



Written by [Jack Kenny](#) on June 17, 2013

Big Government Is Watching the Watchdogs

The role of a free press, it is often said, is to act as a watchdog over public officials and to sound the alarm over abuses of power. The recent news that government officials seized records of two months of phone calls from Associated Press lines raises serious questions about who is watching whom in a legal house of mirrors.

In what the news service's top executive called a "massive and unprecedented intrusion" into news-gathering activities, the AP learned on May 10 that Justice Department officials had seized the phone records of both office and personal phone numbers of individual reporters, and of general AP office numbers in New York; Washington; and Hartford, Conn.; in addition to the main number for the AP in the House of Representatives press gallery. Records for more than 20 different phone lines assigned to the AP and its journalists were seized for the months of April and May 2012. More than 100 journalists work in the offices where the phone lines were targeted, the news agency said.

In a letter of protest sent to Attorney General Eric Holder, AP President and Chief Executive Officer Gary Pruitt demanded the return of the phone records and the destruction of all copies.

"There can be no possible justification for such an overbroad collection of the telephone communications of The Associated Press and its reporters," Pruitt wrote. "These records potentially reveal communications with confidential sources across all of the newsgathering activities undertaken by the AP during a two-month period, provide a road map to AP's newsgathering operations and disclose information about AP's activities and operations that the government has no conceivable right to know."

Only days later Pruitt said there had already been evidence of the intimidating effect that news of the government inspection of AP's phone records was having on news sources.

"Officials that would normally talk to us and people we talk to in the normal course of newsgathering are already saying to us that they're a little reluctant to talk to us," Pruitt said on CBS's *Face the Nation*. "They fear that they will be monitored by the government."

Endangering Security — or Spoiling a Press Conference?

The Associated Press learned about the action after the fact by a letter to the news agency from Ronald





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Machen, the U.S. attorney in Washington, D.C. The call records were obtained through Justice Department subpoenas, though it was not clear if a judge or grand jury authorized the subpoenas, the AP reported. The letter did not say why the search was made, but government officials had previously said publicly that the U.S. attorney in Washington was conducting a criminal investigation into who may have provided information for a May 7, 2012, AP story about a foiled terrorist plot to detonate a bomb on an airplane bound for the United States. Five reporters and an editor who worked on that story were among those whose phone records were seized, the AP said.

John Brennan, then the president's counterterrorism advisor and currently head of the CIA, said in written testimony to the Senate that an "irresponsible and damaging leak of classified information was made ... when someone informed The Associated Press that the U.S. government had intercepted an IED (improvised explosive device) that was supposed to be used in an attack and that the U.S. government currently had that IED in its possession and was analyzing it."

Yet the secrecy of the undercover operation may have been compromised most critically by Brennan himself, according to a Reuters news account of a private teleconference the president's advisor held with former counterterrorism officials who are frequent commentators on TV news shows. According to "five people familiar with the call," Reuters reported, Brennan stressed that plot was never a threat to the United States or to air safety because Washington had "inside control" over it.

Richard Clarke, a counterterrorism official in the Clinton administration, said on ABC's *Nightline*: "The U.S. government is saying it [the plot] never came close because they had insider information, insider control, which implies that they had somebody on the inside who wasn't going to let it happen." That "somebody on the inside" may have been a CIA agent posing as one of the plotters, a group known as the al-Qaeda of the Arabian Peninsula. Reuters reported, based on its own counterterrorism sources, that the British domestic and foreign intelligence services MI-5 and MI-6 were working with the CIA in penetrating the al-Qaeda group and foiling the plot. What was supposed to be a continuing covert operation had to shut down because of the leaks, officials said.

Yet the original AP story said nothing about an undercover informant or the "control" of the operation from inside the ranks of the terrorists, saying only that the fate of the would-be suicide bomber was unknown. AP said it held back on publishing the story at the request of government officials who said it might put the agents involved in danger. Once officials said that danger was passed, AP published the story, despite a request from the Obama administration to withhold publication until the administration could make an official announcement.

There remain a number of unanswered questions about the government's response to the AP story. How were the U.S. and British agents able to apprehend or otherwise stop the alleged bomber carrying out the plot without giving themselves away as double agents? What did the May 7 news story reveal that the administration would not itself have said in its planned official announcement? And was the AP's offense revealing state secrets, or spoiling a planned press conference?

Pruitt's contention that the secret taking of the phone records was "overbroad" raises a constitutional issue that has at least as much to do with the Fourth Amendment ban on "unreasonable searches and seizures" as with the First Amendment guarantee of the freedom of the press. A lawful search is supposed to be supported by a warrant "particularly describing the place to be searched and the person or things to be seized." Obtaining all the phone records from four news outlets and 20 phones for a two-month period sounds more like the type of fishing expedition commonly carried out under King George's Writs of Assistance — the type of search the Fourth Amendment was written to prevent.



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News of the search brought expected condemnations from various news organizations. The seizure of phone records is “a disturbing affront to a free press,” said Arnie Robbins, executive editor of the American Society of News Editors. “It’s also troubling because it is consistent with perhaps the most aggressive administration ever against reporters doing their jobs — providing information that citizens need to know about our government.” The Newspaper Association of America issued a statement saying the Justice Department actions “shock the American conscience and violate the critical freedom of the press protected by the U.S. Constitution and the Bill of Rights.”

E-mails Under Surveillance

A few days after the AP learned of the seizure of its phone records, the *Washington Post* reported the FBI had been reading the e-mails and tracking the movements of Fox News chief Washington correspondent James Rosen in connection with a criminal investigation into a 2009 news leak. Rosen had reported that intelligence officials expected North Korea to respond to a UN security council resolution condemning its nuclear and ballistic missile testing by launching another missile. The government has indicted the alleged source of the leak, government advisor Stephen Jin Woo Kim, for revealing classified national defense information, but has not charged Rosen with a crime. The FBI, however, in seeking a warrant to search Rosen’s e-mail account, described the reporter as “at the very least, either as an aider, abettor and/or co-conspirator.”

Here again, it’s not clear what secrets Rosen’s story violated. Certainly it was no surprise to North Korea that they were planning to conduct a missile test. “In Rosen’s case,” wrote Fred Kaplan in *Slate*, “the alarm bells went off not because he reported that North Korea was about to conduct a nuclear-weapons test but because he reported that the CIA learned of this fact from a source inside North Korea.” That couldn’t have been much of a surprise, either. How else would the CIA have obtained that information? It’s not the kind of news that agents would likely stumble across in a press release from Pyongyang.

The government has often investigated reporters in an effort to identify the source of news leaks, but allegations of criminal conduct have in the past been limited to charges against the leaker rather than the journalist reporting the story. The FBI hardly bolstered its charge against Rosen by accusing the reporter of “employing flattery and playing to Mr. Kim’s vanity and ego.” That’s standard practice for a journalist trying to elicit information from a potential source. Michael Clemente, executive vice president of Fox News, called it “downright chilling” that Rosen “was named a criminal co-conspirator for simply doing his job as a reporter.” Bruce Brown, the executive director of the Reporters Committee for Freedom of the Press, said treating “routine news-gathering efforts as evidence of criminality is extremely troubling and corrodes time-honored understandings between the public and the government about the role of the free press.”

Ironically, it was only a year ago that the Obama administration itself was accused of leaking classified national security information in order to enhance the president’s election-year stature in prosecuting the war against terrorism. Last June, 31 Republican senators, led by Obama’s 2008 opponent John McCain, signed a letter calling on Attorney General Eric Holder to appoint a special prosecutor to investigate the leaks. “This administration cannot be trusted to investigate itself,” Texas Sen. John Cornyn said at a news conference.

In August a group of former military and intelligence personnel, called the Special Operations OPSEC (for Operation Secrecy) Education Team, released a video accusing the president of leaking security secrets for the purpose of “politically capitalizing on U.S. national security operations and secrets.” The



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group claimed the administration turned the May 1, 2011 raid that killed Osama bin Laden into a “national security disaster” by releasing information that enabled Pakistani officials to find the doctor that helped U.S. troops, by briefing Hollywood filmmakers about the raid, and by using the raid as the subject of a campaign ad. The Obama campaign denied the charges and accused the OPSEC team of “swiftboating” the president, a reference to another group — Swiftboat Veterans of America — that attacked the military record of John Kerry when the Massachusetts senator was the Democratic nominee for president in 2004.

Espionage Act Revisited

Yet the current administration might be the most aggressive ever in efforts to stop news leaks and silence whistleblowers. It has prosecuted six cases under the 1917 Espionage Act, twice as many as all previous administrations combined. Enacted just two months after the United States entered World War I, the Espionage Act made it a crime to turn over classified information to someone not authorized to receive it or to assist in that transaction. A year later Congress met President Woodrow Wilson’s request for censorship power by passing the Sedition Act, criminalizing, among other things, “abusive language” about the government.

Socialist newspapers were barred from the U.S. mails. A filmmaker went to prison for making a movie about the Revolutionary War that was deemed to be offensive to our British allies. The Wilson administration even prosecuted a minister for claiming Jesus was a pacifist. Libraries banned German-language books, and German language newspapers were forced out of business. Eugene Debs received nearly a million votes as the Socialist Party candidate for president in 1920, while sitting in a federal prison in Atlanta for a speech he had made opposing the war. Charles Schenk went to prison for helping to print leaflets urging young men to resist the draft, and newspaperman Jacob Frohwerk was behind bars for accusing the government of committing murder for sending American troops to France.

Like the Alien and Sedition Acts of 1798, the 1918 version was written to shield the incumbent administration from criticism and was scheduled to expire in the year following the next election. A Republican Congress under President Warren Harding allowed the Sedition Act to expire in 1921, but the Espionage Act is still on the books. It was invoked by the Nixon administration in 1971 in an effort to prevent the *New York Times* from publishing documents about the Vietnam War that came to be known as the *Pentagon Papers*.

The United States was still fighting in Vietnam at the time, but the memos, classified “Top Secret,” that the *Times* received from an anonymous source (later revealed to be former Defense Department analyst Daniel Ellsberg) did not involve current troop locations or battle plans. What they did reveal was a history of behind-the-scenes decisions to send thousands of American foot soldiers and hundreds of pilots into combat under the guise of advisors to the South Vietnamese Army, plans for escalating the war, and the fact that neither the Johnson nor the Nixon administration had any plan or hope of winning the war, despite all public statements to the contrary.

Restraining the Press

The *Times* began publishing the memos in serial form, on June 13, 1971. A second installment followed the next day. On the evening of June 14, publisher Arthur Ochs Sulzberger received a telegram from Attorney General John Mitchell advising the publisher of the top-secret classification of the material.

“As such, publication of this information is directly prohibited by the provisions of the Espionage Law, title 18, United State Code, Section 793,” Mitchell said in requesting that the *Times* stop publishing the



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documents. The section cited by the attorney general states that not only the transmitter of the classified document, but anyone who “willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it ... shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.”

The *Times* responded with a statement saying it would “respectfully decline” the attorney general’s request and continue publishing the series. A third installment appeared the next day. The Justice Department responded with a motion in the U.S. District Court for the Southern District of New York for a temporary restraining order and injunction against further publication. The court granted the restraining order and a preliminary injunction, pending further review. The *Times* complied with the order.

In arguing the case in District Court, attorney Alexander Bickel, representing the *Times*, noted that none of the documents in the newspaper’s possession was less than three years old and said there was no danger that their publication would result in a foreign government breaking a U.S. military code. “It is common knowledge that the security of codes is insured by their being changed with extreme rapidity in very short order,” he said. To the government’s argument that the publication violated the confidentiality of diplomatic exchanges and could further damage negotiations over the Vietnam War and other matters, Bickel argued there is no constitutional authority to prevent publication of information on the grounds that “the government may be discomfited” and “may be put in an unfavorable light with a foreign government as a result of internal political discussion.” That, he said, would be “a flagrant violation of the First Amendment, in our view.”

Judge Murray Gurfein left the case in limbo, refusing the government’s request for a permanent injunction, but also declining to lift the temporary restraining order on the *Times*. Meanwhile the *Washington Post* began publishing sections of the same documents the *Times* had been publishing and soon found itself under a restraining order from the Court of Appeals for the D.C. Circuit. Soon other newspapers around the country were publishing excerpts from the documents, while the *Times* and the *Post* were appealing their cases to the U.S. Supreme Court. The court consolidated the two appeals in *New York Times v. United States*.

“What the Founders Hoped ... ”

Because of the urgency of the matter, the court met in a rare Saturday session to hear the oral arguments. Solicitor General Erwin Griswold said publication of the documents posed an immediate, grave danger to the security of the United States and further claimed it involved “the question of the integrity of the institution of the Presidency, whether that institution, one of the three great powers under the separation of powers, can function effectively.”

Attorney William Glendon, representing the *Washington Post*, noted that on some occasions the executive branch tries to defend the integrity of its classified information by preventing its disclosure. “On other occasions,” Glendon said, “the Government itself engages in leaks, because some official will feel that in the public interest it is well for the public to know, and that overrides any particular judgment of security or classification.”

The following Wednesday, June 30, 1971, the court announced its decision. By a vote of 6-3, the justices denied the government’s request for a permanent injunction and lifted the restraining orders on both newspapers. Chief Justice Warren Burger, along with Justices John Harlan and Harry Blackmun, dissented, deferring to the authority of the president to prevent the disclosure of confidential material



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affecting foreign policy. Justices Potter Stewart, William Brennan, and Byron White found nothing in the documents that posed a threat to the nation's security or its armed forces. Justices Hugo Black, William Douglas, and Thurgood Marshall held that the First Amendment trumped the government's security claims. Wrote Black:

Paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to foreign lands to die of foreign fever and foreign shot and shell.... The *New York Times*, the *Washington Post*, and other newspapers should be commended for serving the purpose that the founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam War, the newspapers nobly did what the founders hoped and trusted they would do.

But the intention of the Founders appears less important to those in power than the ability to control the flow of information that reaches the American people. "From a civil-liberties perspective, Obama has carried forward nearly every one of the war-on-terror powers that led liberals to denounce George W. Bush as a goose-stepping fascist, and in fact has made many of them worse," wrote A. Barton Hinkle on *reason.com*. Recalling that Obama once taught courses in constitutional law, Hinkle added: "When he retires from public life, perhaps he will return to teaching the Constitution. That should be much easier work — given how little of it there will be left."

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