

**REDUCING SECRECY:
BALANCING LEGITIMATE GOVERNMENT
INTERESTS WITH PUBLIC ACCOUNTABILITY**

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One of the Federalist Society's founding principles, that "the state exists to preserve freedom,"¹ could have come straight from the ACLU Policy Guide. Likewise, the Federalist Society's mission statement stresses that the organization "seeks . . . to . . . reorder[] priorities within the legal system to place a premium on individual liberty."²

Exactly twenty years ago, I was on a Federalist Society panel with one of your founding figures, Irving Kristol. As usual, I recited these libertarian tenets of your group, and that sent him into a state of shock! This was his exact response:

I am shocked to discover that the Federalist Society seems to have said somewhere that the State exists to preserve freedom. The Federalist Society should call a meeting immediately and change that . . . You say that, and you get yourself in the kind of trap that Ms. Strossen has now sprung.³

Since then, before every Federalist Society speaking engagement, I re-read your website to make sure you have not heeded Irving Kristol's advice. So far you have not done that,⁴ so, to quote Mr. Kristol, you are again trapped by your own words when it comes to protecting government secrets and punishing leaks.

The urgent need to reduce government secrecy and to increase protection for whistleblowers follows from the portions of your mission statement that I just quoted. Moreover, my po-

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1. *About Us*, FEDERALIST SOC'Y, <http://www.fed-soc.org/AboutUs/> [<http://perma.cc/XHS8-ZT9M>] (last visited Nov. 7, 2014).

2. *Id.*

3. Irving Kristol, *Educating the Urban Poor: The (Only) Legitimate Function of the Public Schools*, 1 MICH. L. & POL'Y REV. 325, 325 (1996).

4. *About Us*, *supra* note 1.

sition in this debate is reinforced by yet another tenet in your mission statement, “that the separation of governmental powers is central to our Constitution.”⁵

In contrast, Roger Pilon’s position squarely violates the separation of powers and individual liberty that are enshrined in both the U.S. Constitution and the Federalist Society mission statement.⁶ Indeed, the same is true of the status quo. It already violates freedom and separation of powers, so Pilon advocates change in the opposite direction of what we need. We already have excessive executive branch secrecy,⁷ too often wielded not to protect genuine national security concerns, but rather to shield the executive branch from embarrassment, criticism, and dissent.⁸

Likewise, the status quo embodies selective, overzealous executive branch prosecution of whistleblowers. These efforts are made against those who have disclosed executive law-breaking and power abuses,⁹ while other leaks, which aim to make the executive look good, go unpunished.¹⁰ Equally unpunished are the executive officials on whom the whistle is blown¹¹—those who have violated the Constitution and federal statutes, and trampled on both individual freedom and separation of powers.¹²

All of this would be deplored by the Founding Father who is so revered by this group that his profile is on the tie Roger is wearing. As a civil libertarian, I of course also greatly admire James Madison. Therefore, long ago, I bought a Federalist Society tie for my husband. As I told him, all of those “FS’s” on the tie stand for “Free Speech!” Let me remind you of one of the

5. *Id.*

6. Roger Pilon, *On the National Security Leaks Dilemma*, 2 HARV. J.L. & PUB. POL’Y: FEDERALIST EDITION 39 (2015).

7. See Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 474 (2014).

8. See *id.* at 460–64.

9. See *id.* at 464.

10. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 559–60 (2013).

11. See, e.g., Colleen Curry, *NSA Spying Will Continue Despite Snowden’s Leaks, Experts Say*, ABC NEWS, Oct. 30, 2013, <http://abcnews.go.com/US/edward-snowdens-leaks-lead-change-intelligence-experts/story?id=20713875> [<http://perma.cc/C6KW-G72L>].

12. *Id.*

most famous, oft-quoted statements that James Madison made, which fully supports my position in this debate:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.¹³

Let me also cite a recent editorial cartoon. It shows two NSA officials plugged into a computer, listening intently. One of them, flabbergasted, says to the other: “We’re actually listening in on James Madison—Father of the Constitution?!” To which the other replies: “Sort of . . . that’s the sound of him rolling over in his grave.” So, as Irving Kristol warned you, to prevail in this debate, I need only invoke your own founding principles and your own favorite Founding Father!

Now let me state a few factual premises on which I hope we can all agree.¹⁴ First, our classification system is dysfunctional, hugely bloated, and covers material that poses no genuine security risk.¹⁵ Second, and relatedly, our system is flooded with leaks¹⁶—as an inevitable counter to this excessive secrecy and essential for government accountability to We the People, the ultimate governors.¹⁷ Third, excessive secrecy is a huge waste of our precious security resources.¹⁸ All of you fiscal conservatives out there should balk at the huge cost of the counterproductive classification system—almost \$10 billion in 2012.¹⁹ And that doesn’t

13. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON (Gaillard Hunt ed., 1910), 103.

14. Indeed, these factual premises reflect the consensus of intelligence community experts across the political spectrum. See, e.g., Donald H. Rumsfeld, Op-Ed., *War of the Words*, WALL ST. J., July 18, 2005, <http://online.wsj.com/news/articles/SB112164930948087989> [<http://perma.cc/TY5M-H5WL>]; Ramsey Cox, *Shaheen to Obama: ‘Over-classification’ in government costs taxpayers money*, THE HILL (May 30, 2013 8:59 PM), <http://thehill.com/blogs/floor-action/senate/302629-shaheen-to-obama-over-classification-in-government-costs-taxpayers-money> [<http://perma.cc/SLY6-3XE4>].

15. Pozen, *supra* note 10, at 581, 623–25.

16. *Id.*

17. *Id.*

18. INFO. SEC. OVERSIGHT OFFICE, 2012 ANNUAL REPORT TO THE PRESIDENT 24–25 (2013).

19. *Id.*

include classification expenses incurred by the security agencies themselves²⁰ because, ironically, those numbers are classified!²¹

Fourth, excessive secrecy actually undermines national security by preventing effective information sharing, thus leading to flawed intelligence.²² This point was underscored by none other than a former head of the whole classification system, J. William Leonard, who was a former Director of the Information Security Oversight Office. As he said: “Government secrecy just about guarantees the absence of an optimal decision on the part of our nation’s leaders, oftentimes with tragic consequences for our nation.”²³ Additionally, the Bipartisan 9/11 Commission actually concluded that excessive secrecy could well have contributed to the 9/11 attacks.²⁴

Given the Federalist Society’s commitment to empowering state and local governments,²⁵ I should stress state and local officials’ complaints that undue secrecy has hampered their ability to fight terrorism,²⁶ thus endangering all of us.²⁷ For example, let me quote Commander Michael Dowling of the LAPD’s Counterterrorism Bureau: “[The federal government’s]

20. *Id.* at 25.

21. The security classification expenses incurred by the following agencies are classified, and not included in the totals: CIA, NSA, Defense Intelligence Agency, Office of the Director of National Intelligence, National Geospatial-Intelligence Agency, and National Reconnaissance Office. *Id.*

22. See ELIZABETH GOITEIN & DAVID M. SHAPIRO, BRENNAN CTR. FOR JUSTICE, REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY 1 (2011).

23. MIKE GERMAN & JAY STANLEY, AM. CIVIL LIBERTIES UNION, DRASTIC MEASURES REQUIRED: CONGRESS NEEDS TO OVERHAUL U.S. SECRECY LAWS AND INCREASE OVERSIGHT OF THE SECRET SECURITY ESTABLISHMENT 29 (2011) (citing William Leonard, *Classification: Radical, Let Alone Incremental, Reform Is Not Enough!*, INFORMED CONSENT, Aug. 9, 2009).

24. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 276 (2004) (concluded that publicity about the increased terrorism threat reporting during the summer of 2001 might have actually derailed the 9/11 plot); see also *id.* at 541 n.107 (“[H]ad KSM known that Moussaoui had been arrested, he would have cancelled the 9/11 attacks.”).

25. See *Our Background*, FEDERALIST SOCIETY, <http://www.fed-soc.org/aboutus/page/our-background> (last visited Nov. 7, 2014) [<http://perma.cc/LF9C-FB73>].

26. See *The Over-Classification and Pseudo-Classification: The Impact on Information Sharing: Hearing Before the Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Security*, 110th Cong. 31–32 (2007) (statement of Michael P. Downing, Assistant Commanding Officer, Counter-Terrorism/Criminal Intelligence Bureau, L.A. Police Department).

27. See *id.*

classification process has been a substantial roadblock to [local law enforcement's] capacity to investigate terrorism cases and work hand-in-hand with these federal agencies."²⁸

Now for a fifth and final factual point, about which there is also consensus: There are good leaks and bad leaks. I don't know of any responsible analyst who takes an all-or-nothing position on these issues, including my ACLU colleagues who have been working full-time on these issues. Rather, they advocate certain governing principles for handling particular cases. For example, Ben Wizner, the ACLU lawyer who has been advising Edward Snowden, has advocated four principles to shape fairer policies toward unauthorized disclosures,²⁹ in contrast to what journalists have denounced as the Obama Administration's war on not only whistleblowers, but also newsgathering.³⁰

To substantiate these charges, I will cite just two examples, which should have special resonance for Federalist Society supporters because they involve Fox News and the *Wall Street Journal*. Last spring, we learned that, in a leak inquiry, the Justice Department had secretly seized telephone and email records of Fox News chief Washington correspondent James Rosen,³¹ including his personal emails.³² Most chillingly, the FBI declared that there was "probable cause to believe that" Rosen had violated the 1917 Espionage Act.³³

As its name indicates, the Espionage Act is an archaic law which was originally aimed at spies who transmitted U.S. se-

28. *Id.* at 31.

29. Ben Wizner, *Bradley Manning was no criminal*, POLITICO (Aug. 22, 2013, 6:10 PM), <http://www.politico.com/story/2013/08/bradley-manning-was-no-criminal-95820.html> [<http://perma.cc/EA7C-4NHE>].

30. See Glenn Greenwald, *Kiriakou and Stuxnet: the danger of the still-escalating Obama whistleblower war*, THE GUARDIAN (Jan. 27, 2013, 9:10 AM), <http://www.theguardian.com/commentisfree/2013/jan/27/obama-war-on-whistleblowers-purpose> [<http://perma.cc/EQA7-BHJE>].

31. Ann E. Marimow, *Justice Department's scrutiny of Fox News reporter James Rosen in leak case draws fire*, WASH. POST, May 20, 2013, http://www.washingtonpost.com/local/justice-departments-scrutiny-of-fox-news-reporter-james-rosen-in-leak-case-draws-fire/2013/05/20/c6289eba-c162-11e2-8bd8-2788030e6b44_story.html [<http://perma.cc/Q35U-GHKN>].

32. *Id.*

33. Erik Wemple, *Eric Holder on Fox News's James Rosen: Weaselly garbage*, WASH. POST, June 20, 2013, <http://www.washingtonpost.com/blogs/erik-wemple/wp/2013/06/20/eric-holder-on-fox-newss-james-rosen-weaselly-garbage/> [<http://perma.cc/9T4H-AQ5A>].

crets to hostile countries.³⁴ Throughout its history, countless journalists have issued countless stories based on countless unauthorized leaks.³⁵ Yet not a single administration had ever invoked the Espionage Act to prosecute a single journalist.³⁶ Thus, the Obama Administration's threat to do so against Fox's Rosen has cast a big chill over journalists.

In the same vein, shockingly, the Obama Administration has pursued more Espionage Act prosecutions against government employees who disclosed information to the press than all prior administrations combined.³⁷ No wonder these attacks on basic newsgathering have been denounced by the whole journalism world, across the ideological spectrum.³⁸

Even such a strong supporter of strong executive power and national security policies as the *Wall Street Journal* said the Obama Administration was engaging in "a pattern of anti-media behavior," and that its so-called "leak" investigations "are less about deterring leakers and more about intimidating the press."³⁹

34. 18 U.S.C. § 798 (2012).

35. See Adam Liptak, *A High-Tech War on Leaks*, N.Y. TIMES, Feb. 11, 2012, http://www.nytimes.com/2012/02/12/sunday-review/a-high-tech-war-on-leaks.html?pagewanted=all&_r=0 [<http://perma.cc/NMV7-KW7Q>].

36. 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/> [<http://perma.cc/6XR4-NJJD>].

37. Daniel Politi, *Obama Has Charged More Under Espionage Act Than All Other Presidents Combined*, SLATE (June 22, 2013, 3:32 PM), http://www.slate.com/blogs/the_slatest/2013/06/22/edward_snowden_is_eighth_person_obama_has_pursued_under_espionage_act.html [<http://perma.cc/B8Q6-PM5F>].

38. See Leonard Downie Jr., *In Obama's war on leaks, reporters fight back*, WASH. POST, Oct. 4, 2013, http://www.washingtonpost.com/opinions/in-obamas-war-on-leaks-reporters-fight-back/2013/10/04/70231e1c-2aeb-11e3-b139-029811dbb57f_story.html [<http://perma.cc/6VAD-47YS>]; Dan Kennedy, *Obama's War on Journalism*, HUFFINGTON POST (Feb. 27, 2012, 11:18 AM), http://www.huffingtonpost.com/dan-kennedy/calling-out-obama-for-his_b_1303783.html [<http://perma.cc/SLD-8CWF>]; Alex Newman, *Obama War on Journalism: Feds Raid Reporter, Seize Notes*, NEW AMERICAN (Oct. 28, 2013, 9:56 AM), <http://www.thenewamerican.com/usnews/crime/item/16819-obama-war-on-journalism-feds-raid-reporter-seize-notes> [<http://perma.cc/TL95-UPGA>]; David Sirota, *Obama's war on journalism*, SALON (Jun. 27, 2013, 8:00 PM), http://www.salon.com/2013/06/28/obamas_war_on_journalism/ [<http://perma.cc/G6UB-RQAX>].

39. *A Journalist 'Co-Conspirator'*, WALL ST. J., May 20, 2013, <http://online.wsj.com/news/articles/SB10001424127887324102604578495253824175498> [<http://perma.cc/AX8L-G5N3>].

So, how do we fairly accommodate both the government's legitimate interest in protecting some secrets and the public's vital need to know enough to ensure the government's accountability and adherence to our Constitution and laws?

Here are the four principles that Ben Wizner endorsed:⁴⁰

(1) Government employees who expose misconduct should not be punished more severely than those who engage in misconduct.

(2) The government should have to demonstrate that the leaked information had been properly withheld from the public.

(3) The government should not systematically fail to pursue leaks that advance its interests, while aggressively prosecuting leaks that do the opposite. Whistleblowing leaks should be treated differently from other leaks. Especially given the government's excessive secrecy, We The People have had to depend on whistleblowers to disclose a whole range of post-9/11 power abuses, including the Abu Ghraib scandal, the CIA's secret prisons, kidnapping and torture of suspects, targeted killing of US citizens by drone, and, of course, the NSA's sweeping domestic surveillance, which has been strongly condemned across the political spectrum.

(4) Whistleblowers who disclose such government misconduct should be able to defend themselves on the ground that the public benefit of their disclosures far outweighs any harm to security. Indeed, unauthorized disclosures about government illegality should not be prosecuted at all because the public's right to know about this categorically outweighs the government's interest in secrecy.

Now, to complement the core guidelines that Ben laid out, I would like to list a few more points. First, we must drastically reduce the entrenched overclassification that has long prevailed. High-ranking intelligence and military officials have estimated that we could safely release at least half—some estimates go as high as ninety percent—of classified documents.⁴¹ Overclassification means that massive numbers of government employees need security clearances. That number is now an

40. Wizner, *supra* note 29.

41. Elizabeth Goitein & J. William Leonard, *America's Unnecessary Secrets*, N.Y. TIMES, Nov. 7, 2011, http://www.nytimes.com/2011/11/07/opinion/national-security-and-americas-unnecessary-secrets.html?_r=0 [<http://perma.cc/BN58-HFHZ>].

astounding one in every fifty American adults.⁴² No wonder we are awash in leaks! As Justice Stewart observed in the landmark Pentagon Papers case:

[W]hen everything is classified, then nothing is classified, and the system . . . [is] disregarded by the cynical or the careless, and . . . manipulated by those intent on self-protection or self-promotion. . . . [A] truly effective . . . security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.⁴³

Second, we must provide clear procedures under which intelligence employees can report wrongdoing and be protected from retaliation. While some procedures purport to facilitate whistleblowing by intelligence employees, they do not protect the whistleblowers from retaliation, and many of them do not apply at all to employees of independent contractors, such as Edward Snowden.

Therefore, individuals such as Edward Snowden have to risk their freedom and their careers by disclosing official misconduct to the press. I assume that not everyone in this audience views Snowden as a whistleblowing hero.⁴⁴ So let me cite a pertinent editorial cartoon. It depicts an angry NSA spy pounding his fist and exclaiming: “Snowden secretly stole private information using the excuse that he was protecting the American people . . . Who does that traitor think he is??? US!?!”

Congress and the President should heed the following statement, supporting robust protection for all whistleblowers, including in sensitive national security positions: “Often the best source of information about . . . abuse in government is a[] . . . government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism . . . should be encouraged rather than stifled.” Who made this statement? No, it wasn’t the head of a whistleblower ad-

42. Leigh Munsil, ‘Top secret’ is the new ‘secret,’ POLITICO (Jun. 14, 2013, 2:04 PM), <http://www.politico.com/story/2013/06/top-secret-is-the-new-secret-92818.html> [<http://perma.cc/HT62-33PV>].

43. *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

44. Drew Guarini, *Bill Gates: Edward Snowden Is No Hero*, HUFFINGTON POST (Mar. 1, 2014, 12:10 PM), http://www.huffingtonpost.com/2014/03/14/bill-gates-snowden_n_4964311.html [<http://perma.cc/4S8U-RNPX>].

vocacy group. Rather, it was Barack Obama during his 2008 election campaign.⁴⁵

Third, government employees who disclose information to the press or the public should not be criminally prosecuted as if they were spies who had given information to a hostile government. In fact, they should not be subject to any criminal penalty unless they specifically intended to harm our national security interests, and they had no substantial basis to believe that the public interest in disclosure outweighed any national security harms.

Finally, members of the media should not be subject to criminal prosecution merely for publishing information that they obtained from a government source who was unauthorized to provide it to them. This position is consistent with Supreme Court rulings, although the Court has never directly resolved the issue.⁴⁶ Moreover, this position has been endorsed by a federal judge who has been a Federalist Society stalwart—Judge J. Harvie Wilkinson.⁴⁷ In fact, Judge Wilkinson’s opinion included an eloquent summary of the reasons why my position in this debate is right, and Pilon’s is wrong.⁴⁸ So let me conclude with not my own, but Judge Wilkinson’s words:

Criminal restraints on the disclosure of information threaten the ability of the press to scrutinize and report on government activity. . . . The First Amendment interest in informed popular debate does not simply vanish at the invocation of the words ‘national security.’ National security is public security, not government security from informed criticism.⁴⁹

45. The Office of the President-Elect, *Agenda: Ethics*. CHANGE.GOV, http://change.gov/agenda/ethics_agenda/ (last visited Nov. 7, 2014) [<http://perma.cc/DS9A-5ASB>].

46. See JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41404, CRIMINAL PROHIBITIONS ON THE PUBLICATION OF CLASSIFIED DEFENSE INFORMATION 26–27 (2013) (citing *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102–03 (1979); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *New York Times Co. v. United States*, 403 U.S. 713 (1971)). However, others have plausibly interpreted these same precedents as not supporting the stated proposition. See, e.g., Derigan A. Silver, *National Security and the Press: The Government’s Ability to Prosecute Journalists for the Possession or Publication of National Security Information*, 13 COMM. L. & POL’Y 447 (2008).

47. See *United States v. Morison*, 844 F.2d 1057, 1080 (4th Cir. 1988) (Wilkinson, J., concurring).

48. *Id.* at 1080–85.

49. *Id.* at 1081.