Secrecy, transparency and government whistleblowing

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Abstract
In the first part of the 21st century, the complicated relationship between transparency and security reached a boiling point with revelations of extra-judicial CIA activities, near universal NSA monitoring and unprecedented whistleblowing – and prosecution of whistleblowers under the Espionage Act. This article examines the dual necessities of security (specifically, the Intelligence Community) and transparency (specifically, the Fourth Estate or media) for any democracy, and the manner in which whistleblowers radically saddle this Janus-faced relationship. Then I will move to contemporary examples of whistleblowing, showing how and why some prove more damaging or beneficial than others. I will conclude with some suggestions as to practical reforms which might mitigate the seemingly inevitable pendulum-swinging between Snowden-style vigilantism and a panoptic security state.

Keywords
democracy, intelligence ethics, journalism ethics, transparency, whistleblowing

Introduction
This article hopes to examine the curious character of the intelligence community (IC) government whistleblower, in order to ask whether, under what circumstances and to what extent a whistleblower should be treated as a boon or a bane for a would-be just society. It proceeds in three main parts. First, I will briefly engage the scholarly literature on whistleblowing, in order to provide a sketch of the tripartite intelligence–whistleblower–media relationship. Second, I will discuss cases wherein the relations between intelligence–whistleblower–media ultimately prove successful (e.g. the revelation of...
CIA ‘black sites’), and others arguably less so (e.g. the ‘outing’ of CIA agents, WikiLeaks and the use of the Espionage Act under the Obama administration). Third, I will conclude with suggestions as to how we might improve.

This examination does not set out to answer whether certain whistleblowers are ethically ‘right’; rather, by illustrating that our current approach is inherently pendulous I hope to contribute to a dialogue about developing more agile tools to face the complicated and, at times, conflicting realities of democratic practice. Either way, there is no more room for Captain Renaults to claim, as indignantly as disingenuously, that they are ‘shocked, shocked’ at what is going on.1

I Anatomy of a whistleblower

The government whistleblower requires meditation, as – simultaneously – she or he is capable of benefitting and harming, manipulating and strengthening, both the IC and the Fourth Estate. To examine her or him, we must first look at the nature of both secrecy and transparency in the USA (understood as a just or nearly-just society, wherein one can generally assume an obligation to follow the law). Then we will place the whistleblower in relief against this backdrop.

I Secrecy and transparency

 Democracies are bastions of secrecy qua privacy, insofar as this constitutes their would-be distinction from totalitarian regimes.2 Aside from and in addition to the secrecy that is built into the very survival of any body politic (i.e. the intelligence apparatus), democracies have been historical defenders par excellence of a number of celebrated confidential relationships. The august respect afforded to privacy is most evident at the ballot box, a secrecy long considered an existential necessity for any just society.3 This is extended – evolving out of the explicit protections enumerated in the Bill of Rights inter alia4 (e.g. self-incrimination, unreasonable searches, etc.) – to a number of common law privileges: the priest–penitent, therapist–patient, attorney–client, journalist–informant, and spousal.5 Beyond these is a galaxy of further expectations of privacy that, while arguably not constitutive of a just society, are nevertheless outgrowths and expectations of such considerations (e.g. mail and phone correspondence) Therefore, the dual necessities of secrecy at the macro-level (e.g. most agree that the identities of covert agents or nuclear launch codes should not be public) and the micro-level (e.g. most agree that the above relationships are sacrosanct) entail that maintaining secrecy is essential to a would-be just, democratic state.6

 However, the same is true of democracy’s relationship to transparency. The ability of a democratic citizenry to access the workings of its government is equally essential and constitutive of its functioning. Indeed, this is the holy charge of the Fourth Estate: to provide the public, virtually unhindered,7 with the information necessary for proper decision-making. ‘Let the people know the facts, and the country will be safe’ (Abraham Lincoln); ‘If it were left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter’ (Thomas Jefferson); ‘A popular government without popular
information, or the means of acquiring it, is but a prologue to a farce or tragedy; or perhaps both’ (James Madison).8

If secrecy is an existential necessity for democracy, and is most directly manifested in both the IC and the above confidential relationships – let alone for the idea of a citizen’s ‘private life’ to have any meaning – then transparency is equally vital, as represented by the unimpeded activities of the journalist vis-à-vis the public’s need-to-know.

2 External government whistleblowing by members of the IC

Although the scholarly literature (and the legal apparatus) on whistleblowing is extensive for the sphere of business ethics,9 related discussions in political philosophy are (until recently) relatively nascent.10 This is especially true for the narrow field of external government, whistleblowers within the IC, the focus of the present project.

As will be evident to anyone familiar with her indispensable work, I borrow freely from Candice Delmas’ examination of external government whistleblowing. She contrasts it with ‘internal’ whistleblowing (i.e. going through proper channels within an organization) as ‘unauthorized acquisition (typically through mishandling or theft of protected documents) and disclosure (typically through leaks to a news outlet) of classified information about the state or government’ and as ‘a form of “political vigilantism” which involves transgressing the boundaries around state secrets, for the purpose of challenging the allocation or use of power’.11 Further, she notes that the whistleblower is either an insider (i.e. someone with current or former privileged access to the information in question) or an outsider (i.e. someone who has obtained the information without prior authorization). While she recognizes that these terms are limited, her article provides an excellent provisional taxonomy to discuss the complicated identities involved.

There is a fundamental distinction between government whistleblowers in the IC and all others. On the one hand, internal and external whistleblowers in both private and public spheres are protected by a cornucopia of laws.12 On the other hand, at present no such protections exist for members of the IC. The unauthorized disclosure of classified information is ipso facto unlawful.13

Extensive disagreement as to whether such leaks should be regarded as unethical and/or illegal notwithstanding, with respect to the above systems of transparency and secrecy, the IC government whistleblower is a consummate paradox. She is a champion of transparency and saboteur of secrecy, insofar as she presents classified information to the public. Yet she is privy to such secret information only due to the fact that she received the appropriate clearance. This entails that she previously vowed to keep it secret as a prerequisite of joining the security apparatus she now exposes.14 Further, she most often hopes that her own identity will remain secret, in order to avoid retaliation.15 Finally, the act of revelation itself is selective: her existence qua whistleblower is predicated on her exposing some aspect of her access rather than the entire apparatus to which she is privy, and she typically makes every attempt to keep other aspects of that which she knows secret. The whistleblower simultaneously eschews and affirms the necessity of secrecy in the act of becoming a whistleblower.16
Meanwhile, her actions turn the transparency and secrecy systems against one another: the Fourth Estate now reports that some aspect of the IC has become a threat, and the IC now regards the Fourth Estate—and its informant(s)—as a threat. Insofar as one understands both the security apparatus and the Fourth Estate as dual defense systems, the whistleblower qua whistleblower exists simultaneously as a friend and a foe. Whether she is a de facto or de iure hostile element depends both on whether the whistleblower–journalist team has rightly identified and properly exposed an actual threat, and on how the government responds. To wit: wanton disclosure of secrets is inherently dangerous, but so is retaliation against those seeking to create a more just society in the name of transparency. On the one hand, given that the whistleblower is as capable of representing the best practices within these democratic functions as of presenting carnival-mirror distortions of them, this entails that she is capable of recognizing the process’ (im)propriety vis-à-vis a society’s movement towards justice. On the other hand, the lurching (over)(re)actions between secrecy and transparency seem to be not just anomalies or mistakes but constitutive and inevitable. Therefore, the question becomes how to minimize the potential damage while maximizing the potential good—i.e. what we can do, if anything, to try to mitigate this pendulum-swinging.

II Swinging towards the good: Priest and ‘black sites’

There are many historical examples of a minimally damaging, maximally informing interaction between secrecy and transparency. These include the Pentagon Papers, the 2004 revelation that the NSA was warrantlessly wire-tapping Americans, and the exposure of the CIA’s creation of ‘black sites’ and their use as extra-judicial, extra-national prisons and torture facilities. This article will focus on the third.

In November 2005, Dana Priest of The Washington Post broke the story that the CIA had created ‘black sites’ in foreign countries, through illegal bribes and without the knowledge of either our or their countries’ central governments, as a means to interrogate and torture prisoners on foreign soil. In her original piece (for which she won a Pulitzer), Priest said, ‘The Washington Post is not publishing the names of the Eastern European countries involved in the covert program, at the request of senior US officials. They argued that the disclosure might disrupt counterterrorism efforts in those countries and elsewhere and could make them targets of possible terrorist retaliation’. Priest later revealed the process that led to the story and its temporary redaction. Through a combination of good old-fashioned investigative journalism and some as yet unknown (and this will be important later) intelligence official(s), she discovered names, locations, photographs—a veritable library of top-secret materials regarding the program. Recognizing the incredibly sensitive nature of this material alongside the ethical imperative of revealing it to the public, she and her executive editor Leonard Downie contacted the White House. A series of meetings ensued, including ones wherein former Vice-President Cheney and President Bush personally asked her not to run the story. The reporters responded that they had to go forward, but they would work with the administration and redact parts if and when they were convinced of the necessity. This is important: Priest and Downie refused to fold before the nebulos claim of ‘national security’, responding that in the absence of specific explanations as to any danger, they
had an obligation to publish the documents. The administration returned that its concerns were manifold, but provided credible threats against foreign nationals as retaliation for working with the USA in this manner – e.g. oblique, but relevant and dangerous, intelligence regarding human lives in eastern European countries who might be targeted as a result of the program, even if they had no knowledge of the program. After several days of negotiations, the parties reached a compromise – but only after the journalists had been given a type of ad hoc top-secret clearance. They ran the story, providing the information they deemed both necessary and useful for the public (the existence, nature and extent of the program), while withholding that which was deemed unnecessary due both to the legitimate potential danger (to which they were now privy) and to the specificity (the locations). The USA needed to know that this was happening, not where it was happening; the latter would not add significantly to informed debate about whether it should be happening, although it might result in loss of life.21

The response was remarkable in three ways. First, groups like Fairness and Accuracy in Reporting (FAIR) and the Guardian found this withholding to be subservient and enabling. Writing for the Guardian, Glenn Greenwald praised Priest’s as ‘a superb act of journalism’, yet then accused her and The Washington Post of ‘purposely conceal[ing] the identity of the countries . . . in order to enable the plainly illegal program to continue’. He summarily dismissed this, and ‘each instance’ of US media self-censorship ‘over the last decade’, as having

...nothing to do with legitimate claims of national security... Instead, it has everything to do with obeying government dictates; shielding high-level government officials from embarrassing revelations; protecting even the most extreme deceit and illegality; and keeping the domestic population of the US (their readers) ignorant of the vital acts in which their own government is engaged.22

FAIR went further; while admitting that the threat of retaliation was very real, it nevertheless charged that unless the Post revealed the specific locations, the legal challenges and political condemnation necessary to force their closure would be ‘difficult if not impossible’.23

Second, the response from the right was even more vociferous. The Post was attacked for damaging national security by public figures, pundits, etc.24 The CIA asked the Department of Justice (DOJ) to open a criminal investigation directed at The Washington Post and Priest.25 House Speaker Dennis Hastert (R-IL) and Senate Majority Leader Bill Frist (R-TN) called for an investigation into the leak, stating ‘such an egregious disclosure could have long-term and far-reaching damaging and dangerous consequences and will imperil our efforts to protect the American people and our homeland from terrorist attacks’.26 A witch-hunt ensued for the leaker, and although it has been asserted that CIA employee Mary O. McCarthy was identified and fired as a/the whistleblower, she, The Washington Post and the government still maintain publicly that she was not a/the source for Priest’s piece.27

Third, the response from the US public – at first, and for several years – was a combination of apathy and cynicism. True, the International Committee of the Red Cross,28 the EU,29 the Council of Europe30 and numerous other groups began
investigations, and countries began looking into their own backyards for potentially unwitting CIA complicity. But it took until 22 January 2009 for President Obama to sign an Executive Order to reform—not end—the practice of extraordinary rendition.\textsuperscript{31} Nevertheless, this serves as an example of a success in the relationship of media–whistleblower–intelligence. On the one hand, Priest and The Washington Post provided the public with the necessary information to produce informed debate, in an effort to address a program that clearly represented overreach by the IC. In spite of unsubstantiated claims from the left, there is no reason to concede that it would have furthered the theoretical or practical purposes of justice to reveal specifics. In the absence of evidence, it is at best counter-productive, at worst libelous, to accuse Priest and The Washington Post of intentionally enabling illegal activities, particularly given that their decision to publish led to internal and international investigations and eventual reform, as well as professional criticism and personal threats. On the other hand, they withheld that which they believed could potentially and needlessly endanger lives. In spite of inconsistent claims from the right, the Fourth Estate has an obligation to expose, rather than protect, an immoral (and, in this case, very likely both unconstitutional and illegal) venture on the basis of its potential ‘use’. And they did so in a way that respected the very real threat of retaliation, both against those involved and innocents. Maximally informing, minimally damaging, all while performing their sacred secular duty to democracy: contrary to criticism, this should be regarded as a successful venture for the media–whistleblower–intelligence relationship vis-à-vis a would-be just society.

III Swinging towards the bad: ‘outed’ agents and WikiLeaks

There are numerous examples as well of misapplications or misallocations of these same processes. And these notably fall on both sides: the ‘bad’ here describes overreach both by the government (security) and by the whistleblower/Fourth Estate (transparency). The Pentagon Papers fall into the category of a thankfully failed response against a vindicated exposure: though Daniel Ellsberg and Anthony Russo were charged under the Espionage Act, they were acquitted and have since been celebrated. The most obvious recent examples are the outing of CIA operatives Valerie Plame and Raymond Davis, and Manning’s leaks to WikiLeaks.

The cases of Plame and Davis should not require much discussion, although the majority of the public remains unaware of them. Regarding the former: in 2002, the CIA was attempting to corroborate intelligence from the vice-president’s office regarding Iraq’s attempts to obtain yellow cake uranium from Niger. Plame informed her co-workers that her husband Joe Wilson, a former diplomat with extensive contacts in the region, could act as the CIA’s liaison on the ground. When Wilson found no evidence for the uranium claim, the vice-president’s office responded that it had its own sources of intelligence, and the claim even became a centerpiece for the administration’s call to war.\textsuperscript{32} Wilson cast doubt on this with an op-ed in The New York Times,\textsuperscript{33} and within a week Bob Novak outed Plame as a covert CIA agent.\textsuperscript{34} Although no one was charged for the leak, the ensuing investigation revealed that Richard Armitage, Karl Rove and Lewis ‘Scooter’ Libby informed at least three reporters (including Novak) of Plame’s identity, potentially as retribution for Wilson’s challenging the war’s justification. Although the
other reporters refused to publish the information (Judith Miller of The New York Times even went to jail for 12 weeks for refusing to name her source\textsuperscript{35}), and although subsequent investigations showed that he was told repeatedly not to reveal Plame’s identity, Novak went forward because he felt that Wilson’s prior partisan leanings made his claims invalid (regardless of their objectivity) – and that this also required his wife’s CIA identity to be compromised.\textsuperscript{36}

Regarding the latter: Raymond Davis was working for the CIA in Pakistan under the guise of a consulate employee when he shot and killed two men, Faizan Haider and Faheem Shamshad. According to him it was self-defense. While the police investigation contradicted Davis’ claim that the young men were armed or that they were the aggressors, he was eventually acquitted.\textsuperscript{37} President Obama himself demanded that Davis receive diplomatic immunity.\textsuperscript{38} It was revealed by the Guardian that Davis was working for the CIA. The New York Times, The Washington Post and Associated Press later admitted that they knew, although they agreed not to disclose, his identity due to the potential damage to both national security and individual persons – both Davis specifically and US nationals generally in Pakistan.\textsuperscript{39} Two days later the Telegraph reported that Davis was actually section chief for Pakistan.\textsuperscript{40}

In both the Plame and Davis cases, there are multiple cases of misappropriation. First, it is \textit{ipso facto} illegal – as per the Intelligence Identities Protection Act – for any US citizen to reveal the identity of a covert operative.\textsuperscript{41} Novak violated this in outing Plame, although his defense – he stated that everyone in DC knew she was an agent – managed to keep him from prosecution.\textsuperscript{42} In the case of Davis, Greenwald blasted the ‘shameless, self-censoring, obedient’ New York Times as ‘an active enabler of government propaganda’ for not revealing that President Obama was ‘lying’ when he called Davis a diplomat.\textsuperscript{43} But had the president confirmed Davis’ identity, he would not only have broken a federal law, he would have further potentially endangered a covert US operative (and others) currently held in a hostile, foreign prison.\textsuperscript{44}

Second, revealing their identities did not serve the public in any clear manner. In Plame’s case, it was irrelevant to Novak’s piece – which is why neither Judith Miller nor Mathew Cooper (of Time) published the information – and thereby his motivation for doing so seems at worst retaliation, at best partisan or irresponsible.\textsuperscript{45} Regarding Davis, nothing in the Guardian or the Telegraph’s articles elucidated why or how his true identity was newsworthy. When The New York Times did come forward, claiming that the incident ‘inadvertently pulled back the curtain on a web of covert American operations inside Pakistan, part of a secret war run by the CIA’,\textsuperscript{46} Greenwald cited that specific sentence to conclude that Davis’ role was ‘not just newsworthy, but crucial’.\textsuperscript{47} But the Pakistani intelligence apparatus (ISI) admitted both knowledge of Davis’ true role and collusion with such, insofar as he was part of a years-long, complicated and covert attempt to keep tabs on numerous militant/extremist elements within Pakistan. In other words, his identity was secret from the public for a reason, as he was acting under the auspices of both the US and Pakistani governments. Thus, in both Davis’ and Plame’s cases, those outing them are guilty of ‘begging the question’: assuming transparency is a good thing without actually proving it.

Third, identifying a covert operative has potential effects that are simultaneously immoral, damaging to national security, devastating to the individuals themselves,
incalculable, and both impossible and unwise to prove. Anyone who considers what is required of an intelligence agent in a foreign country should recognize the potential fallout of that person’s identity being compromised. The moment a foreign agent is identified, competence would require an investigation into whether, where, when, for how long, etc., the named individual was within your country. This would require everything from surveillance to incarceration to interrogation of every person with whom the outed agent interacted: the newsstand where Plame bought her morning paper, the coffee shop attendant Davis chatted with most mornings, the person who cut his hair, her regular cab driver, etc. These are neither speculative nor conspiratorial, but mandatory reactions for counter-intelligence upon confirming a covert agent has been in their country – even if that nation were an ally. The outing of Davis and Plame undoubtedly resulted in counter-intelligence measures which proved both unnecessary (as against those who were in no way involved, i.e. non-asset acquaintances) and damaging (as against those who were, i.e. assets – regardless of whether they themselves realized it).

Therefore, the statements by those who say that these intelligence revelations both served the public interest and resulted in no damage to the USA, its interests, or individuals (regardless of whether they were assets) are as yet untenable. A frequent response is to claim that the USA consistently has failed to demonstrate or provide evidence of such negative consequences, in this and virtually all intelligence leaks. But it would be inarguably unwise for any government to admit the damage caused by an intelligence leak, as this would provide irrefutable proof to foreign intelligence services that they had, in fact, successfully thwarted real assets and activities rather than merely potential ones. Further, it would volunteer specifics as to the nature and extent of an ongoing covert agent/program’s work, thereby potentially leading to further damage (both to intelligence and to collateral individuals). In short, asserting that the USA acted wrongly when ‘lying’ about intelligence activities, while simultaneously failing to prove the utility of revealing them, begs the question exponentially.

Both the Davis and Plame cases demonstrate the unconscionable, self-inflicted harm possible in leaking: rather than serve any legitimate, informative purpose, the outing of an intelligence officer is a misapplication of the Fourth Estate’s mandate – regardless of whether it is done by a conservative commentator under a Republican administration (Novak), or called for by a liberal one under a Democrat (Greenwald).

The case of WikiLeaks is dissimilar in kind, but not in potential effects. In 2010, Chelsea Manning – then an intelligence analyst for the US Army – indiscriminately dumped hundreds of thousands of classified documents on WikiLeaks. Julian Assange, WikiLeaks founder and chief, published all of them in unredacted form in 2011. Manning was tried and convicted under the Espionage Act in 2013, and is currently serving a 35-year sentence. Assange, after numerous investigations by numerous governments, has been granted political asylum by the embassy of Ecuador in London (and is there as of this writing).

Although many have praised Manning as a whistleblower, there are numerous difficulties with this. First, while it is unquestionable that there are newsworthy needles in this vast haystack, dumping them en masse on an unaccountable ‘anarchist’ like Assange was indisputably irresponsible. Pozen forcefully notes the contrast: unlike Ellsberg, who ‘withheld four volumes of the Pentagon Papers containing diplomatic
materials out of concern that their revelation would cause significant harm’, Manning’s ‘almost total failure to discriminate among the hundreds of thousands of documents she passed to WikiLeaks’ forces even a strategic but ultimately tolerant administration to react, as ‘it cannot tolerate the proliferation of internal dissenters who seek to impeach the entire secrecy and national security system’. Second, WikiLeaks’ publication of all diplomatic cables in unredacted form was indefensible. Such cables were private by definition: publishing correspondence between individuals, regardless of their occupation, is not essentially different than opening someone else’s mail. Third, considering that these cables were diplomatic in nature, their publication involved a combination of sensitive information (read: national security and interests) and personal fuming (read: human frailty). Fourth, and related, international diplomacy is notoriously a minefield of egos. Therefore, even though there were legitimate issues of public interest contained within the documents, the public is not served by the additional knowledge that, for example, a US diplomat vented one evening to a colleague about her liaison, including unflattering descriptions and nicknames. However, the embarrassment caused by the latter could take years to repair, and thereby potentially damages the influence of the USA (and its allies) in the respective country vis-à-vis unrelated and much more important issues, e.g. environmental policy. Finally, a number of senior US officials, as well as groups like Human Rights Watch and Human Rights First, claimed that the deluge of information endangered not just US interests, but also the lives of US and international assets, researchers, human rights workers, journalists, activists, etc. While many retorted that such fears have not been proven, as mentioned above, in the event of real damage caused by such revelations, it would be self-flagellation to admit it. If such revelations directly or indirectly resulted in, for example, the (in)correct assumption by a foreign intelligence service that a mole in its midst was working with the USA, and the subsequent removal of that mole/innocent, one wonders how it would serve justice to corroborate. It would only result in further damage to US relations with that country (and others), as well as greater scrutiny regarding those who might or might not also be (knowing) assets. Even admitting the damage caused by an insult gives the slight an international stage – pouring salt on the wound. In short, this is an example of the security–whistleblower–transparency relationship gone wrong: while Manning and Assange correctly identified that there was news-worthy information of potential use to a would-be just society, the former failed qua intelligence operative and whistleblower in choosing WikiLeaks and in dumping the documents en masse, and Assange (et al.) failed qua journalist for handling them with such feckless bravado.

Like the CIA outings, the Manning–WikiLeaks incident is maximally damaging, minimally informative. And in both cases, it would only compound the fallout for the USA to detail the extent of the damage – even if there was none. At best, the results represent naïve, or even retaliatory, forms of vigilantism. At worst, they are wantonly anarchic.
IV The dangers of (over)(re)acting

As seen above, in near-just societies like the USA, the secrecy–transparency relationship is as essential to the proper functioning of a democratic state as it seems inexorably prone to distorted misapplications.

In the examples of security: the torture programs were unforgiveable, although the USA did not cease to utilize them even after their revelation. The NSA’s warrantless wire-tapping programs were revealed as illegal under Bush (in 2005, in 2006, in 2008, and in 2009 as breaking the Foreign Intelligence Surveillance Act – and Congress proved this, as it otherwise would not have passed a law granting the executive retroactive legal authority for something that was already legal), and ironically their metastasizing into metadata collection was not illegal under Obama (as authorized by multiple acts of Congress and overseen by the Foreign Intelligence Surveillance Court – thereby gaining legality via all three branches of government at the federal level, although NSA individuals still exceeded even this expanded authority). Nevertheless, these programs were essentially inexcusable unforced errors: (1) torture has been shown since the Middle Ages to be unreliable and unproductive; (2) an unknown number of misidentified, innocent individuals were, and continue to be, wrongfully imprisoned, interrogated and/or tortured under these programs specifically because they lacked the ability to prove their innocence; (3) warrantless wire-tapping of US citizens – or anyone – is at least a prima facie violation of their human rights vis-à-vis privacy; (4) the unimaginable amounts of metadata collected by the NSA exponentially increase the number of proverbial haystacks in the ostensible attempt to find needles, thereby constituting a misallocation of resources.

The same is true of the examples from transparency. The Pentagon Papers served the public interest, and although Ellsberg and Russo were exonerated due to the government’s gross mishandling of the case, the Nixon administration still attempted to punish them for their revelation. Priest and others were, and continue to be, attacked by all-comers for their work, although they tried to balance the delicate relationship between security and the public’s right to know by providing only that which was necessary for informed debate. WikiLeaks ironically attacked the privacy of individuals and their correspondence in the name of transparency, without serving any clear mandate or purpose. And Snowden has witnessed the capricious pendulum of public opinion swing back and forth in real time, as he was regarded by a majority one day as a traitor deserving prosecution (and possible execution), the next as a heroic vigilante deserving pardon (and indeed exultation – busts of him have even begun popping up in public spaces). Finally, the Obama administration has responded in the most damaging way possible: by going to the Espionage Act in instances of national security leaks, the erstwhile outspoken proponent of transparency appears to multiply the use of this counter-productive tool. The result, according to The New York Times’ former executive editor Jill Abramson, has ‘put a chill on sources, particularly those involved in national security matters’ to the extent that

... the atmosphere for reporting has never been less hospitable, and that means that keeping the public informed has become more difficult. There are principled people in government
who want to share certain information, but are now too scared to talk because they fear prosecution.\footnote{71}

Again, we see misappropriation everywhere, whether responding to the whistleblowers and journalists in the name of security, or responding to the intelligence apparatus in the name of transparency.

V Toward the center: responsible and protected whistleblowing

So what are we to make of all these theoretical histories and practical examples? Most importantly, how does it help to recount them, when this all seems inevitable?

First, that total surveillance is anathema to democratic society is tautological.\footnote{72} However, it is important to recognize that much of this has been enacted willingly.\footnote{73} Indeed, Facebook founder and CEO Mark Zuckerberg has been credited with the eponymous Zuckerberg Law, which claims that each year people will willingly and freely give up twice as much private information to the Internet as they did the year before – and he has proven prescient.\footnote{74} There is something of farce in the public’s pendulous swings over the last 15 years regarding its privacy. (1) After 9/11, the fear and proximity to the event leads to carte blanche approval of unprecedented powers under President Bush in the name of security, whereas time and distance from it lead to outrage against less invasive programs under President Obama. (2) The public shock and fury at the NSA’s collection of personal data are ironic when it repeatedly elects a Congress that \emph{publicly} authorizes such programs, which have been ‘revealed’ numerous times in the last decade. (3) And all this occurs while the public knowingly volunteers exponentially more information on a daily basis via social media sites, Google searches, etc., which is collected by private corporations for personally directed marketing and other forms of manipulation.\footnote{75} In the face of such vaudeville – decrying the Panopticon that we ourselves built and willingly inhabit – even Captain Renault would blush.

However, this need not lead to cynicism or paralysis. By articulating what constitutes relative success and failure for the Fourth Estate and IC, in their characteristic functions as defenders of transparency and secrecy qua a more just society, we can respond with proposals that attempt to lessen the pendulum-swinging between \emph{ancien régime} and \emph{la résistance}.\footnote{76} With this in mind, I will close with three potential ameliorative reforms.

First, the USA should create a Security Ombudsman who is outside of any departmental jurisdiction or chain of command. The need for this can be illustrated by reference to Snowden. In interviews, and from comments in the film \emph{Citizen Four}, Snowden stated that he exhausted available channels before leaking the documents. Snowden’s own admission was that he ‘repeatedly raised objections inside the NSA, in writing, to its widespread use of surveillance. But he said he was told, “more or less, in bureaucratic language, ‘You should stop asking questions’”’.\footnote{77} Frustrated, he decided he had no choice but to go to the press. But rather than follow the example of those like Ellsberg or Priest, for Snowden this meant absconding to a foreign (and arguably hostile) nation with hundreds of thousands of (related and unrelated) stolen classified documents.

While it is technically true that no federal protections exist for IC contractors who leak (without authorization), it is also clear that Snowden did not exhaust all of his
possible options. Nevertheless, that there is not an office explicitly tasked with such concerns is counter-productive; in addition to everything else Snowden revealed he dramatically proved the need for a Security Ombudsman. This could have the effect of reducing the seeming inevitability of ‘external’ whistleblowers (who, by disclosing classified information to an unauthorized party – even if their intentions are benevolent, namely to expose an unethical, illegal, or harmful activity – act illegally) by allowing them to remain ‘internal’ whistleblowers (who, by going through internal channels, may discharge this duty without thereby becoming criminals); at the very least, it would discourage unnecessary and collaterally damaging ‘general’ leaks by encouraging ‘specific’ ones. The USA could create an office specifically for such concerned intelligence operatives that is simultaneously outside of the chain of command (in order to preclude potential direct or oblique interference/retaliation by the whistleblower’s superiors), yet supersedes it (in order to legitimate such concerns by being able to escalate them, and/or giving a green light regarding their revelation via the Fourth Estate). The Security Ombudsman could be an executive appointee and office, but confirmed by the legislative branch, possessing an equivalent, although ad hoc, need-to-know as the Director of National Intelligence (who is tasked by law to keep Congress informed of executive intelligence activities, although it is up to the DNI as to what exactly needs to be disclosed). Such positions exist in all manner of public and private institutions as privileged gatekeepers tasked with identifying the difference between benign and threatening elements – and when they function correctly, they are the difference between self-help and self-harm. The government’s intelligence apparatus needs one too.

Second, there should be national Shield Laws protecting both sources and journalists. On the one hand, currently no federal-level protection exists for journalists. Indeed, despite recognizing that such privilege is not found at common law, Branzburg – the only Supreme Court decision in the modern era concerning a reporter’s privilege, and widely regarded as woefully inadequate – states that ‘without some protection for seeking out the news, freedom of the press could be eviscerated’. On the one hand, the Supreme Court shied away from enshrining a privilege (to strong dissent from J. Douglas and Stewart) due to the concern that ‘citizens generally are not constitutionally immune from grand jury subpoenas’ because the ‘public has a right to every man’s evidence’. On the other hand, journalistic privilege is not merely implicit. At present, every state (save Wyoming) and the District of Columbia have created some manner of ‘shield’ law, and the First, Second, Third, Fourth, Fifth, Ninth, Tenth, Eleventh and the DC. circuits have all recognized varying degrees of journalistic privilege (although the Seventh cast doubt upon such, and the Sixth rejected it). Given the near-ubiquitous recognition both in the courts and in the states, Congress clearly would satisfy the Supreme Court’s prerequisites regarding privilege should it attempt to clarify such muddy legal waters. And given the recent impression of a ‘War on Whistleblowers/Leakers/Journalists’, and the concomitant chilling effect it has had vis-à-vis reporters and sources, it would likely do quite a bit of good.

Whereas Pozen convincingly argues that ‘in practice, the government has established the media’s privileged position largely through inaction’, national Shield Laws could stipulate de iure that the default is on the side of the journalists and their sources. The onus needs to be on the government to show that it can and should pursue any
intelligence leak, rather than the reverse. Likewise, Shield Laws could be written in such a manner that the journalist has a clear point of contact at the highest possible level whenever he or she obtains classified material (e.g. the aforementioned Security Ombudsman).

Third, we should establish a Federal Whistleblower Court. This would have to be both agile and strict: agile, so that the court may be provided with ad hoc access to necessary (classified) information to decide on a case-by-case basis regarding whistleblowers; strict, so that the same court is empowered regarding such decisions.

The Foreign Intelligence Surveillance Court is the obvious model. While the Foreign Intelligence Surveillance Act (1978) (FISA) was written as a check on executive power in the aftermath of the Nixon administration’s Watergate scandal – amid questions regarding individual privacy directly related to the recent NSA scandals – the secret court it created has been called a rubber stamp. Nevertheless, its design is a perfect corollary, insofar as it originated in recognition of the tendency towards misappropriation in the secrecy/transparency relationship. On the one hand, FISA precludes warrantless wire-tapping of US citizens. On the other hand, its court reviews any claim by the government that a case constitutes such a clear and present danger as to permit suspension of this protection. The proceedings are secret, but this is ipso facto required insofar as the judges on the court access secret intelligence in order to deliberate. Thus, it is an appropriate forerunner for a Whistleblower Court: it simultaneously could allow the government to state its case concerning intelligence damages and provide full legal defense for the whistleblower herself or himself – all the while avoiding military tribunals, public validation of intelligence exposures, etc. Again, the default position should be the protection of the public’s right to know, and consequently those agents attempting to inform it. Nevertheless, it must establish a clear avenue for the government to state its case in the event of potential misappropriation – with the burden of proof resting on the government rather than the Fourth Estate/whistleblower.

**Conclusion**

Although the pendulum swinging between secrecy and transparency may be inescapable for any near-just society, this should not thereby entail cynicism or paralysis. On the contrary: by recognizing the necessity of both security and transparency as dual sine qua non defense systems for any democracy, and by admitting their tendency toward overreach, we may thereby reduce counterproductive and anti-democratic pendulum swings and their post hoc justifications. Although federal policy reforms are not the norm in philosophy articles, the suggestions of Shield Laws, a Whistleblower Court and a Security Ombudsman are made in this spirit. And while this is an improper venue for fully fleshed-out iterations for such structures, it can and should be the proper locus for informing the judgment that such decisions require. These (or similar) reforms may enhance both security and transparency while diminishing their tendency toward Doppelgänger. Democracy has always represented a form of controlled chaos, wherein it is impossible to do nothing because inaction itself is a political decision. The only option is to experiment with thoughtful processes that attempt to mitigate or reduce its pendulous tendencies, rather than resigning oneself that they must continue.
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Notes
3. ‘The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures’ (Universal Declaration of Human Rights, article 21.3).
4. Although most of what follows applies generally to just and near-just democracies, I will remain focused on the United States, unless otherwise specified.
5. Federal Rules of Evidence. Article V. Privileges, Rule 501. ‘Privilege in General’. Indeed, although Congress has repeatedly been advised to make these privileged relationships explicit (along with trade secrets and required reports), Congress has declined, preferring to keep privilege agile and at the presiding judge’s discretion, rather than to calcify it via statute.
6. The literature on the complicated, yet essential, right of privacy is too broad to properly address herein. For excellent examinations of the interests associated with the right, and their relationship to living in a (near-just or) just, democratic society, see J. J. Thomson, ‘The Right to Privacy’, Philosophy & Public Affairs 4(4) (summer 1975): 295–314; James


12. For example: the Lloyd-La Follette Act (1912), the Federal Whistleblower Protection Act (1989), the Military Whistleblower Protection Act (1998), the Notification and Federal Employee Antidiscrimination and Retaliation Act (2002), the False Claims Act (2010), the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), the Federal Whistleblower Protection Enhancement Act (2012), to name a few. While the Intelligence


14. Again, insofar as an IC government whistleblower has access to the classified information she exposes, she must have previously signed a government classified information non-disclosure agreement to receive such security clearance, on the pre-condition of ‘willingness and ability to abide by regulations governing the use, handling, and protection of classified information’. Thus, disclosure is a violation of 18 U.S. 798. Whereas some whistleblowers and commentators have disputed this claim – that all IC government whistleblowers are acting illegally – they appeal to the 4th Amendment as an *ex post facto* justification while conceding that current federal statute is unambiguous. See Scheuerman, ‘Whistleblowing’: 611 (himself citing Edward Snowden’s ‘Moscow Statement’); Delmas, ‘Ethics’: 81–2; and David Pozen, ‘Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information’, *Harvard Law Review* 127 (2013–14): 512–635 (516, 523–4).

15. Aside from high-profile cases such as Ellsberg, Manning and Snowden, according to Pozen this anonymity remains largely intact:

   Even if we were to limit the denominator to classified information leaks that the Intelligence Community (IC) is known to have referred to DOJ or that government officials have otherwise documented publicly – which may be a small fraction of the universe of potentially prosecutable offenses – the historic indictment rate for leak-law violators would be below 0.3%. The actual rate is probably far closer to zero. (Pozen, ‘Leviathan’: 536)

   As for punitive measures (e.g. removal/reduction of clearance status, internal career considerations, etc.):

   It is very hard to know how these remedies have been utilized. So far as I am aware, the government has never released any data on them, and no one has attempted a tabulation. Anecdotal accounts indicate that a number of individuals have been reprimanded over the years for leaking confidential information to the media… Still, given the potential deterrence value of that publicity for government enforcers, the media’s interest in protecting their sources against reprisal, and the disciplined individual’s interest in claiming whistleblower status, it is noteworthy how rarely accounts of such cases have surfaced. (Pozen, ‘Leviathan’: 540–1)

16. While this is true historically, the Snowden leaks are more complicated, and the Manning–WikiLeaks pairing seems completely to have eschewed the principle. At times, the whistleblower dumps a pile of *specific* or *general* intelligence on the desk of a journalist, with the ostensible goal of absolving himself or herself of the various responsibilities just named and leaving them to an agent of the Fourth Estate who – ironically – he or she hopes ‘knows better’ how to proceed and what to redact. According to Dana Priest, this was the case regarding the CIA ‘black sites’, although all leaked documents were *specifically* related to the program. By contrast, according to Assange and WikiLeaks, Manning did the digital equivalent through a *general* leak: an indiscriminate library of classified documents across
the spectrum of sources and subjects. Further, the two recipients could not be more different:
the former was a celebrated journalist working for an internationally respected outlet
(The Washington Post) with a history of handling such classified information carefully,
while the latter was (and remains) an arguably anarchic organization and individual,
who neither had a history of showing nor indeed did show similar care with such
information. Indeed, at the time of this writing, WikiLeaks is further embroiled in what
some believe to be a Russian-based hack into the Democratic National Committee.
While their ostensible purpose in releasing the documents was transparency, Assange
also made it clear he ‘hoped to harm Hillary Clinton’s chances of winning the pre-
sidency’. The timing and subject-matter of this ‘leak’ arguably incriminate WikiLeaks
as a(n) (un)witting conspirator in a foreign power’s attempt to manipulate a US pres-
that Russia Hacked D.N.C.’, The New York Times (26 July 2016): A1; Massimo Calab-
resi, ‘How Russia Wants to Undermine the U.S. Election’, TIME (29 September 2016)
[accessible online].

17. The same is true for the journalist/outlet that the whistleblower chooses to inform.

18. According to Pozen, they are actually enormously beneficial in toto. More on this later.


lecture on ethics in journalism, Duke University (19 October 2009).

21. Most amazingly, the CIA apparently did not even inform the vice-president or president of
the sites after 2002. Indeed, the first – in Thailand, which was approved directly by the
president, and which was closed in 2002 – was ‘the last location of a CIA detention facility
known to the President or Vice-President’ in order to ‘avoid inadvertent disclosures’. In other
words, at the time Priest and Downie approached the US government, they knew more than
the Pentagon, the Department of Defense – even the Oval Office. Cf. ‘Report of the Senate
Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s
Detention and Interrogation Program’, 113th Congress, 2d Session (S. Report 113-288: 9

Guardian (7 February 2013) [accessible online].

[Action Alert, 4 November 2005] [accessible online].

24. ‘They’ve damaged, in no doubt, the countries that are probably assisting the United
States of America. You’ve damaged them at home because they’ve worked in alli-
ance with us’: ‘Interview: Patrick Buchanan’, Frontline (28 March 2006) [accessible online]. See also ‘Interview: Dana Priest’, Frontline (27 April 2006) [accessible online].

The New York Times (9 November 2005) [accessible online].

26. ibid. It should be noted that this was not a unified response: high-ranking GOP members like
Senators John McCain (R-AZ) and Lindsay Graham (R-SC), among others, publicly broke
with their party on the issue.


40. Rob Crilly, ‘Raymond Davis “Was Acting Head of CIA in Pakistan”’, the *Telegraph* (22 February 2011) [accessible online].


42. Novak, ‘CIA Leak’.


44. Although the president has broad authority to declassify information, the outing of a CIA operative currently in theater (further, in prison) almost assuredly would be regarded as a federal crime – not to mention as hurting national security and endangering human life. Greenwald’s moral indignation notwithstanding, it would seem in such cases that those wishing to live in a just or near-just state would want the president to lie about such things.

45. Novak claimed that Wilson’s former links to the Clinton administration made the latter’s arguments suspect; his only defense for outing Plame was that he did not realize her identity was secret. Cf. Novak, ‘CIA Leak’.


47. Greenwald, ‘Obedience’.
48. Just to mention a few: Denver Nicks, ‘Did Bradley Manning Actually Harm National Security?’, The Nation (12 January 2012) [accessible online]; Ed Pilkington, ‘Bradley Manning Leak Did Not Result in Deaths by Enemy Forces, Court Hears’, the Guardian (31 July 2013) [accessible online]; Richard Norton-Taylor and Ian Cobain, ‘10 Reasons Not to Trust Claims National Security is Being Threatened by Leaks’, the Guardian (16 October 2013) [accessible online]. More will be said on this later.

49. In the interest of space, this is a truncated account of the timeline. On the one hand, Manning made no attempt to discriminate; she simply dumped all of the documents on WikiLeaks. On the other hand, WikiLeaks bounced back and forth between attempts at responsible (e.g. sometimes partnering with the Guardian, The New York Times or Der Spiegel), inexcusable (e.g. publishing the Afghan War documents without redacting names) and grossly negligent disclosure (e.g. making 250,000 diplomatic cables available without redaction). See Christian Stöcker, ‘ Leak at WikiLeaks: A Dispatch Disaster in Six Acts’, Spiegel Online (1 September 2011); Glenn Greenwald, ‘Facts and Myths in the WikiLeaks/Guardian Saga’, Salon (2 September 2, 2011) [accessible online]; Matthew Weaver, ‘Afghanistan War Logs: WikiLeaks Urged to Remove Thousands of Names’, the Guardian (10 August 2010) [accessible online].


51. Greenwald has called her the most important whistleblower since Daniel Ellsberg and stated that she deserved a medal rather than dishonorable discharge. Cf. Steve Fishman, ‘Bradley Manning’s Army of One’, New York Magazine (3 July 2011) [accessible online].

52. The characterization is Alan Rusbridger’s, the editor of the Guardian who worked extensively with Assange. See Ken Auletta, ‘Freedom of Information’, The New Yorker (7 October 2013) [accessible online]; also Sarah Ellison, ‘The Man Who Spilled the Secrets’, Vanity Fair (6 January 2011) [accessible online].


55. ‘People are scared. We’re getting lots of e-mails from people who might be mentioned even tangentially in these documents’, said a US-based human rights advocate who declined to be identified. ‘Our biggest concern is for foreign nationals who do research for us. Do you think someone who found out damaging details about a foreign government’s human rights abuses is going to be invited over for tea? Not a chance. They are going to get their head busted in.’ A senior US official said there was a great deal of debate within the government about whether redactions should be negotiated with WikiLeaks. ‘It’s a very sensitive issue’, the official said. ‘The problem is if you point out the most sensitive things to them, then you are implicitly saying that other things which are comparably sensitive are not being pointed out. And they can legitimize a large group of disclosures.’ Colum Lynch and Peter Finn, ‘Human Rights Groups Fearful Over WikiLeaks Releases’, The Washington Post (29 November 2010) [accessible online].

56. ‘Extraordinary rendition’, ‘enhanced interrogation techniques’ and ‘black sites’ were each condemned by the Obama administration within days of his inauguration. Cf. ‘Secret Prisons: Obama’s Order to Close “Black Sites”’, the Guardian (22 January 2009) [accessible online]; Executive Order 13491 – Ensuring Lawful Interrogations (22 January 2009).

58. Leslie Cauley, ‘NSA has Massive Database of American’s Phone Calls’, USA Today (11 May 2006) [ accessible online].


61. ‘The 2008 amendments appear to be designed to legalize warrantless wiretapping by the NSA that had been done illegally prior to the amendment’, according to Molly Bishop Shadel, an expert in foreign intelligence law, at the University of Virginia, School of Law. Cf. Jon Greenberg, ‘Comedy Central’s Jon Stewart: Congress’ Shock at Spying on Allies Rings Hollow’, Politifact (5 November 2013) [ accessible online].


63. Although US Code states that legally intelligence agencies ‘shall keep the congressional intelligence committees fully and currently informed of all intelligence activities’, in 2012, Congress even went so far as to reject three separate amendments to the reauthorization of FISA which called for greater disclosure. As Electronic Frontier Foundation’s Trevor Timm said, Congress ‘definitely had a chance to pass amendments that would have given them more information’. See FISA Amendments Act Reauthorization Act of 2012, H.R.5949, 112th Congress (30 December 2012); Greenberg, ‘Rings Hollow’.

64. The FISA Court, or FISC, approved the order renewing mass collection of metadata every few months for many years. At some point during 2011, the NSA (under direction from the Obama administration) stopped collecting Internet metadata. Additionally, the Supreme Court dismissed numerous cases against the NSA programs during the Obama administration (although most of the plaintiffs were pursuing more egregious invasions which occurred under President Bush). And although the metadata collection was technically legal under all three branches, the NSA was found to be in violation of its authority thousands of times in internal audits revealed by Snowden. Nevertheless, the oft-missed point is that there were audits, which caught instances wherein employees exceeded their authority – i.e. an alternative narrative could state that the program (since 2009) was under continual, corrective oversight. An excellent timeline, with dates and links, is accessible @: https://www.eff.org/nsa-spying/timeline

65. Patrick Cockburn, ‘CIA Torture Report: It Didn’t Work Then, It Doesn’t Work Now’, the Independent (14 December 2014) . Also, Khalid Sheikh Mohammed’s defense team used his confessions to crimes he could not possibly have committed (questions asked as controls) to prove that he was ‘confessing’ simply to make the torturers stop; see Alexis Unkovic, ‘Militant Convicted of Pearl Killing to Rely on KSM Guantánamo Confession on Appeal’, Jurist (19 March 2007) [ accessible online].

66. According to former Guantánamo commander General Jay Hood, deputy commander General Martin Lucenti, military attorney Lt Col. Stephen Abraham, and countless declassified reports from the Combatant Status Review Tribunals (CSRT) and Administrative Review Boards set up by the US government in response to the Supreme Court’s order (Rasul v. Bush, 542 US 466 [2004]) that several hundred individuals held at the prison were in fact innocent – even though this often did not lead to their subsequent release; accessed 22

67. ‘I cannot imagine a more “indiscriminate” and “arbitrary” invasion than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval... Surely, such a program infringes on “that degree of privacy” that the founders enshrined in the Fourth Amendment’: US District Court (DC) Judge Richard J. Leon, Klayman v. Obama, Civil Action No. 13-0881 (RJL) (D.D.C. 16 December 2013), p. 63.


70. Again, Pozen’s exhaustive ‘Leviathan’ provides a powerful and convincing counter-narrative to this ‘War on Whistleblowers’, insofar as he illustrates both that leaking is extremely beneficial for governments and that investigations/punishment are extremely rare. See also Randall D. Eliason, ‘The Problems with the Reporter’s Privilege’, American University Law Review 57 (2007–8): 1342–79.


72. ‘The state and corporate cultural apparatuses now collude to socialize everyone into a surveillance regime, even as personal information is willingly given over to social media and other corporate-based sites... It is no longer possible to address the violations committed by the surveillance state without also analyzing this broader regime of security and commodification’: Henry A. Giroux, ‘Totalitarian Paranoia in the Post-Orwellian Surveillance State’, Cultural Studies 29(2) (March 2015): 108–40 (110).

73. See Alexia Tsotsis, ‘Mark Zuckerberg Explains His Law of Social Sharing [Video]’, Techcrunch (6 July 2011) [accessible online].


75. See Michael P. Colaresi, Democracy Declassified: The Secrecy Dilemma in National Security (Oxford: Oxford University Press, 2014), for an in-depth analysis (with extensive
data covering multiple democracies over several decades) of the dual necessities both of secret government agencies and of oversight institutions.

77. ‘Interview with Edward Snowden’, *NBC News* (28–9 May 2014); Ken Dilanian, ‘Read the Only Email of Snowden Raising Concerns the NSA Has Found’, *PBS* (29 May 2014); Mike Brunker, Mathew Cole and Richard Esposito, ‘NSA Officials: Snowden Emailed With Question, Not Concern’, *NBC News* (13 January 2015).

78. On the one hand, although at the time of writing no federal protections exist for IC contractors who leak (without authorization), Snowden had numerous other avenues set by precedent that he did not pursue. On the other hand, only one email has surfaced ostensibly to corroborate his claim that he ‘actually did go through channels, and that is documented. The NSA has records, they have copies of emails right now to their Office of General Counsel, to their oversight and compliance folks . . . raising concerns about the NSA’s interpretations of its legal authorities’ (‘Interview’, *NBC News*). When the NSA released this single email – which asks for clarification rather than raising the stated concerns – Snowden released a public statement proclaiming both vindication and conspiracy; see Mike Brunker and Matthew Cole, ‘Snowden Strikes Back at NSA, Emails NBC News’, *NBC News* (30 May 2014). One is forced to wonder how an individual capable of stealing almost 2 million pages of classified documents over several years from the world’s foremost spying agency failed to save the only documents which could corroborate his purpose and intent. Nevertheless, the numerous alternatives available to Snowden are admittedly not legal solutions, but workarounds similar to those sought by prior whistleblowers like Ellsberg. They are detailed in a forthcoming project.


80. I borrow these categories from Pozen, ‘Leviathan’: 533.

81. For those who may sniff that this would be to have the fox watch the henhouse, one might respond with that aphorism attributed to Voltaire about the perfect being the enemy of the good; *Concise Oxford Dictionary of Quotations*, ed. Susan Ratcliffe (Oxford: Oxford University Press: 2011), p. 389.

82. 50 US Code § 413a.


85. ‘Reporter’s constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public.’ Because there is ‘a right to publish’, there is a ‘right to gather news’, and that the ‘right to gather news
implies... a right to a confidential relationship between a reporter and his source’. See Weinberg, ‘Supporting’: 169; Branzburg, 706, 710 (Powell concurring), 722 (Douglas, dissenting), 725, 727–8, 731 (Stewart, dissenting).

93. Shoen v. Shoen, 5 F.3d (9th Cir. 1993), pp. 1289, 1292.
100. In Jaffee, wherein the Supreme Court established the 4-part framework for common law privileges: (1) whether the asserted privilege would serve important private interests; (2) whether the asserted privilege would serve public ends; (3) the likely evidentiary benefit that would result from the denial of privilege; and (4) whether the privilege has been widely recognized by the states (Jaffee, 11–13; Weinberg, ‘Supporting’: 178–9).
101. ‘Because federal courts have recently refused to quash subpoenas directed at reporters, a legislative response is required to protect the First Amendment’ (Weinberg, ‘Supporting’: 166). ‘If potential informants believe that a subpoena can convert journalists into “an investigative arm of the government”, they will be far less likely to share controversial information’: Laura R. Handman, ‘Essay on Source Confidentiality: Protection of Confidential Sources: A Moral, Legal, and Civic Duty’, Notre Dame Journal of Law, Ethics & Public Policy 19 (2005): 573–88 (578–9), citing Branzburg, 709 (J. Powell, concurring).
103. ‘An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all’; Jaffee, 18, quoting Upjohn Co. v. United States, 449 U.S. (1981), pp. 383, 393.
104. 50 US Code §§ 1801–11, 1821–9, 1841–6, 1861–2, 1871.
105. The FISC has not rejected a single warrant request in 4 years, and denied only 10 of 34,000 applications since 1978. However, former Chief Judge Royce Lamberth and then Chief Judge Reggie Walton have defended the court, the latter testifying to Congress that it changes 1 in 4 government spying requests. See Frederic J. Frommer, ‘Federal Judge: FISA Court not a Rubber Stamp’, The Seattle Times (11 July 2013) [accessible online]; Carol D. Leonnig, ‘Secret Court Says it is No Rubber Stamp; Led to Changes in US Spying Requests’, The Washington Post (15 October 2013) [accessible online].
106. In a similar vein, see Kitrosser, ‘Classified’: 926–8.