingness to rule in favor of the public’s right to obtain government records where no ongoing law enforcement interest in closure exists.<sup>177</sup>

### B. Defenses Against Espionage Charges

Because the Espionage Act has never been used to prosecute the press for publishing leaked information, no appellate court has yet had the opportunity to consider legal challenges in that context. But there are a number of potential defenses that can be raised to an Espionage Act prosecution of a journalist.

First, the intent of the journalist should feature prominently in any defense strategy. Specifically, the government bears the burden of showing that the journalist acted “willfully” and with “reason to believe” the information “could be used to the injury of the United States or to the advantage of any foreign nation.”<sup>178</sup> In *Rosen*, the U.S. District Court for the Eastern District of Virginia interpreted the willfulness requirement to mean that the government “must prove beyond a reasonable doubt that the defendants knew the information was NDI . . . and that the persons to whom the defendants communicated the information were not entitled under the classification regulations to receive the information.”<sup>179</sup> As national security and media law scholar Mary-Rose Papandrea has argued, bad intent—for example, disclosing national defense information with the purpose to harm the United States—should also be relevant to an Espionage Act prosecution, “both as a

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<sup>175</sup> See *Globe Newspaper Co. v. Superior Court for Norfolk*, 457 U.S. 596, 606–07 (1982); *Press-Enter. Co. v. Superior Court of California for Riverside Cty. (Press-Enterprise II)*, 478 U.S. 1, 9–10 (1986).

<sup>176</sup> *Press-Enterprise II*, 478 U.S. at 9–10.

<sup>177</sup> See, e.g., *Nixon v. Warner Commc’ns*, 435 U.S. 589, 597 (1978) (holding that there is a presumption of access to judicial records under the common law); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004) (distinguishing between “government records that function properly only if kept secret, like grand jury proceedings,” and government records for which there exists a presumption of openness); *Matter of the Application of WP Co. LLC*, 201 F. Supp. 3d 109, 129 (D.D.C. 2016) (finding that “at least where an investigation has concluded, a common law right of public access generally attaches” to records).

<sup>178</sup> 18 U.S.C. § 793(d) (2012).

<sup>179</sup> *United States v. Rosen*, 445 F. Supp. 2d 602, 625 (E.D. Va. 2006), *amended on other grounds by* No. 1:05cr225, 2006 WL 5049154 (E.D. Va. 2006), *aff’d*, 557 F.3d 192 (4th Cir. 2009). The *Rosen* court also found that when the information disclosed was transmitted orally, such that it was “more difficult for defendants to know whether they are violating the statute,” *id.* at 627, the government must additionally show that the defendant acted with “a bad purpose either to disobey or disregard the law,” *id.* at 625 (quoting *United States v. Morison*, 844 F.2d 1057, 1071 (4th Cir. 1988)). As such, if the national defense information at issue is intangible, any defense strategy should consider this potential bad faith requirement.

matter of public policy and as a matter of constitutional law.”<sup>180</sup> Professor Papandrea argues that statutory language, legislative history, and certain Supreme Court jurisprudence provide support for this intent requirement.<sup>181</sup> A media lawyer defending a journalist from an Espionage Act claim should therefore demand that the government meet its high burden of establishing that the journalist acted with knowledge that the information was classified national defense information, and with intent to cause harm.<sup>182</sup>

Second, the Espionage Act may fail to provide adequate notice to the press that its conduct could be covered by the statute. The result is also demonstrated by official statements of uncertainty regarding the scope of the statute; for example, in 1979 the General Counsel of the Central Intelligence Agency testified before Congress that “[w]hat has never been sorted out is whether these statutes can be applied, and would be constitutional if applied, to the compromise of national security information that occurs as a result of anonymous leaks to the press or attributed publications.”<sup>183</sup> Even today, because no journalist has been prosecuted for unlawful disclosures under the Espionage Act in the law’s hundred-year history, there is not adequate notice about whether the law can apply to the press. Because the press “must necessarily guess at its meaning and differ as to its application,” the statute “violates the first essential of due process of law.”<sup>184</sup> This argument is consistent with the legislative history of the statute, which indicates that it was intended to target classic spying activity,<sup>185</sup> as well as the text of a 1950 amendment to the statute itself, which contains language indicating that Congress did not intend the statute to reach communications by or to the press.<sup>186</sup>

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<sup>180</sup> Mary-Rose Papandrea, *National Security Information Disclosures and the Role of Intent*, 56 WM. & MARY L. REV. 1381, 1382 (2015).

<sup>181</sup> See *id.* at 1393–1411, 1418–33.

<sup>182</sup> See, e.g., *id.* (providing a roadmap for an intent requirement); CHRISTINA WELLS, AM. CONST. SOC’Y L. & POL’Y, RESTORING THE BALANCE BETWEEN SECRECY AND TRANSPARENCY: THE PROSECUTION OF NATIONAL SECURITY LEAKS UNDER THE ESPIONAGE ACT 9 (2017), [https://www.acslaw.org/sites/default/files/Espionage\\_Act\\_ACS\\_Issue\\_Brief.pdf](https://www.acslaw.org/sites/default/files/Espionage_Act_ACS_Issue_Brief.pdf) [<https://perma.cc/5F4U-4TXE>] (explaining that the “reason to believe” requirement is far from straightforward).

<sup>183</sup> *Espionage Laws and Leaks: Hearing Before the Subcomm. on Legislation of the H. Permanent Select Comm. on Intelligence*, 96th Cong. 22 (1979) (statement of Anthony A. Lapham, General Counsel, Central Intelligence Agency).

<sup>184</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

<sup>185</sup> See *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 720–22 (1971) (Douglas, J., concurring).

<sup>186</sup> The Internal Security Act of 1950 amended the Espionage Act and stated that “[n]othing in this Act shall be construed . . . in any way to limit or infringe upon freedom of the press or of speech . . . .” Pub. L. No. 831, 64 Stat. 987, § 1(b). Of course, this is limited comfort if the Court finds that an Espionage Act prosecution of a journalist for publishing national defense information is not an infringement upon freedom of the press. For example, in *United States v. Morison*, discussed in Part III.C, the Fourth Circuit expressly held that the Espionage Act prosecution did not infringe upon freedom of the press: “Actually we do not perceive any First Amendment rights to be implicated here. This certainly is no prior restraint case . . . . We do not think that the First Amendment offers asylum under [these] circum-

Third, if a vagueness challenge fails, the coverage of the statute must necessarily be “narrowly drawn to prevent the supposed evils.”<sup>187</sup> The category of information covered by the statute—national defense information—is not well-defined. What is clear is that it does not map squarely onto all classified information, because the statute itself predates the classification system.<sup>188</sup> Courts have allowed the government to overcome void-for-vagueness challenges to the statute by reading its coverage to encompass only closely held information concerning the national defense or military preparedness—information that may cause injury to the U.S. or benefit a foreign government.<sup>189</sup> A journalist prosecuted under the Espionage Act could demand the government meet its burden on this point by describing with specificity how the disclosed information would harm the U.S. or benefit a foreign government and by showing that the information was closely held by the U.S. government.

Any legal defense to the Espionage Act should ultimately hinge on the broader constitutional implications of using a classic spying law to punish the press for engaging in activity at the very core of the First Amendment’s protections, namely, informing the public about government conduct.<sup>190</sup> The Supreme Court has repeatedly stated that “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”<sup>191</sup> This purpose does not simply vanish in the areas of executive action touching upon foreign policy, military action, and national affairs. Indeed, the Supreme Court has also stated that “[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.”<sup>192</sup> There may be reasonable exceptions to that principle, especially where government officials have access to information that must remain secure for national safety,<sup>193</sup> but any excep-

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stances, if proven, merely because the transmittal was to a representative of the press.” 844 F.2d 1057, 1068 (4th Cir. 1988).

<sup>187</sup> *Aptheker v. Sec’y of State*, 378 U.S. 500, 514 (1964).

<sup>188</sup> See DEP’T OF STATE CLASSIFICATION GUIDE: A GUIDE FOR THE CLASSIFICATION OF DOCUMENTS UNDER EXEC. ORDER 12958 1, 5 (2005) <https://www.fas.org/sgp/othergov/dos-class.pdf> [<https://perma.cc/J3T4-HF3V>] (noting that simplification of the classification system occurred in 2003, which was fifty-three years after passage of the Internal Security Act of 1950).

<sup>189</sup> See *Gorin v. United States*, 312 U.S. 19, 28 (1941); *United States v. Rosen*, 599 F. Supp. 2d 690, 692 n.3, 694 (E.D. Va. 2009), *amended on other grounds by* No. 1:05cr225, 2006 WL 5049154 (E.D. Va. 2006), *aff’d*, 557 F.3d 192 (4th Cir. 2009) (defining the Espionage Act to cover not all classified information, but only national defense information, which was judicially defined as information that “was closely held by the United States” at the time of disclosure and the disclosure of which “would be potentially damaging to the United States or useful to an enemy of the United States”); *Morison*, 844 F.2d at 1070–75 (narrowly interpreting the phrases “national defense” and “entitled to receive” to overcome a vagueness challenge, and defining “national defense” information as that which is closely held by the government, such that it is not available to the general public, and would be potentially damaging to the United States or useful to an enemy of the United States).

<sup>190</sup> See, e.g., *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

<sup>191</sup> *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

<sup>192</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

<sup>193</sup> See, e.g., *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (CIA may impose restrictions on employee expressive activity to protect government interests); *United*

tions for the press and the public must be narrowly tailored, clearly defined, and accompanied by sufficient notice in order to honor the First Amendment's purpose. Thus, the thrust of any defense to the Espionage Act should focus on the fact that the application of the law to a journalist or publisher is not only inconsistent with legislative history, but also repugnant to the Constitution.

## CONCLUSION

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.<sup>194</sup>

Judge Learned Hand's prescient 1944 quote captures the problems that would still persist for journalists even if the aforementioned legal arguments and defenses were perfectly successful. This article focuses on the ability to obtain information about the executive branch, but that is not the end of the story for the press: Their accountability function relies also on their legitimacy in the eyes of the public.

Unfortunately, that attack on legitimacy is one area in which President Trump is landing blows,<sup>195</sup> and courts are ill-equipped on their own to turn around public opinion. This article does not attempt to tackle the problem of attacks on the cultural authority of the press. It lays out legal threats and litigation solutions that can offer some limited protections, but litigation alone cannot restore the role of journalism, which must instead be addressed through practical, real-world solutions. For example, reporters should respond to the growing surveillance capabilities of the executive branch by perfecting data security practices; this will further professionalize the industry and signal to potential anonymous sources that newsrooms are taking all possible steps to protect them. Several U.S. press freedom organizations including the Reporters Committee publish resources to help journalists secure their data.<sup>196</sup> The first step toward press legitimacy, however, is rigorous,

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States v. Marchetti, 466 F.2d 1309, 1316–18 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972) (enforcing employee's secrecy agreement with CIA to the extent that information has not already been disclosed to the public).

<sup>194</sup> Learned Hand, Judge on the U.S. Court of Appeals for the Second Circuit, *The Spirit of Liberty*, Address Before "I Am an American Day" (1944), in *DIGITAL HISTORY* (2016), [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtID=3&psid=1199](http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1199) [<https://perma.cc/WDY2-PNRN>].

<sup>195</sup> See Jonathan Easley, *Poll: Majority Says Mainstream Media Publishes Fake News*, HILL (May 24, 2017, 10:10 AM) <http://thehill.com/homenews/campaign/334897-poll-majority-says-mainstream-media-publishes-fake-news> [<https://perma.cc/JB25-S3NQ>].

<sup>196</sup> See GUIDES AND TRAINING, FREEDOM OF THE PRESS FOUND., <https://freedom.press/training/> [<https://perma.cc/Q3SK-DCEP>]; SURVEILLANCE SELF-DEFENSE: TIPS, TOOLS AND HOW-TOS FOR SAFER ONLINE COMMUNICATIONS, ELEC. FRONTIER FOUND., <https://ssd EFF.org/>

fact-based reporting, relying on anonymous sources only as a last resort. When it comes to holding the executive branch accountable, the best defense is a good offense.

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[<https://perma.cc/W5R6-A7PV>]; Aaron Sankin, *How to Stay Safe Online: A Cybersecurity Guide for Political Activists*, CTR. FOR INVESTIGATIVE REPORTING (Dec. 8, 2016), <https://www.revealnews.org/article/how-to-stay-safe-online-a-cybersecurity-guide-for-political-activists/> [<https://perma.cc/4RZB-GGKT>].