Obama Press Attacks Degrade the First Amendment In The Name of Security

By **Jennifer Granick** on March 20, 2014 at 2:32 PM

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This post is co-authored with Morgan Weiland, a J.D.-Ph.D. candidate at Stanford Law School and the Stanford Communication Department. Before coming to Stanford, Weiland was a Research Project Manager at Media Matters for America, a media watchdog in Washington, D.C. She also has worked as a journalist on Capitol Hill.

Fifty years ago, the U.S. Supreme Court decided the case of *New York Times v. Sullivan*, "the clearest and most forceful defense of press freedom in American history." With *Sullivan*, the Supreme Court ensured that newspapers acting in good faith could hold southern politicians accountable for the tyranny of Jim Crow without the threat of punitive libel suits. Yet today, journalism in America is again under attack.

President Obama's has been the most aggressive Administration in history, not only in going after whistleblowers, but also pursuing the reporters who write their stories.

National security reporting has long been one of the most effective checks on government power. As we have seen over the last year, the bulk collection of citizens' phone records has driven a national debate about the proper role of surveillance in the United States. The President himself has said this is a national conversation worth having, yet the source of this revelation, Edward Snowden, has had to flee to Russia, the U.S. having successfully

pressured European countries to deny him asylum. This Justice Department has pursuedseven other whistleblowers who revealed abuses ranging from government waste to torture—more than all previous Administrations combined.

The Obama Administration's unprecedented pursuit of criminal liability against security leakers threatens to rope in the Fourth Estate. Case in point, the Obama administration has ordered *New York Times* reporter James Risen to testify against one of his CIA sources, forcing the case all the way to the Supreme Court. In another investigation, the Justice Department subpoenaed—without notice—two months worth of Associated Press reporters' phone records on a leak fishing expedition. The message? Don't report national security stories or you will become a target. If the Administration's goal is not to restrict the press and First Amendment, it is doing an excellent job nonetheless.

Partially in response to the firestorm of criticism of these and other investigations against journalists, the DOJ recently promulgated a final rulepurporting to limit when the government may obtain journalists' records. But the national security exceptions to the rule, including a loophole for FISA wiretaps and search warrants as well as for national security letters, undermine the rule's ability to effectively protect journalists.

With no standing to challenge suspicionless surveillance that ensnares national security journalists thanks to the Supreme Court's *Clapper v. Amnesty International* decision, and little protection from the loophole-ridden DOJ rule, the government has forced journalists to go cloak-and-dagger themselves: encrypting messages, building secure document storage like SecureDrop, and hoping that they stay ahead in a cat and mouse game against the most sophisticated intelligence agency on Earth. Journalists who can't stand the heat have one viable option: Don't report the story.

The Administration's aggressive criminal pursuit of sources contributes to a growing climate of hostility toward journalists. House committee chairman Mike Rogers (R-MI) has charged that journalists who work with leakers might be criminal "accomplices." According to Rogers, freelance journalists or others not associated with a "genuine news outlet" are not doing "legitimate journalism that is protected by our Constitution." If journalists weren't already chilled by the surveillance dragnet, by the Obama Administration's aggressive prosecution of leakers, by its insistence that reporters violate privilege and testify against sources, and by the DOJ's practice and policy allowing investigation of

journalists themselves, Congress' suggestion that national security reporters are criminal "accomplices" will probably do the trick.

Fifty years ago, in *New York Times v. Sullivan*, the Supreme Court held that informed public debate is essential to our democracy. Rep. Rogers should reread *Sullivan*, which ruled that the First Amendment even protects "the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press." In that case, the Court quoted Judge Learned Hand, saying that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many, this is, and always will be, folly, but we have staked upon it our all." The purpose of the First Amendment,*Sullivan* says, is "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

President Obama has welcomed the conversation and recognized the need for change in our surveillance practices. Yet, as national security journalists seek to pull back the veil of secrecy and expose the government's potential abuses of the Fourth Amendment—his Administration is vigorously undermining the press' First Amendment function. We can't have it both ways. This nation will not be more secure if we trade away either privacy, or First Amendment freedoms, in the name of national security.

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