Manning, Assange, Snowden: Their names are by now familiar to most Americans and certainly familiar to every reader of this volume. Some think them heroes and patriots; others think them villains and traitors. This dichotomy reflects what we have come to think of, in creating this volume, as the fundamental tension—the perpetual and unsteady equilibrium between secrecy and transparency in American society.

We say “fundamental” because in many senses the tension is ineradicable and inherent in the structure of American government. It requires us to consider and reconcile two cherished values—limited government and effective government.

Americans value limited government because they value freedom—and they think that government is as much a threat to freedom as an enabler of it. And so we esteem an independent check on government excess so highly that the right to freedom of the press is enshrined in the First Amendment. The words are familiar to almost everyone—“Congress shall make no law . . . abridging the freedom . . . of the press.” From the time of our founding Americans saw the press as a critical check on authority. Indeed, distrust of government is, boiled down to its essence, the foundational insight of the Declaration of Independence—an assertion that the rights to life, liberty and the pursuit of happiness are inalienable rights that belong to citizens by virtue of their humanity—and not, in any way, derived from or granted by governments. If you see government as subordinate to natural rights then, naturally, you see a need for ways to effectively check government abuse and overreach.
The Fundamental Tension: An Introduction

At the same time, however, we want a government that works and works well. The desire for order and government protection from threats stretches at least as far back as the Hobbesian concern that, without communal security, life is “nasty, mean, brutish, and short.” That concern finds strong echoes in the constitutional preamble, which sets as one of the priorities for the new government that it “provide for the common defense.”

American law is foundationally committed to a vision of freedom and transparency that sees the press as a crucial component of limited government—so much so that it is often called the “Fourth Estate,” the fourth branch of government. At the same time, we recognize that, at some level, secrecy is essential in an increasingly dangerous world.

This fundamental tension is, in the end, best summarized by a quip and a quote. The quip is “Doctors bury their mistakes; government officials classify theirs.” That reflects the skepticism with which we view official secrecy—it is as much a barrier to accountability as it is an enabler of effective action.

By contrast, the late Army Lt. Gen. Vernon A. Walters, former U.S. ambassador to the United Nations and deputy director of central intelligence, once wrote, “Americans have always had an ambivalent attitude toward intelligence. When they feel threatened, they want a lot of it, and when they don’t, they regard the whole thing as somewhat immoral.”1 That, too, describes the fundamental tension—Americans want an effective government, but it has to be one that is circumscribed by law and policy.

In the end, we think the tension metaphor may present a false choice—that you can either have transparency and accountability or you can have secrecy and effectiveness. If we really were put to such a choice it would a difficult, indeed almost existential, question—but the choice is not real. The United States can, and indeed, does have both transparency and secrecy; both accountability and effectiveness. The goal should be to maximize both values to the extent practicable.

And that, at bottom, is the theme of this book. It’s not about “resolving” the fundamental tensions that exist permanently in American democracy. It’s about managing them, living with them, and accommodating the competing values to the maximum extent practicable. We all want to be safe; we all want an effective government that can provide national security; and we all want one that acts within the rule of law. We all want a government that is transparent and accountable, not despotic. And we all want a legal and policy structure that fosters our desires.

Sometimes the country gets the balance wrong. Far more often, as is to be expected in a pluralistic society, citizens simply disagree about precisely how to achieve the ends we seek. You will see much of that disagreement played out in these pages. But at its core, the discussion and even tensions in this book are emblematic of the value of competing ideas—legal analyses of a living, breathing aspect of a functioning democracy.

I. A Constitutional Perspective

The concern for ineffective government action was an animating force behind the Constitutional Convention. The Articles of Confederation had proven to be inadequate to the task of enabling the federal government. The Constitution itself was, therefore, a reaction against an ineffective government and the chaos of an ungoverned society. Hence, the framers of the Constitution sought to create a stronger government—what Alexander Hamilton so famously called one possessing “energy in the Executive.”

And throughout U.S. history, Americans have confronted crisis with strong executive action—sometimes even action that trenches close to or crosses the line of the law. Examples abound, ranging from President Abraham Lincoln’s unilateral suspension of the writ of habeas corpus to President Franklin Roosevelt’s covert aid to Britain in World War II in contravention of the Neutrality Act. Most recently, of course, and more controversially, we have seen strong executive branch action in the wake of the events of September 11, 2001. Those activities have ranged from covert surveillance to the military response in Afghanistan and the subsequent conflict in Iraq.

But one thing unites all of these examples—the need, in some part, for secrecy in execution. Roosevelt’s aid to Britain would have been stopped had it been widely known to a still isolationist Congress. And, manifestly, secrecy was essential to the successful operation targeting Osama bin Laden. Indeed, to cite an example from recent headlines, the disclosure by The New York Times that the National Security Agency (NSA) is capable of physical intrusions into computers in China inevitably means that that program of covert surveillance will become less effective—with effects on American security that cannot be known or predicted. In short, secrecy is sometimes crucial to effectiveness.

But secrecy is likewise often a handmaiden to thwarting transparency and accountability. The case of the disclosure of the Pentagon Papers (involving the leak of a Defense Department analysis of the Vietnam War) reminds us that often governments use secrecy to conceal mistakes or misconduct (like the FBI’s surveillance of Americans in the 1970s as part of its counterintelligence program, COINTELPRO), or simply to avoid embarrassment. And so secrecy and transparency are often in equipoise—too much secrecy threatens liberty; too much transparency threatens security.

We’ve recognized this tension since the dawn of democracy in America. Thomas Jefferson once said: “The natural progress of things is for liberty to yield

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2. The Federalist No. 70 (Alexander Hamilton).
and government to gain ground.” ⁴ We must guard against this natural tendency. Though Jefferson was right that we must be cautious, philosopher John Locke was equally correct when he wrote: “In all states of created beings, capable of laws, where there is no law there is no freedom. For liberty is to be free from the restraint and violence from others; which cannot be where there is no law; and is not, as we are told, a liberty for every man to do what he likes.” ⁵

Thus, the obligation of the government is a dual one: to protect civil safety and security against violence and to preserve civil liberty. That dual obligation remains, at the core, the challenge of the secrecy/transparency debate.

II. JAMES ROSEN AND THE RESPONSE OF GOVERNMENT

We can see all of these different strands of concern play out in any number of recent cases—NSA leaker Edward Snowden, Private First Class Chelsea (formerly Bradley) Manning, and WikiLeaks founder Julian Assange are familiar to most readers these days.

Consider the case of James Rosen, a Fox News reporter. Rosen had written several stories regarding American policy and North Korea—at least one of which seems clearly to have been based on classified information that he received from a confidential source. On June 11, 2009, Rosen published a story in the midst of a U.N. Security Council debate as it considered its response to North Korean developments. Rosen’s article addressed the question of how North Korea might react to a Security Council action. The story was significant in part because Rosen disclosed that the U.S. government thought that the North Korean regime would in all likelihood stage another nuclear test as a result of American action.

The source of the information for Rosen’s story was, according to Rosen, information that “the Central Intelligence Agency has learned, through sources inside North Korea.” ⁶ The story went on to say that “FOX News is withholding some details about the sources and methods by which American intelligence agencies learned of the North’s plans so as to avoid compromising sensitive overseas operations in a country—North Korea—U.S. spymasters regard as one of the world’s most difficult to penetrate.” ⁷

Notwithstanding the disclaimer, the story made waves. It appeared to disclose the existence of a confidential source (whether human or technical is not known)

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⁷. Id.
inside North Korea—a revelation that certainly set off alarm bells in Pyongyang. Fearing that consequence, and determined to deter further leaks on the subject, the Department of Justice (DoJ) began an extensive investigation into how Rosen came to have this classified information—information to which fewer than 100 people in government had access.

According to The Washington Post, in order to track the source of the leak, the DoJ reviewed Rosen’s activities by tracking his visits to the Department of State (DoS), using phone traces, analyzing the timing of his calls, and reviewing his personal e-mails. The evidence collected makes a powerful, albeit circumstantial, case that State Department contractor Stephen Jin-Woo Kim was Rosen’s source.

Here’s a summary of some of the most salient information—all taken from the affidavit of FBI agent Reginald Reyes:

- On the day the story was published, Kim and Rosen apparently had a face-to-face meeting—at least, that is what the access logs to DoS headquarters at 2201 C St. NW suggest. A few hours before the story was published, “Mr. Kim departed DoS at or around 12:02 p.m. followed shortly thereafter by the reporter at or around 12:03 p.m.” Then, “Mr. Kim returned to DoS at or around 12:26 p.m. followed shortly thereafter by the reporter at or around 12:30 p.m.”
- Kim and Rosen had frequent contact by phone. Kim’s phone records showed that seven calls lasting from 18 seconds to more than 11 minutes were placed between Kim’s desk telephone and Rosen’s cellphone and desk phone at the DoS. Over a two-month period, more than 36 calls were made from Kim’s desk to Rosen. More to the point, at the very moment that Rosen and Kim were talking, computer records showed that Kim’s user profile was logged in, viewing the classified report on which Rosen’s report was based.
- Finally, Rosen and Kim appeared to take steps to conceal their contacts. In their e-mails, Rosen used the alias “Leo” to address Kim and called himself “Alex.” Rosen instructed Kim to send him coded signals on his Google account: “One asterisk means to contact them (i.e., Fox News) or that previously suggested plans for communication are to proceed as agreed; two asterisks means the opposite.” In one email Rosen wrote: “What I am interested in, as you might expect, is breaking news ahead of my competitors,” including “what intelligence is picking up. . . . I’d love to see some internal State Department analyses.”

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To collect this evidence, the government sought and received a warrant from a federal court, which found probable cause to believe that a crime had been committed. In the warrant application, the Justice Department labeled Rosen a “criminal co-conspirator” with Kim, the suspected source of the leaks. As is required by current regulations, Attorney General Eric Holder personally approved the search warrant for Rosen. Rosen did not know he was under surveillance or investigation until it was publicly disclosed by the press.

The collection of information about a reporter’s contacts with a source has generated real controversy. To some, the Justice Department’s aggressive investigative methods are a cause for concern because they might have a chilling effect on news organizations and degrade their ability to create transparency into government operations. As Fox News contributor and New Jersey Superior Court Judge Andrew Napolitano commented: “This is the first time that the federal government has moved to this level of taking ordinary, reasonable, traditional, lawful reporter skills and claiming they constitute criminal behavior.”

Balanced against this concern is the countervailing value of efficacy—efficacy of the government in keeping secrets and efficacy of the judicial system in enforcing the rule of law. One of the fundamental tenets of law is that those investigating a crime are entitled to every person’s evidence. The exceptions to this general rule are few and far between (the most commonly known is the attorney-client privilege). Reporters often argue that they should be permitted to make a legally enforceable promise of confidentiality to their sources. But the Rosen case goes beyond that and suggests that some members of the press think that even the extrinsic physical evidence of their activities (where they go, for example) ought to be out of bounds, because it is essential to the performance of their jobs. Carving an exception like that into the general law for investigating criminal activity would be a significant and new departure from existing norms.

And so, this single case (emblematic of so many more) provides a host of interesting questions—questions both of policy and of law—and not all with satisfactory answers:

- Was Kim a whistleblower, or a traitor?
- What criminal laws did Kim violate?
- Who is a journalist? Rosen seems clearly to be one, but is Julian Assange?
- Can Rosen be charged as a co-conspirator for violating the criminal laws?
- Can government investigations compel reporters to disclose the identity of their sources? Should federal law protect a reporter’s privilege against disclosure?
- If there is a privilege, is it part of the First Amendment, or must it be created by statute?

II. James Rosen and the Response of Government

- Can investigators look at physical evidence of reporters’ activities to try to identify their sources?
- Are there alternatives to criminal prosecutions through civil enforcement?
- What if the leaked information was not appropriately classified in the first instance?
- How would classified information have been handled at Kim’s trial (he has pled guilty, so there won’t be one)?
- How would this case be handled in other countries?

One final observation about this case (and others like it) is a reflection on the changing norms of reporting on national security. As Fred Kaplan, the Edward R. Murrow fellow at the Council on Foreign Relations, wrote in 2013, opining on the Rosen/Kim matter: “It may seem odd for someone who has been reporting on national security matters for a few decades to say this, but just because the government is doing something in secret—and just because a leaker tells someone like me about it—that doesn’t necessarily mean it should see the light of day. That is especially so if the secret activity in question doesn’t break laws, expose deceit, kill people, violate basic decency, or . . . (feel free to add to this list).”

That traditional view of the role of the press—as overseers with responsibility for ferreting out wrongdoing—reflects the long-understood balance between secrecy and transparency.

But the times they are a-changing—and that balance may be shifting in favor of transparency. Consider, again, The New York Times article about NSA intrusions into Chinese computers. It met none of the criteria that Kaplan had articulated less than a year earlier. As Jack Goldsmith, a law professor at Harvard, noted:

[T]his article shows how much publication norms have changed in recent years. . . . This is a story about the technical means and methods of surveillance against foreign countries, including our military adversaries, Russia and China. . . . I imagine that [reporters David] Sanger and [Thom] Shanker would say . . . [that] revelations about the NSA (including ones related to this story) are pouring out from scores of sources abroad, and that if they do not report this story someone else will. If these are the arguments, it is hard to see what NSA secrets the [New York Times] would not publish.

And that, in a nutshell, captures the changing landscape.

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In the pages that follow, we seek to provide an easily accessible introduction to
the law and policy relating to national security, whistleblowers, and leaks to the
media. There are ample numbers of legal texts— but no layman’s guide. This vol-
ume aims to fill that niche.

This chapter and chapter 2 set the scene for the later chapters’ outlines of the
various laws related to whistleblowing and leaks. The chapters focus on recent
controversies concerning leaks and the salience of the issue, from James Rosen of
Fox News to the case of New York Times reporter James Risen, whose prosecution
by the Justice Department for his stories on a secret NSA program involving spy-
ing on U.S. citizens, based on leaked information, has continued for years. The
chapters also review the history of leaks and whistleblowers. The topic has been
part of American history since its founding and has become even more prominent
in the time since the 1970s and the growth of investigative journalism.

Chapters 3 and 4 review U.S. criminal and other relevant laws and efforts to
change those laws. Criminal law has been applied to leakers at least since 1917.
We examine the Espionage Act and trace its application in a variety of prosecu-
tions. In addition, the chapters examine the perception that leak prosecutions have
increased in recent years and that increasingly, the federal government is using
more aggressive tactics to prevent reporters from accessing classified information.
We survey the laws being used now and assess their historical provenance. We
then look again at history, this time with a closer focus on efforts over time to stop
leaks, draft leaks laws, or amend espionage laws. That history shows how difficult
it is to craft the right language to protect secrets.

Leaks are “leaks” because they go to the press. If they go only to a foreign
nation, they are espionage. But the press has certain First Amendment protections.
Chapter 5 surveys First Amendment arguments for news media protection. It also
addresses why free speech as it applies to the press is not unlimited, and why
there is no demonstrable constitutional basis for the open publication of properly
classified information.

Chapter 6 reviews the panoply of laws that exist to protect whistleblowers
in this country. Some are intended to protect those who go public in the media;
others are intended to foster internal dissent within the government and protection
from retribution.

Chapters 7 and 8 give the reader a primer on classification law, including
how something gets classified and declassified and what the various classification
levels mean, and a rundown of classification law. They also review how classified
information is used (or, sometimes, not used) during criminal proceedings.

Chapter 9 is an examination of other countries’ laws, looking at parallel legal
systems for areas of congruence and divergence. And chapter 10 looks at the ques-
tion from the law enforcement officer’s perspective. What tools are available to
the government to track down leakers and address breaches of security?

The issue of big data and leaks in the computer age get a thorough review in
chapter 11. Among the issues: the post-9/11 change in emphasis from “need to
know” to “need to share” among intelligence agencies. The conundrum for the
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Press and leaks is exemplified by the remark of a federal investigator that never again would a subpoena need to be issued to a reporter for his or her testimony because the reporter’s electronic trail would identify sources without the testimony. At the same time, big data allows for greater transparency when it is focused on government.

Chapter 12 reviews various ways leakers are or could be held accountable and offers thoughtful ideas on what might by a comprehensive U.S. approach to dealing with national security leaks.

Chapters 13 and 14 are styled as a “debate” and offer two views of the consequences of leaks—the loss of secrecy on one hand, and greater transparency on the other. Chapter 13 examines the origins and evolution of the government’s right, including its constitutional basis, to protect information from public disclosure. Official secrecy and classification are well established in both statutory and case law. The chapter reviews the damage that leaks can cause to national security, particularly to intelligence sources and methods, and to military operations. Foreign adversaries of the United States feed off press leaks, which some believe have become an even more important source of U.S. classified information to foreign adversary governments and non-state actors than foreign spying and espionage. In response, chapter 14 looks at leaks as an antidote to government secrecy and government power and examines the press’s role as an external check and balance on government power.

Finally, we want to thank all of the authors who have written for us. They have given freely of their time and expertise and this volume would not exist without their efforts. We hasten to add, on their behalf (and especially for those of our authors who still work in government) that the views they express are their own and reflect neither the views of any institution where they work nor, for that matter, the opinions of the American Bar Association or the Medill School of Journalism, Media, Integrated Marketing Communications of Northwestern University. Leaks and the press are controversial topics—expect the views offered here to challenge you. Expect as well that this survey will shed light on an area of public discourse more frequently characterized by heat and passion.

In the realm of policy and law, we attempt, continually, to square the circle of transparency and secrecy, never succeeding and, quite possibly, never really expecting that we can succeed. Rather this unending tension calls for us to continually rebalance and reexamine fundamental values, trying our best to give effect to both as circumstances permit.