

# THE CRIMINALIZATION OF WHISTLEBLOWING

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## INTRODUCTION

The year 2009 began a disturbing new trend: the criminalization of whistleblowing. The Obama administration has pursued a quiet but relentless campaign against the news media and their sources. This Article focuses on the sources who, more often than not, are whistleblowers. A spate of “leak” prosecutions brought under the Espionage Act<sup>2</sup> has shaken the world of whistleblower attorneys, good-government groups, transparency organizations, and civil liberties advocates. The Obama administration has prosecuted five criminal cases

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2. *Espionage Act of 1917*, Pub. L. 65-24, 40 Stat. 217 (June 15, 1917).

under the Espionage Act, which is more than all other presidential administrations combined.<sup>3</sup>

These “leak” prosecutions send a chilling message to public servants, as they are contrary to President Barack Obama’s pledge of openness and transparency.<sup>4</sup> The vast majority of American citizens do not take issue with the proposition that some things should be kept secret, such as sources and methods, nuclear designs, troop movements, and undercover identities.<sup>5</sup> However, the campaign to flush out media sources smacks of retaliation and intimidation. The Obama administration is right to protect information that might legitimately undermine national security or put Americans at risk. However, it does not protect national security interests when it brings cases against whistleblowers who divulge information that communicates important information to the public; sparks meaningful dialogue; or exposes fraud, waste, abuse, illegality, or potential dangers to public health and safety. A free and open democratic government welcomes debate. Stifling information violates that democratic principle.

These “leak” prosecutions are a legal stretch and share many unusual elements. For example, they are brought under a novel theory of the Espionage Act espoused by a neo-conservative,<sup>6</sup> and they often involve stale cases opened during the Bush administration.<sup>7</sup> Further, the prosecutions identify no actual national security harm caused by the leak, and they target those who appear to be classic whistleblowers.

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3. See Jane Mayer, *The Secret Sharer*, NEW YORKER, May 23, 2011, at 46, 47, available at [http://www.newyorker.com/reporting/2011/05/23/110523fa\\_fact\\_mayer?currentPage=all](http://www.newyorker.com/reporting/2011/05/23/110523fa_fact_mayer?currentPage=all) (noting that, of those five, two were opened by the Bush administration); see also Michael Isikoff, ‘Double Standard’ in White House Leak Inquiries?, MSNBC (Oct. 18, 2010), [http://www.msnbc.msn.com/id/39693850/ns/us\\_news-security/t/double-standard-white-house-leak-inquiries/](http://www.msnbc.msn.com/id/39693850/ns/us_news-security/t/double-standard-white-house-leak-inquiries/) (“Kim’s case was the fourth leak prosecution brought by the Obama administration in recent months. That’s more than the last three administrations combined.”); see also Scott Shane, *Obama Steps up Prosecution of Leaks to the News Media*, N.Y. TIMES, June 12, 2010, at A1 (“President Obama has already outdone every previous president in pursuing leak prosecutions”).

4. See Office of the President-Elect, Ethics Agenda, [http://change.gov/agenda/ethics\\_agenda/](http://change.gov/agenda/ethics_agenda/) (last visited Jan. 5, 2011) (describing the President’s commitment to a transparent government by protecting whistleblowers).

5. See Humphrey Taylor, *Most People Think Releases by WikiLeaks Should be Illegal*, ¶1 (2011), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/666/Default.aspx> (analyzing a poll of 2,019 American adults which found that 69% felt that publishing Wikileaks documents could pose a security threat to the United States and should be illegal.).

6. See generally GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW (2010) (Ironically, Obama has presided over the most draconian crackdown on leaks in our history—even more so than Nixon.).

7. See Shane Harris, *Plugging the Leaks*, WASHINGTONIAN, (July 21, 2010), <http://www.washingtonian.com/print/articles/20/99/16361.html> (recounting the Bush administration’s investigation into who leaked classified CIA information to James Risen for his book, *State of War*); see also Editorial, *The Obama Administration’s Attacks on the Media*, L.A. TIMES, (Aug. 16, 2010), (hereinafter *Obama Attacks*) available at <http://articles.latimes.com/print/2010/aug/16/opinion/la-ed-leaks-20100816> (questioning the purpose of keeping the case against Risen open now that *State of War* is four years old and focuses on a past presidential administration).

Protecting whistleblowers rather than targeting them for criminal investigation would more surely protect national security than the Obama administration's policy of using the Espionage Act to criminalize whistleblowing. This Article will explain how strengthening legal protections for whistleblowers will serve to stop leaks of properly secret information, actually enhancing national security.

THE NEW YORK TIMES' WARRANTLESS WIRETAPPING STORY &  
THE SURGE OF LEAK INVESTIGATIONS

On December 16, 2005, the *New York Times* published an explosive story disclosing the National Security Agency's (NSA) domestic spying program,<sup>8</sup> which plunged the United States deep into a constitutional crisis with few parallels in American history. It is not hyperbole to say that Americans were stunned by the revelation of the warrantless wiretapping program.<sup>9</sup> The Senior Leaders of the intelligence community (IC) had a different reaction: on December 19, 2005, John Negroponte, former Director of National Intelligence, sent an e-mail to the NSA workforce, calling the *Times* article "an egregious disclosure of classified information."<sup>10</sup> President Bush claimed, "My personal opinion is: it was a shameful act for someone to disclose this very important program in a time of war. The fact that we're discussing this program is helping the enemy."<sup>11</sup>

The leak to the *Times* prompted justice department interest in prosecuting both the *Times* and the leakers.<sup>12</sup> Privacy and civil liberties advocates quickly argued that the "leak investigation" should be set aside in favor of an investigation of the secret surveillance itself.<sup>13</sup> However, on December 30, 2005, the Justice Department (DOJ) launched a large-scale investigation into the sources for the *Times* December 16, 2005 article.<sup>14</sup> The sprawling investigation included five prosecutors and twenty-five FBI agents, cost millions of dollars,

8. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, available at <http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=911> (revealing the Bush administration's dealings in domestic spying).

9. See *id.* (describing the change of NSA policy from only performing foreign searches to also performing domestic searches).

10. E-mail from John Negroponte, former Dir. Nat'l Intelligence, Nat'l Sec. Agency, to Nat'l Sec. Agency's Workforce, Dec. 19, 2005 (on file with author).

11. Transcript, *President Bush's News Conference*, N.Y. TIMES, Dec. 19, 2005, <http://www.nytimes.com/2005/12/19/politics/19text-bush.html?adxnnl=1&adxnnlx=1321334368-jebkUNiyDpBs5GYcDg6Asg>

12. Josh Gerstein, *Wiretapping Leak Probe Dropped*, POLITICO, (Apr. 26, 2011), <http://www.politico.com/news/stories/0411/53718.html>.

13. See *id.* (commenting that several public claims that the warrantless wiretapping program was illegal helped to stave off prosecution).

14. See *id.* (recounting how the National Security Agency filed a formal leak complaint shortly after the December 16, 2005 *New York Times* story on the secret surveillance program was published).

and is still ongoing.<sup>15</sup> The government identified and targeted approximately 1,000 people in the universe of possible sources, issued subpoenas for over fifty individuals, and raided almost a dozen of their homes.<sup>16</sup> About half of the dozen individuals were whistleblowers who had previously complained through proper internal channels about the NSA.<sup>17</sup> For example, on July 26, 2007, the FBI conducted coordinated armed raids on the homes of William Binney (a retired NSA mathematician), J. Kirk Wiebe (a retired NSA communications analyst), Edward Loomis (a retired NSA technician), and Diane Roark (a retired staffer on the House Intelligence Committee who held the NSA portfolio).<sup>18</sup> The four had jointly filed a Department of Defense Inspector General (DOD IG) complaint in 2002 regarding the NSA.<sup>19</sup> Thomas Drake, discussed herein,<sup>20</sup> served as the unnamed “DOD senior executive” source for the two-year investigation that ensued, which resulted in a Report that was damning to the ultra-secret agency, but immediately classified and hidden from the public.<sup>21</sup> Drake’s home was searched on November 28, 2007.<sup>22</sup>

Drake initially drew the attention of the investigators because the government believed that he was a source for the *Times* article.<sup>23</sup> Although Mr. Drake was not one of the *Times*’ sources and was never charged with leaking to the *Times* or any other media outlet, he is the only person that was prosecuted as a result of the leak investigation.<sup>24</sup> This fact is all the more difficult to square with the Justice Department decision to drop their fierce investigation in the fall of 2010 of former Department of Justice lawyer Thomas Tamm, who had publicly admitted to leaking information about President Bush’s electronic

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15. See Mayer, *supra* note 3, at 60 (highlighting the massive efforts to find and prosecute the media leaks).

16. See *id.*, at 61–62 (describing the raids that preceded that on Drake).

17. See Ellen Nakashima, *Ex-NSA Official Thomas Drake to Plead Guilty to Misdemeanor*, WASH. POST, June 9, 2011, [http://www.washingtonpost.com/national/national-security/ex-nsa-manager-has-reportedly-twice-rejected-plea-bargains-in-espionage-act-case/2011/06/09/AG89ZHNH\\_story.html](http://www.washingtonpost.com/national/national-security/ex-nsa-manager-has-reportedly-twice-rejected-plea-bargains-in-espionage-act-case/2011/06/09/AG89ZHNH_story.html) (discussing Drake’s original attempt to report his concerns to multiple government officials).

18. See Mayer, *supra* note 3, at 61 (noting that the raided individuals believed the raids to be retribution).

19. Defense Hotline case #85671, Sept. 4, 2002.

20. See discussion *infra* at 63–67 (describing the aftermath of Drake’s leaking to *The Baltimore Sun*).

21. OFFICE OF THE INSPECTOR GEN. OF THE DEP’T OF DEF., REQUIREMENTS FOR THE TRAILBLAZER AND THINTHREAD SYSTEMS, 05-INTEL-03, Dec. 15, 2004, (hereinafter TRAILBLAZER AND THINTHREAD SYSTEMS), available at <http://www.whistleblower.org/storage/documents/IGR.pdf> (an unclassified, heavily redacted portion of the Report was released in June 2011); see also Press Release, *Inspector General Report Vindicates GAP Clients From National Security Agency*, GOVERNMENT ACCOUNTABILITY PROJECT, (June 23, 2011), <http://www.whistleblower.org/press/press-release-archiv/1206-inspector-general-report-vindicates-gap-clients-from-national-security-agency>.

22. See Mayer, *supra* note 3, at 42 (discussing Drake’s experience with the agents and the raid that ensued).

23. See Mayer, *supra* note 3, at 43

24. *Id.*

eavesdropping program to the *Times*.<sup>25</sup> Even more puzzling, Attorney General Eric Holder, Jr., testified that he did not make the decision to drop the case against Tamm,<sup>26</sup> which is curious given the knowledge and involvement of the uppermost echelons of the government in the Drake case, including President Barack Obama, Attorney General Holder, and Lanny Breuer, head of the DOJ's criminal division.<sup>27</sup> The DOJ never indicted Russell Tice, another former NSA analyst who claimed to be a *Times* source.<sup>28</sup>

#### THE OBAMA ADMINISTRATION'S AGGRESSIVE CRACKDOWN ON WHISTLEBLOWERS

The Bush administration never prosecuted suspected leakers in federal court, despite vigorously investigating leaks.<sup>29</sup> Between 2005 and 2009, U.S. intelligence agencies made 183 referrals to the FBI, reporting unauthorized disclosures of classified information.<sup>30</sup> Subsequently, the FBI opened twenty-six "leak investigations," which identified fourteen suspects, and prosecuted none of them.<sup>31</sup>

In contrast, the Obama administration has pursued "a quiet but malicious campaign against the news media and their sources, more aggressively attacking those who ferret out confidential information than [ ] the George W. Bush administration did."<sup>32</sup> To make things worse, the administration is charging "leakers" under the Espionage Act, a little-used World War I-era

25. See Josh Gerstein, *Holder: Warrantless Wiretapping Leak Prosecution Rejected, But Not by Me*, POLITICO (May 4, 2011, 11:10 AM), [http://www.politico.com/blogs/joshgerstein/0511/Holder\\_warrantless\\_wiretapping\\_leak\\_prosecution\\_rejected\\_but\\_not\\_by\\_me.html](http://www.politico.com/blogs/joshgerstein/0511/Holder_warrantless_wiretapping_leak_prosecution_rejected_but_not_by_me.html) (recounting that during a Senate Judiciary Committee oversight hearing, Attorney General Eric Holder confirmed the Justice Department's decision not to prosecute Tamm, but denied personal involvement in the decision); see also Michael Isikoff, *The Fed Who Blew the Whistle: Is He a Hero or a Criminal?*, THE DAILY BEAST (Dec. 22, 2008), <http://www.thedailybeast.com/newsweek/2008/12/12/the-fed-who-blew-the-whistle.html> (explaining that Tamm decided to publicly disclose information on this secret program because his knowledge of it had caused ethical uncertainty in his life).

26. See Gerstein, *supra* note 25 (suggesting that, if Holder's testimony is true, then senior prosecutors may never have formally requested subpoenas from the *New York Times*).

27. See Gerstein, *supra* note 25.

28. See Gerstein, *supra* note 25 (explaining that prosecutors have not contacted Tice for several years).

29. See Mark Hosenball, *House Republican Staffer Introduced Alleged NSA Leaker to Reporter*, THE DAILY BEAST (Apr. 16, 2010), <http://www.thedailybeast.com/newsweek/blogs/declassified/2010/04/16/exclusive-house-republican-staffer-introduced-alleged-nsa-leaker-to-reporter.html>.

30. See Steven Aftergood, *FBI Found 14 Intel Leak Suspects in Past 5 Years*, SECURITY NEWS, June 21, 2010, [http://www.fas.org/blog/secretcy/2010/06/intel\\_leak.html](http://www.fas.org/blog/secretcy/2010/06/intel_leak.html) (noting an FBI document acknowledging that most of these referrals provide insufficient information for beginning an investigation); see also Harris, *supra* note 7 (explaining how President Bush criticized the *New York Times* article reporting that he authorized the secret surveillance program in the wake of September 11, 2011, by suggesting that such disclosure by the *Times* would endanger the safety of U.S. citizens).

31. See Harris, *supra* note 7, at 35.

32. *Obama Attacks*, *supra* note 7.

law that punishes the gathering, disclosure, or retention of national defense information that could harm the United States.<sup>33</sup> The crackdown shows no signs of slowing down. It should be noted that most of the cases described below are in motion, and that their procedural posture may have changed by the time this Article goes to press.

### 1. *Shamai Leibowitz*

In December 2009, the government charged Shamai Leibowitz, a former contract linguist for the FBI, with disclosure of classified information to the host of a blog.<sup>34</sup> Specifically, Leibowitz disclosed five papers to an unnamed blogger, now known to be Richard Silverstein.<sup>35</sup> He was charged with disclosure of classified information under 18 U.S.C. § 798 (2006) (the SIGINT statute).<sup>36</sup> Leibowitz pleaded guilty and was sentenced to twenty months in prison.<sup>37</sup> Appallingly, even the judge did not know what information Leibowitz disclosed, or how it compromised the country.<sup>38</sup> Even though Leibowitz never claimed to be a whistleblower, his stated motive for his disclosure meets the legal definition of whistleblowing.<sup>39</sup> This claim is readily apparent from his statements made at his sentencing, where he stated:

During the course of my work I came across wrongdoings that led me to conclude this is an abuse of power and a violation of the law. . . . I disclosed the violations to a member of the media . . . . I would like to emphasize . . . that I was not motivated by greed, fame, personal ambition, or foreign interests. I made a

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33. See Mayer, *supra* note 3, at 46, 47 (noting that the Obama administration has been using the 1917 law in more leak prosecutions than all previous administrations combined).

34. See Maria Glod, *Former FBI Employee Sentenced for Leaking Classified Papers*, WASH. POST, May 25, 2010, at B3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/24/AR2010052403795.html> (noting that Leibowitz leaked information while he worked on contract with the FBI).

35. See *United States v. Leibowitz*, Criminal No. AW-09-CR-0632 (D. Md. 2010) (stating that the five documents were “secret” and that they contained information regarding communication intelligence activities); Scott Shane, *Leak Offers Look At Efforts By U.S. To Spy On Israel*, N.Y. TIMES, Sept. 6, 2011, at A1 (revealing blogger to be Richard Silverstein).

36. See *id.* (describing the defendant’s disclosure of classified information was done “knowingly and willfully”); see also, 18 U.S.C. § 798 (a) (2006) (requiring that anyone who “knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person . . . any classified information [regarding communication intelligence] . . . be fined . . . or imprisoned [up to] ten years, or both”).

37. See Aftergood, *supra* note 30 (remarking that Leibowitz’s sentence is longer than that of any previous convicted leaker).

38. See Glod, *supra* note 34 (opining that the federal government’s response to the leak convinced the judge of the offense’s seriousness, despite not knowing the contents of the leak).

39. Cf., 5 U.S.C. § 213 (2006) (explaining that the section covers employees, former employees, and applicants for employment who disclose information that they “reasonably believe [ ] evidences—(A) a violation of any law, rule, or regulation; or (B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety”).

mistake but only because I believed it was in the best interests of the American people. I truly regret that my misguided patriotism led me to make a mistake . . . .<sup>40</sup>

The legal definition of whistleblowing includes disclosures to the media, regarding an abuse of authority.<sup>41</sup> The blogger Leibowitz disclosed to Silverstein, confirmed Leibowitz's salutary motives: "I see him as an American patriot and a whistle-blower, and I'd like his actions to be seen in that context"<sup>42</sup>

Leibowitz also said that he should have pursued other options within the government to report his concerns, such as reporting to the DOD IG, though it is questionable whether that would have afforded him greater protection.<sup>43</sup>

## 2. *Thomas Drake*

Even if Leibowitz had reported his concerns through "proper" internal channels within the government, subsequent events indicate that he would have fared no better. For example, Thomas Drake, a former senior executive at the NSA, had concerns about massive waste, mismanagement, illegality, and a willingness to compromise the privacy of U.S. citizens.<sup>44</sup> He reported his concerns to as many people within the IC as possible, including his immediate supervisors, the NSA's inspector general, the DOD IG, and Congressional intelligence committees.<sup>45</sup> When all these routes produced no results, he went to a Baltimore Sun reporter with information that was not even classified.<sup>46</sup>

Drake initially landed on the government's radar screen as a result of the New York Times leak investigation.<sup>47</sup> The government believed Drake was a source for the warrantless wiretapping story, a belief Drake consistently refuted, and the Government never presented any evidence that Drake was

40. Steven Aftergood, *Jail Sentence Imposed in Leak Case*, *SECURITY NEWS* (May 25, 2010), [http://www.fas.org/blog/secretcy/2010/05/jail\\_leak.html](http://www.fas.org/blog/secretcy/2010/05/jail_leak.html).

41. *Cf.*, 5 U.S.C. § 1213 (2006) (explaining that the section covers employees, former employees, and applicants for employment who disclose information that they "reasonably believe [ ] evidences—(A) a violation of any law, rule, or regulation; or (B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety"); *See also* Horton v. Dep't of Navy, 66 F.3d 279, 282 (Fed. Cir. 1995 (noting that disclosures to the press are protected disclosures)

42. Scott Shane, *Leak Offers Look At Efforts By U.S. To Spy On Israel*, *N.Y. TIMES*, Sept. 6, 2011, at A1.

43. *See id.* (explaining Leibowitz's lack of continued attempts to properly report the information after the original attempt was unsuccessful).

44. *See* Shane, *supra* note 3 (noting that Drake worried that the government's eavesdropping programs wasted millions of dollars when a program like ThinThread could filter the NSA's collected data while better protecting privacy).

45. *See id.* (explaining that agency leaders ignored Drake's complaints, and instead used a program called Trailblazer, which they later judged to be expensive and inefficient).

46. *See* Mayer, *supra* note 3, at 59–64 (stating that, while Drake claims he made sure to disclose only unclassified information, the government insists that some of the documents were either classified, or that they were meant to be classified and Drake should have known that).

47. *See* Mayer, *supra* note 3, at 63–64 (noting that Drake denied his involvement in the *Times* leak and admitted contacting the *Baltimore Sun*).

a source for *Times*.<sup>48</sup> Drake was a senior executive at the NSA, who served as the primary material witness in the DOD IG complaint filed by retired colleagues about the NSA choosing an expensive, invasive, undeveloped, and ultimately failed domestic surveillance program called Trailblazer over a cheaper, effective, legal alternative called ThinThread.<sup>49</sup> ThinThread had built-in features to protect the privacy of individual Americans.<sup>50</sup> The DOD IG investigated the complaint over several years, and, in a December 2004 Audit Report, substantiated the whistleblowers' claims.<sup>51</sup>

In the time period between the Leibowitz case and the Drake case, the government shifted strategies. Originally, the government had contemplated charging Drake under the SIGINT statute —as it did with Leibowitz— with giving information to a reporter but it never filed the draft indictment.<sup>52</sup> Instead, a new prosecutor, William M. Welch, II, took over the case and charged Drake under § 793(e) of the Espionage Act with “retaining” national defense information at home, obstruction of justice, and making false statements.<sup>53</sup> Drake faced up to thirty-five years in jail.

Drake thus entered the history books as the fourth case in which the Espionage Act was used to charge someone for allegedly mishandling classified information; specifically, Drake allegedly retained classified information at the time he was in touch with a *Baltimore Sun* reporter who chronicled mismanagement at the Agency in an award-winning series of articles.<sup>54</sup>

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48. See Mayer, *supra* note 3, at 60 (explaining that while investigators believed that the source who leaked to the *Baltimore Sun* was the same person who leaked to the *New York Times*, they never proved this).

49. See *60 Minutes: U.S. v. Whistleblower Tom Drake* (CBS television broadcast May 22, 2011), available at: <http://www.cbsnews.com/video/watch/?id=7366912n> (“One of them was Lieutenant General Michael Hayden, the head of the agency: Hayden wanted to transform the agency and launched a massive modernization program, code named: “Trailblazer.” It was supposed to do what Thin Thread did, and a whole lot more. Trailblazer would be the NSA’s biggest project. Hayden’s philosophy was to let private industry do the job. Enormous deals were signed with defense contractors. [Bill] Binney’s Thin Thread program cost \$3 million; Trailblazer would run more than \$1 billion and take years to develop.”)

50. See Mayer, *supra* note 3, at 52–53 (describing how ThinThread would discard unnecessary files, immediately to prevent overloading).

51. See Deputy Inspector General for Intelligence, REQUIREMENTS FOR THE TRAILBLAZER AND THINTHREAD SYSTEMS, Nov. 23, 2004, available at <http://www.whistleblower.org/storage/documents/IGR.pdf> (responding to allegations such as Trailblazer’s wasting of federal money, and the NSA’s disregard of effective options).

52. See Shane Harris, *Indictment Continues Obama Administration’s War on Leaks*, WASHINGTONIAN, Jan. 25, 2011, available at <http://www.washingtonian.com/blogarticles/people/capitalcomment/18114.html> (explaining that after the case was transferred from the senior Justice Department attorney to a new attorney in 2010, the majority of the charges were dropped).

53. See *United States v. Drake*, No. 1:10-CR-00181-RDB, 2010 WL 1513342 (D. Md filed Apr. 14, 2010) (indictment) (listing five counts of willful retention of nation defense information, one count of obstruction of justice, and three counts of making a false statement).

54. *Id.*



Tellingly, the first case proceeded against Pentagon Papers whistleblower Daniel Ellsberg. It was subsequently dismissed because of government misconduct.<sup>55</sup> Drake's case became "one of the Obama administration's most prominent efforts to punish accused leakers."<sup>56</sup>

After winning the Ridenhour Prize for Truth-Telling and being featured in a hard-hitting investigative piece by Jane Mayer in *The New Yorker*,<sup>57</sup> as well as featured on the final episode of the season on "60 Minutes," the case was propelled into the national spotlight.<sup>58</sup> After a string of adverse rulings for the government, the Justice Department approached Drake with a series of plea bargains, a number of which he rejected.<sup>59</sup> The Drake case ended dramatically in "a last-minute plea deal . . . abruptly ending a high-profile case in the Obama [A]dministration's pursuit of government leaks to the press."<sup>60</sup> The government dropped all ten felony charges, and Drake pleaded guilty to a single minor misdemeanor charge of "exceeding his authorized use of a computer," with a recommendation from the government of no jail time and no fine.<sup>61</sup> The failed case is clearly seen as a loss for the government. Steven Aftergood, head of the Federation of American Scientists' Project on Government Secrecy, followed the Drake case closely, and later described the plea bargain as: "a pale shadow of the original indictment . . . . The defendant was facing decades in prison, and all of the sudden the government says never mind [sic]. It's a pretty big reversal of course."<sup>62</sup>

55. See *U.S. v. Russo & Ellsberg*, Crim. No. 9373 (WNB) (C.D. Cal. 1973) (dismissing the case after the federal government admitted to spying on the defense team via wiretaps); see also *United States v. Morison*, 604 F. Supp. 655 (D. Md. 1985), *aff'd*, 844 F.2d 1057 (4th Cir. 1988) (deciding the second case prosecuted under the Espionage Act for allegedly mishandling classified information brought against Samuel Loring Morison); *U.S. v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006), *aff'd* 557 F.3d 192 (4th Cir. 2009) (deciding the third case prosecuted under the Espionage Act for allegedly mishandling classified information brought by the American Israel Public Affairs Committee ("AIPAC") case against lobbyists Steven Rosen and Keith Weissman. The prosecution of Ellsberg and Russo after the Pentagon Papers disclosure never reached a verdict because a mistrial was declared on the grounds of flagrant government misconduct. Morison was convicted and later pardoned by President Clinton, and the AIPAC case was aborted).

56. Ellen Nakashima, *Files in Leak Case are Pulled*, WASH. POST, June 9, 2011.

57. See Jane Mayer, *supra* note 3 (explaining the Drake case and the current state of affairs with handling of whistleblowers under the Obama Administration).

58. See *60 Minutes: U.S. v. Whistleblower Tom Drake*, (CBS broadcast May 22 2011), available at: <http://www.cbsnews.com/video/watch/?id=7366912n>.

59. See, e.g., Ellen Nakashima, *Ex-NSA Manager Has Reportedly Twice Rejected Plea Bargains in Espionage Act Case*, WASH. POST (June 9, 2011, 11:00 AM), available at <http://www.washingtonpost.com/national/national-security/ex-nsa-manager-has-reportedly-twice-rejected-plea-bargains-in-espionage-act-case.html> (detailing how Drake turned down a deal to plead guilty to unauthorized retention of classified documents, similar to the deal accepted in a 2005 plea by former national security adviser Samuel R. "Sandy" Berger, after he removed and shredded classified material relating to the Clinton administration's record on terrorism from the National Archives).

60. Brent Kendall, *Plea Deal Ends Leak Case Against Former Official*, WALL ST. J., June 10, 2011, at A7.

61. *Id.* ("In a sign of how far the government retreated, the Justice Department said in the plea agreement that it wouldn't object if Mr. Drake faced no jail time.")

62. See *id.*

NSA kept the December 2004 DOD IG Report vindicating Drake completely secret until June 2011.<sup>63</sup> After it was clear the Drake case would not go to trial, the NSA released a heavily redacted copy in response to Freedom of Information Act (FOIA) requests from watchdog groups, including the Government Accountability Project, and media outlets.<sup>64</sup>

Drake was sentenced on July 15, 2011.<sup>65</sup> Revealing the reasoning behind the prosecution, Welch requested an upward departure from the federal sentencing guidelines in the form of a \$50,000 fine in order to “send a message” to the “thousands of employees, whether they’re in NSA, CIA, DIA” who sign non-disclosure agreements.<sup>66</sup> Federal Judge Richard D. Bennett sharply criticized DOJ’s handling of the case, demanding an explanation for what he called the “unconscionable” delay between the 2007 raid on Drake’s home and the indictment.<sup>67</sup> Prosecutor Welch had no explanation. Judge Bennett further lambasted the government, comparing the treatment of Drake to British government abuses against colonial Americans and concluding that the case against Drake “did not pass the smell test.”<sup>68</sup> Judge Bennett denied the prosecution’s request, and, noting that Drake had been through “four years of hell,” sentenced him to probation and community service.<sup>69</sup> After sentencing, Drake reflected on the experience of being a whistleblower and the target of a

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63. See R. Jeffery Smith, *Classified Pentagon Report Upholds Thomas Drake’s Complaints About NSA*, WASH. POST, June 22, 2011, available at [http://www.washingtonpost.com/national/national-security/classified-pentagon-report-upholds-thomas-drakes-complaints-about-nsa/2011/06/22/AG1VHTgH\\_story.html](http://www.washingtonpost.com/national/national-security/classified-pentagon-report-upholds-thomas-drakes-complaints-about-nsa/2011/06/22/AG1VHTgH_story.html); see also Press Release, *Inspector General Report Vindicates GAP Clients From National Security Agency*, GOVERNMENT ACCOUNTABILITY PROJECT, (June 23, 2011), <http://www.whistleblower.org/press/press-release-archive/1206-inspector-general-report-vindicates-gap-clients-from-national-security-agency> (discussing the heavily redacted release from the United States Department of Defense).

64. *Id.*

65. Sentencing Hearing Transcript, U.S. v. Drake, Crim. No. 10-181 (RDB) (D.MD 2010), available at <http://www.fas.org/sgp/jud/drake/071511-transcript.pdf>.

66. *Id.*, at 16-17.

67. *Id.*, at 42-43.

68. *Id.*, at 30 (“did not pass the smell test”), 42-43 (comparing the delay between the raid and indictment to British crown abuses in colonial America).

69. *Id.* at 29 (“four years of hell”), 46 (sentence of probation and community service).

“multi-year, multi-million dollar ‘leak’ investigation,” explaining that his life and the life of his colleagues would “never be the same again.”<sup>70</sup>

Drake’s case was to be the first trial in the Obama Administration’s aggressive efforts to plug leaks—but it imploded in spectacular fashion as an instance of overreach,<sup>71</sup> miscalculation,<sup>72</sup> and “payback for whistleblowing.”<sup>73</sup> Former head of the Information Security Oversight Office (ISOO) under the George W. Bush administration and expert for Mr. Drake’s criminal defense team, J. William Leonard, wrote in the *L.A. Times* that the information Mr. Drake was accused of illegally retaining “never should have been classified” in the first place and filed a formal complaint with the office he used to lead.<sup>74</sup> The case against Drake was also hailed as a “setback,”<sup>75</sup> and “major defeat,”<sup>76</sup> and “the almost complete collapse of the government’s effort to make an example of Mr. Drake.”<sup>77</sup> However, the long-term success in quelling the government’s efforts to use an espionage law to target suspected leakers remains to be seen.

70. Dylan Blaylock, *Tom Drake Post-Sentencing Statement*, The Whistleblonger, Jul. 20, 2011, <http://www.whistleblower.org/blog/31-2010/1318-tom-drake-post-sentencing-statement> (last accessed Nov. 21, 2011) (“My life and those of four other colleagues were turned inside out and personally and professionally shattered as a result of becoming the targets of a multi-year, multi-million dollar ‘leak’ investigation led by the Justice Department. Our lives will never be the same again . . .”). Drake also published two op-eds reflecting on his experience and emphasizing the significance of his concerns and need for whistleblower protections for Intelligence Community whistleblowers. See Thomas Drake, *Why are we Subverting the Constitution in the Name of security?*, WASH. POST., Aug. 25, 2011, available at [http://www.washingtonpost.com/opinions/why-are-we-subverting-the-constitution-in-the-name-of-security/2011/08/25/gIQANnrheJ\\_story.html](http://www.washingtonpost.com/opinions/why-are-we-subverting-the-constitution-in-the-name-of-security/2011/08/25/gIQANnrheJ_story.html); Thomas Drake & Jesselyn Radack, *A Surprising War on Leaks Under Obama*, PHILADELPHIA INQUIRER, Aug. 1, 2011, available at [http://articles.philly.com/2011-08-01/news/29838846\\_1\\_whistle-blowers-jesselyn-radack-obama](http://articles.philly.com/2011-08-01/news/29838846_1_whistle-blowers-jesselyn-radack-obama).

71. See Shaun Waterman, *Government’s Espionage Case Against NSA Official Stumbles*, WASH. TIMES, June 10, 2011, at A5; Editorial, *Overreaching on Leaks*, WASH. POST, June 13, 2011, at A16; Tricia Bishop, *Former NSA Employee Pleads Guilty to Lesser Charge in Leak Case*, L.A. TIMES, June 11, 2011; Editorial, *A Case that Could be Overkill Against a Whistleblower*, WASH. POST, June 6, 2011, at A16; Ellen Nakashima, *Some Charges May be Dropped Move is ‘Clearly a Setback,’ Expert Says*, WASH. POST, June 9, 2011, at A1.

72. Tricia Bishop, *Drake Pleads Guilty to Misdemeanor in NSA Espionage Case*, BALTIMORE SUN, June 10, 2011 (quoting Steven Aftergood).

73. See, e.g. *id.*

74. J. William Leonard, Op-Ed., *When Secrecy Gets Out of Hand*, L.A. TIMES, Aug. 10, 2011, available at <http://www.latimes.com/news/opinion/commentary/la-oe-leonard-classified-information-20110810,0,5688807.story>. Leonard’s formal complaint with his former office requests an investigation and discipline for the the NSA and Justice Department officials who over-classified the information in Drake’s criminal case. See Scott Shane, *Complaint Seeks Punishment for Classification of Documents*, N.Y. TIMES, Aug. 1, 2011, at A16, available at [http://www.nytimes.com/2011/08/02/us/02\\_secret.html](http://www.nytimes.com/2011/08/02/us/02_secret.html).

75. Scott Shane, *Ex-N.S.A. Aide Gains Plea Deal in Leak Case; Setback to U.S.*, N.Y. TIMES, June 9, 2011, at A1; Ellen Nakashima, *Ex-NSA Official Thomas Drake to Plead Guilty to Misdemeanor*, WASH. POST, June 9, 2011; Ellen Nakashima, *Some Charges May Be Dropped Move is ‘Clearly a Setback,’ Expert Says*, WASH. POST, June 9, 2011 at A1.

76. Jane Mayer, *Is the N.S.A. Whistleblower Case Falling Apart?*, NEW YORKER, June 9, 2011, available at <http://www.newyorker.com/online/blogs/newsdesk/2011/06/is-the-nsa-whistleblower-case-falling-apart.html>.

77. Shane, *supra* note 75.

### 3. Bradley Manning

On June 7, 2010, the U.S. military arrested Private First Class (PFC) Bradley Manning for alleged unauthorized disclosure of classified information.<sup>78</sup> Among other things, Manning is suspected of having provided WikiLeaks, a radical anti-secrecy website, with a video of a 2007 Apache helicopter gunning down unarmed Iraqi civilians, daily field reports from the wars in Iraq and Afghanistan, and 250,000 pages of diplomatic cables.<sup>79</sup> Because Manning's case is governed by the Uniform Code of Military Justice (UCMJ), technically, he "has not been indicted under the Espionage Act, but its evil twin; he faces the charge of 'aiding the enemy,'" a crime punishable by death.<sup>80</sup> Manning is scheduled to have a first hearing before a military court on December 16, 2011. Additionally, a grand jury heard testimony in June 2011 in a continuing investigation of WikiLeaks.<sup>81</sup> The government is also considering prosecuting its founder, Julian Assange, under the Espionage Act.<sup>82</sup>

Unlike the cases involving Leibowitz and Drake, the media immediately dubbed Manning a whistleblower.<sup>83</sup> He fits the profile. According to one friend, Manning had "misgivings about Iraq because of what he was learning as an intelligence analyst . . . about 'how messed up the situation is.'"<sup>84</sup> According to another close friend, "[h]e wanted to do the right thing . . . [h]e wanted people held accountable and wanted to see this didn't happen again."<sup>85</sup> Even the person who turned in Manning, former computer hacker Adrian Lamo, said "he was 'deeply conflicted' about reporting Manning, 'given that Bradley is an

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78. See Elisabeth Bumiller, *Army Leak Suspect Is Turned In, by Ex-Hacker*, N.Y. TIMES, June 7, 2010, available at <http://www.nytimes.com/2010/06/08/world/08leaks.html>.

79. *Id.*

80. See Judy Bachrach, *Espionage, Manning, and Assange*, WORLD AFFAIRS J., (May 29, 2011), <http://www.worldaffairsjournal.org/new/blogs/bachrach/Espionage> (Article 134 is the UCMJ counterpart to the Espionage Act).

81. See Scott Shane, *U.S. Pressing Its Crackdown Against Leaks*, N.Y. TIMES, June 17, 2011, at A1, available at <http://www.nytimes.com/2011/06/18/us/politics/18leak.html?pagewanted=all> (highlighting the increased pressure that the government has placed on apprehending the sources of leaks).

82. Compare Ruth King, *Gabriel Schoenfeld: Amazing . . . For Once the Government Kept a Secret*, WALL STREET J., May 6, 2011, available at <http://www.ruthfullyyours.com/2011/05/06/gabriel-schoenfeld-amazing-for-once-the-government-kept-a-secret/>, with WikiLeaks, *the Espionage Act & the First Amendment: The Law, Politics & Policy of Prosecuting Julian Assange*, AM. U. CONTINUING LEGAL EDUC., Jan. 11, 2011, available at <http://www.wcl.american.edu/news/wikileaksvent.cfm> (raising potential problems of prosecuting Assange based on jurisdiction, extradition, etc.).

83. See, e.g., Anna Mulrine, *WikiLeaks Suspect: Where Army See Traitor, Some See Whistleblower*, CHRISTIAN SCI. MONITOR, March 3, 2011, <http://www.csmonitor.com/USA/Justice/2011/0303/WikiLeaks-suspect-Where-Army-sees-traitor-some-see-whistleblower>.

84. Ellen Nakashima, *Bradley Manning is at the Center of the WikiLeaks Controversy. But Who is he?* WASH. POST, May 8, 2011, at 8, 16 (quoting Keith Rose, a close friend of Manning's).

85. Kevin Poulsen & Kim Zetter, *U.S. Intelligence Analyst Arrested in WikiLeaks Video Probe*, WIRED.COM (June 6, 2010), at 3-4, <http://www.wired.com/threatlevel/2010/06/leak/> (quoting Manning's friend, Tyler Watkins).

individual acting out of his conscience and his desire to make the world a better place.”<sup>86</sup> Manning’s alleged disclosures reveal potential fraud and illegality in an expensive and decade-long military engagement in Afghanistan.<sup>87</sup>

Like the other defendants, the disclosures Manning allegedly made do not reveal anything about the United States’ military strategy. Instead, the problems they highlight are precisely those that are crucial to the public discussion of whether the war in Afghanistan is worth continuing.<sup>88</sup>

#### 4. *Stephen Kim*

On August 19, 2010, the Justice Department indicted Stephen Kim, a former Senior Adviser for Intelligence on detail to the State Department Arms Control Compliance Bureau, charging him with disclosing national defense information in June 2009 during an interview with Fox News and lying about it to the FBI.<sup>89</sup> Like Leibowitz, Kim did not claim to be a whistleblower; however, it is undisputable that the information he allegedly leaked was of high public interest, as U.S. intelligence had already warned that North Korea would likely attempt another nuclear test following United Nations sanctions.<sup>90</sup> John Bolton, the former Undersecretary of State for Disarmament, and a noted hard-liner on North Korea, said the disclosures in the Fox News story about North Korean intentions were “neither particularly sensitive nor all that surprising.” It involved the kind of information that could have been gleaned from reading stories in the South Korean press at the time, he noted.<sup>91</sup>

Like many of the other leak cases, the Kim case was remarkable for being unremarkable. Moreover, South Korea, China, and other neighbors have an indisputable public interest in knowing if North Korea plans to conduct another nuclear explosive test.

#### 5. *Jeffrey Sterling*

Showing no signs of slowing down in the new year, on January 6, 2011, DOJ arrested former CIA agent Jeffrey Sterling on charges that he “leaked” national

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86. Nakashima, *supra* note 84, at 18 (quoting Adrian Lamo).

87. *Cf.*, 5 U.S.C. § 213 (2006)(explaining that the section covers employees, former employees, and applicants for employment who disclose information that they “reasonably believe [ ] evidences—(A) a violation of any law, rule, or regulation; or (B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety”).

88. *See Obama Attacks*, *supra* note 7.

89. *See United States v. Kim*, No. 1:10-cr-00225-CKK (D.D.C filed Aug. 19, 2010). (indictment) (charging Kim with one count of unauthorized disclosure of national defense information and one count of making false statements).

90. Spencer S. Hsu, *State Dept. Contractor Charged in Leak to News Organization*, WASH. POST, Aug. 28, 2010, at A14.

91. Michael Isikoff, *supra* note 3.

defense information to the media.<sup>92</sup> Although not in the indictment, it is widely known that Sterling is suspected of being the source for a chapter in James Risen's book, *State of War*.<sup>93</sup> The chapter describes a botched CIA program called "Merlin," which involved an attempt to sabotage Iran's nuclear program by providing flawed blueprints for key components to the Iranians.<sup>94</sup> However, the flaws were so obvious that the Iranians detected them, and it turns out that the United States may have given too much real nuclear information to the Iranians and that the operation helped Iran to advance its development of nuclear weapons.<sup>95</sup> Clearly, this is something that is in the public interest to know, especially in light of a recent United Nations report that Iran is further along in developing nuclear devices than previously thought.<sup>96</sup>

Although Sterling, like Leibowitz, does not claim the mantle of "whistleblower," he certainly fits the bill: his alleged disclosures undoubtedly reveal "a substantial and specific danger to public . . . safety."<sup>97</sup>

#### OBAMA'S WAR ON WHISTLEBLOWERS AND THE MEDIA

As a candidate, and when first elected, Obama espoused protecting whistleblowers. His transition website stated:

**Protect Whistleblowers:** Often the best source of information about waste, fraud and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. . . . We need to empower federal employees as watchdogs of wrongdoing and partners in performance.<sup>98</sup>

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92. See *U.S. v. Sterling*, No. 1:10cr485 (E.D.V.A. Dec. 22, 2010) (Indictment) (charging Sterling with leaking information to the media).

93. See Motion of James Risen to Quash Subpoena and/or For Protective Order, at 7; *U.S. v. Sterling*, No. 1:10cr485 (E.D.V.A. June 21, 2011) (insinuating that inquiring the source of the quotations would reveal Sterling as the Source of Risen's information in his book).

94. See JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION*, at 193–219 (2006) (describing the details and failure of Operation Merlin).

95. *Id.* at 211.

96. ATOMS FOR PEACE BOARD OF GOVERNORS, IMPLEMENTATION OF THE NPT SAFEGUARDS AGREEMENT AND RELEVANT PROVISIONS OF SECURITY COUNSEL RESOLUTIONS IN THE ISLAMIC REPUBLIC OF IRAN, Nov. 8, 2011, available at [http://graphics8.nytimes.com/packages/pdf/world/2011/IAEA-Nov-2011-Report-Iran.pdf?\\_ref=world](http://graphics8.nytimes.com/packages/pdf/world/2011/IAEA-Nov-2011-Report-Iran.pdf?_ref=world).

97. Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16 (1989) (codified as amended at 5 U.S.C. § 2302(b)(8)(A)(ii) (2006)).

98. Office of the President-Elect, Ethics Agenda, [http://change.gov/agenda/ethics\\_agenda/](http://change.gov/agenda/ethics_agenda/) (last visited Jan. 5, 2011).

Free speech, good-government, and whistleblower advocates are perplexed and disappointed that Obama's campaign promises of openness and transparency are being transmogrified into a full-fledged war on whistleblowers, who try to shine light on government wrongdoing.

It is no secret that "Obama has privately seethed and vented over leaks."<sup>99</sup> This was evidenced early on by the embarrassment over General Stanley McChrystal, the top U.S. commander in Afghanistan, complaining in *Rolling Stone* magazine about his bosses and the Afghan war he was leading.<sup>100</sup> Obama dismissed McChrystal, but the Pentagon later conducted an inquiry that cleared the general of wrongdoing.<sup>101</sup> In a more recent and glaring example of whistleblower retaliation, State Department spokesman P.J. Crowley was forced to resign after he said that the Pentagon's treatment of Manning was "ridiculous and counterproductive and stupid."<sup>102</sup>

[N]o one on [Obama's] staff was brave enough to tell [Obama] that obsessing over leaks was a colossal waste of time. . . . But it wouldn't have mattered: leaks offended Obama's sense of discipline and reminded him of everything he disliked about the [Capitol]. He was fearsome on the subject, which seemed to bring out his controlling nature to an even greater degree than usual.<sup>103</sup>

In addition to Obama's personal disdain for "leaking," other experts suggest that the Obama administration is likely compensating the IC for the anger it caused by releasing the memos regarding torture under the Bush administration.<sup>104</sup> More generally, Obama may be trying to alter the perception that he is weak on national security and intelligence issues. In the Drake case in

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99. Michael Isikoff, *supra* note 3; see also Scott Shane, *Obama Takes a Hard Line Against Leaks to Press*, NY TIMES, June 10, 2010, at A3 (quoting Steven Aftergood, head of the project on government secrecy at the Federation of American Scientists, who said "Obama is driven to distraction by leaks").

100. See Michael Hastings, *The Runaway General*, ROLLING STONE, Jun. 25, 2011, available at <http://www.rollingstone.com/politics/news/the-runaway-general-20100622> (describing the concerns that the General had about the mismanagement of the Afghan War).

101. See Robert Burns, *Pentagon Inquiry Clears McChrystal of Wrongdoing*, MSNBC (Apr. 18, 2011), [http://www.msnbc.msn.com/id/42648539/ns/politics-more\\_politics/](http://www.msnbc.msn.com/id/42648539/ns/politics-more_politics/) (citing DOD IG report finding that McChrystal had not violated any applicable legal or ethics standard); see also Ellen Nakashima, *Former NSA Executive Thomas A. Drake May Pay High Price for Media Leak*, WASH POST, July 14, 2010, at C5 ("whistleblowers [are] targeted by an Obama administration bent on sealing leaks.")

102. Mark Landler and Michael D. Shear, *Official Exits State Dept. After Jabs at Pentagon*, N.Y. TIMES, Mar. 14, 2011, at A4, available at <http://www.nytimes.com/2011/03/14/us/politics/14crowley.html>.

103. JONATHAN ALTER, THE PROMISE: PRESIDENT OBAMA, YEAR ONE, 155 (2010).

104. Josh Gerstein, *Justice Dept. Cracks Down on Leaks*, POLITICO (May 25, 2010), <http://www.politico.com/news/stories/0510/37721.html>.

particular, many speculated that the government is eager for a sign of progress in the investigation into the *New York Times* sources.<sup>105</sup>

Any of these reasons would only be compounded by the most predictable reason for punishing “leakers”: retaliation for embarrassing those in power. Early in his presidency, Obama stated: “[M]y Administration is committed to operating with an unprecedented level of openness . . . [A] democratic government accountable to the people must be as transparent as possible and must not withhold information for self-serving reasons or simply to avoid embarrassment.”<sup>106</sup> But, when examined closely, the leaks being prosecuted embarrassed the government by exposing high-level government corruption, ineptitude, and illegality. They did not harm to national security, which is a valid concern that the government has denigrated to a fear-mongering tactic. The Drake case exemplifies this clearly, not only because his information regarding waste reflected poorly on the government, but also because he disclosed unclassified information to the *Baltimore Sun* only after his complaining internally produced no tangible results; the obviousness of the government’s embarrassment clearly indicates retaliation.<sup>107</sup>

Likewise, Sterling’s alleged disclosure publicized the CIA’s failure to infiltrate Iran’s nuclear program.<sup>108</sup> Meanwhile, the Obama administration, despite promising rhetoric, has yet to successfully curb the rampant over-classification plaguing the IC, as, in the first year alone, Obama’s administration designated 224,734 new secrets, 22.6% more than those created the previous year.<sup>109</sup> In 2010, the Obama administration classified nearly 77 million documents, an increase of 40% above his first year in office.<sup>110</sup>

The only thing worse than embarrassing those in power is exposing crimes of the powerful. The retaliation is ramped up by an order of magnitude. For a President who declined to investigate war crimes, torture, and warrantless wiretapping by senior Bush officials, targeting mid-level bureaucrats is hypocritical, and it adds insult to injury to go after whistleblowers.

The Obama administration’s attack on whistleblowers is also an indirect attack on the media, and is certainly trying to lay the groundwork with

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105. Ellen Nakashima, *Act of Honor, or Betrayal?*, WASH. POST, July 14, 2010, at C1, C5.

106. Press Release, *Classified Info, and Controlled Unclassified Info.*, May 27, 2009, available at <http://www.fas.org/sgp/obama/wh052709.html>.

107. See *Obama Attacks*, *supra* note 7 (arguing that the Obama administration’s prosecution of whistleblowers is malicious).

108. Glenn Greenwald, *War on Whistleblowers Intensifies*, SALON (May 25, 2010), <http://news.salon.com/2007/11/01/whistleblowers/>.

109. Editorial, *Return of the Plumbers: The Obama Administration is Waging War Against Leakers*, ECONOMIST, June 16, 2011, available at <http://www.economist.com/node/18836544>.

110. Editorial, *Why is that a Secret?*, N.Y. TIMES, Aug. 25, 2011, at A26, available at <http://www.nytimes.com/2011/08/25/opinion/why-is-that-a-secret.html>.



precedents that can be used to attack the press.<sup>111</sup> Schoenfeld himself suggested that journalists who publish allegedly classified information should be criminally prosecuted.<sup>112</sup> As with the attack on whistleblowers, cases brought against journalists who ferreted out confidential information appear to have little to do with protecting national security interests.

The DOJ's repeated attempts to subpoena journalist James Risen in the Sterling case illustrate how easily the attack on whistleblowers becomes an attack on the media.<sup>113</sup> The DOJ has issued a third subpoena for Risen undeterred by facts that (1) a federal judge already quashed a grand jury subpoena for Risen's testimony and (2) Risen's testimony is not necessary to identify his source—the Justice Department already believes Sterling is his source.<sup>114</sup> The subpoena seeks to force James Risen, a *New York Times* correspondent, to testify about his sources for his book *State of War*.<sup>115</sup>

In a motion to quash the subpoena, Risen's attorneys argued that the subpoena is further retaliation against Risen's exposure of controversies during the Bush administration.<sup>116</sup> Risen filed an affidavit describing how "[t]he Bush Administration was embarrassed by the disclosures [he] made in the course of [his] reporting . . . and eventually singled [him] out as a target for political harassment."<sup>117</sup> Specifically, Risen believes the retaliation and harassment began "as part of an effort by the Bush Administration to punish [him] and silence [him], following the publication of the [2005] NSA wiretapping story."<sup>118</sup> Risen was even "told by a reliable source that Vice President Dick Cheney pressured the Justice Department to personally target [him] because [Cheney] was unhappy with [Risen's] reporting and wanted to see [him] in jail."<sup>119</sup> Risen also described how the DOJ repeatedly threatened him with prosecution under the Espionage Act, and explained his belief that, by threatening prosecution, "the Government was trying to intimidate journalists, like me, who publish stories that expose excessive government

111. See, e.g., Mayer, *supra* note 3, at 57 ("Because reporters often retain unauthorized defense documents, Drake's conviction would establish a legal precedent making it possible to prosecute journalists as spies.").

112. See GABRIEL SCHOENFELD, *NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW* 265 (2010).

113. See Charlie Savage, *Subpoena Issued to Writer in CIA-Iran Leak Case*, N.Y. TIMES, May 24, 2011, at A18 (showing that whistleblower investigations often result in the journalist being compelled to reveal their sources).

114. See *id.*

115. Jane Mayer, *James Risen's Subpoena*, NEW YORKER, May 24, 2011, <http://www.newyorker.com/online/blogs/newsdesk/2011/05/james-risens-subpoena.html>.

116. Motion of James Risen to Quash Subpoena and/or For Protective Order, at 12, *U.S. v. Sterling*, No. 1:10cr485 (E.D.V.A. June 21, 2011) (characterizing the charges against Mr. Risen as "harassment"); Memorandum of Points and Authorities in Opposition to the Government's Motion In Limine and in Support of the Motion of James Risen to Quash Subpoena and/or For Protective Order, at 2; *U.S. v. Sterling*, No. 1:10cr485 (E.D.V.A. June 21, 2011).

117. Affidavit of James Risen at 11, *U.S. v. Sterling*, No. 1:10cr485 (E.D.V.A. filed June 21, 2011), ECF No. 115-2.

118. *Id.* at 11.

119. *Id.* at 11–12.

secrecy, illegality, or malfeasance.”<sup>120</sup> The District Court agreed with Risen in part, and issued in order severely restricting Risen’s testimony to unprivileged information.<sup>121</sup>

While the Obama administration would no doubt insist that it is not targeting the press in the recent spate of whistleblower prosecutions, the aggressive campaign to subpoena Risen suggests otherwise. Risen rightly recognized that the Obama administration’s whistleblower prosecutions “will have a chilling effect on the freedom of the press in the United States.”<sup>122</sup>

#### A SOLUTION: THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT

What seems lost on most is that the best way to curtail leaks is to pass meaningful and effective whistleblower protection legislation and to stop, in the words of the *Wall Street Journal*, “criminalizing routine leaks.”<sup>123</sup> Oddly, national security and intelligence officials are exempted from the current Whistleblower Protection Act, despite the fact that they often have the most significant evidence of threats to our country.<sup>124</sup> It is precisely these categories of employees who are most often in the best position to detect fraud, waste, and abuse, and also identify public health and safety problems.

The current Whistleblower Protection Act is a sham:

Enacted with the best of intentions, it has become a trap that rubber-stamps almost any retaliation. The law was supposed to protect federal employees who expose fraud and misconduct from retaliation. But over the years, these protections have been completely undermined. One loophole gives the government the absolute right to strip employees of their security clearances and fire them, without judicial review. Another bars employees of the National Security Agency and the Central Intelligence Agency from any coverage under the law. And Congress has barred national security whistle-blowers who are fired for exposing wrongdoing from obtaining protection in federal court.<sup>125</sup>

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120. *Id.* at 12–14.

121. Order, at 1, *U.S. v. Sterling*, No. 1:10cr485 (E.D.V.A. Jul. 29, 2011). Undeterred, DOJ filed a Motion for Reconsideration. Government’s Motion for Clarification and Reconsideration, *U.S. v. Sterling*, No. 1:10cr485 (E.D.V.A. Aug. 24, 2011); Supplement to Government’s Motion for Clarification and Reconsideration, *U.S. v. Sterling*, No. 1:10cr485 (E.D.V.A. Sept. 2, 2011). The court denied the motion, but granted clarification of Risen’s testimony, which would include a limited inquiry into a proposal for Risen’s book *State of War*. Order, *U.S. v. Sterling*, No. 1:10cr485 (E.D.V.A. Oct. 12, 2011).

122. *Id.* at 16.

123. L. Gordon Crovitz, Editorial, *Information Age: WikiLeaks and the Espionage Act*, WALL ST. J., Apr. 25, 2011, at A13 (advocating that WikiLeaks founder Julian Assange can be prosecuted without criminalizing routine leaks).

124. See Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended in scattered sections of 5 U.S.C.).

125. See Stephen M. Kohn, Op-Ed., *The Whistle-Blowers of 1777*, N.Y. TIMES, June 13, 2011, at A23, available at <http://www.nytimes.com/2011/06/13/opinion/131cohn.html> (criticizing weakness of current WPA).

This lack of normal access to court has been the Achilles' heel of the Act. Cases are enforced by a system of administrative hearings and limited judicial review, by unsympathetic administrative law judges: at the Merit Systems Protection Board and the Federal Circuit—which has monopoly jurisdiction over appeals.<sup>126</sup> A stunning 204 out of 207 cases have gone against whistleblowers since Congress last unanimously “strengthened” the law’s free speech mandate.<sup>127</sup>

The Intelligence Community Whistleblower Protection Act (ICWPA)<sup>128</sup> does apply to IC whistleblowers, but it offers drastically less protection than even the WPA. The ICWPA fails to afford whistleblowers any meaningful protection from retaliation. Passed in 1998, the ICWPA was intended to “encourage” reporting of “wrongdoing within the Intelligence Community” to Congress because Congress, as a “co-equal branch of Government,” has a “‘need to know’ of allegations of wrongdoing within the executive branch.”<sup>129</sup> Congress recognized that even with regard to classified information, whistleblowers were necessary for effective oversight of the intelligence community. The ICWPA sought to provide “a means for such employees and contractors to report to Congress *while safeguarding the classified information involved in such reporting*.”<sup>130</sup> Congress also recognized that fear of retaliation stifled IC employees: “[T]he risk of reprisal perceived by employees and contractors of the Intelligence Community for reporting serious or flagrant problems to Congress may have impaired the flow of information needed by the intelligence committees to carry out oversight responsibilities.”<sup>131</sup>

As an intellectual principle, the ICWPA was a significant step forward. The law’s intent and findings are accurate and appropriate. However, as a practical matter, little has changed within the intelligence agencies since the ICWPA’s passage, as evidenced by the Drake case.<sup>132</sup> Drake followed the procedures outlined in the ICWPA perfectly in reporting his classified concerns about gross waste, mismanagement, fraud, and illegality at NSA to the DOD IG and Congress.<sup>133</sup> However, the procedure set up in the ICWPA failed to protect Drake from the severe reprisal of becoming the target of the *New York Times* leak investigation (for which he was not a source) or from being indicted under

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126. See, e.g., Tom Devine, *The MSPB’s Terrible Ruling on Robert MacLean*, THE WHISTLEBLOGGER (May 18, 2010), <http://www.whistleblower.org/blog/31-2010/559-the-mspbs-terrible-ruling-on-robert-maclean?format=pdf> (describing and criticizing how the WPA is enforced by examining the case of Federal Air Marshall Robert MacLean).

127. *Id.* at 2.

128. Intelligence Community Whistleblower Protection Act, Pub. L. 105-272, Title VII, 112 Stat. 2413 (1998) (codified as amended at 5 U.S.C. App. § 8H).

129. *Id.* at § 701(b).

130. *Id.* at § 701(b)(6) (emphasis added).

131. *Id.* at § 701(b)(5).

132. See R. Jeffery Smith, *Classified Report Upheld Drake Complaint*, WASH. POST, June 23, 2011, at A7, available at <http://www.washingtonpost.com/national/national-security/classified-report-upholds-thomas-drakes-complaint-about-NSA/2011/06/22/AGIVHTgH-story.html> (chronicling the history of Drake case).

133. *Id.*

the Espionage Act.<sup>134</sup> From a public policy perspective, the ICWPA failed as well: even after the DOD IG vindicated Drake and substantiated his grave concerns, nothing changed at the NSA.<sup>135</sup>

An oversight body like the DOD IG that is tasked with holding powerful IC agencies accountable must be able to receive disclosures and protect whistleblowers from reprisal. Even the *Washington Post's* conservative editorial board recognizes the importance of strong and effective inspectors general: "Congress and the administration should work to strengthen the tools and independence of the IG[']s, especially those in the intelligence communities. The administration should also quickly fill the [ten] IG vacancies, including those in the [DOJ], Homeland Security and State departments."<sup>136</sup>

Moreover, the Drake prosecution sends a chilling message to all IC employees that no matter how carefully they follow the ICWPA's procedures, the criminal justice system can still be used against them. The *Washington Post's* editorial board also acknowledged the chilling effect: "[t]he Drake case should serve as a reminder of the importance of giving government employees, especially those who work in areas that touch on national security, a clear and lawful path to allege malfeasance and abuse."<sup>137</sup> Without the freedom to warn for those on the front lines, the Executive Branch, Congress, and the public will keep getting blindsided. Without adequate internal disclosure channels, intelligence whistleblowers are faced with an impossible choice—either risk their careers (and, in Drake's case, his liberty) by making unprotected disclosures, or remain silent about grave national security problems.

The Whistleblower Protection Enhancement Act (WPEA) will prevent leaks and strengthen our national security.<sup>138</sup> It creates a safer, responsible channel to work within the system, when none currently exist. Further, it does not, under any circumstances, protect public disclosures of classified information, nor does it protect disclosures of sensitive sources and information to any unauthorized person or entity.

The WPEA, which has been around for almost a dozen years, nearly became law last year.<sup>139</sup> It had been considered exhaustively, with three House and Senate hearings since 2006, and seven months of negotiations with the minority staff of the Senate Select Committee on Intelligence (SSCI), satisfying all concerns raised by IC staff.<sup>140</sup> One hundred senators passed the legislation by

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134. *Id.*

135. *Id.*

136. Editorial, *Overreaching on Leaks*, WASH. POST, June 13, 2011, at A16.

137. *Id.*

138. *See generally* Whistleblower Protection Enhancement Act, S. 372, 111th Cong. (2009).

139. *See generally* Whistleblower Protection Enhancement Act, S. 372, 111th Cong. (2009).

140. *See* Joe Davidson, *Has the Bell Told on Whistleblower Legislation?*, WASH. POST, Dec. 16, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/15/AR2010121506719.html>.

unanimous consent on December 10, 2010, but it was killed twelve days later by a “secret hold,” hours before Congress adjourned.<sup>141</sup>

A “bipartisan group of senators, led by Daniel K. Akaka (D–Hawaii) and Susan Collins (R–Maine) . . . reintroduced the bill”<sup>142</sup> in April, 2011. The legislation includes protection for national security whistleblowers that the House removed last December after objections by retiring member Pete Hoekstra (R–Mich.), the former ranking member of the House Permanent Select Committee on Intelligence (HPSCI).<sup>143</sup>

The best way to prevent both “leaks” and “leak prosecutions” is to institute meaningful and effective internal whistleblowing channels, such as enacting the WPEA, and strengthening the Inspectors General, ensuring that they have the ability to protect their sources from all retaliation, including criminal prosecution.

### CONCLUSION

Gabriel Schoenfeld’s true motives, like the motives of those in power who are following his lead, are best captured in his own words: “When you catch someone, you should make an example of them.”<sup>144</sup> But making an example of public servants has everything to do with politics, and nothing to do with justice. Moreover, these prosecutions discourage others from making public their legitimate concerns regarding government programs.<sup>145</sup> One hopes that that is an unintended consequence of the latest leak prosecutions; however, in reality, it seems to be precisely the point.

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141. See Tom Devine, Editorial, *A Secret Killer in the Senate; An Anonymous GOP Senator Stopped the Whistle-Blower Protection Act*, L.A. TIMES, Jan. 10, 2011, at A15, available at <http://articles.latimes.com/2011/jan/10/opinion/la-oe-devine-whistleblower-20110110> (stating that an anonymous GOP senator prevented the bill from passing).

142. See Whistleblower Protection Enhancement Act, S. 743, 112th Cong. (2011); Joe Davidson, *Lawmakers Take Up Whistleblower Act-Again*, WASH. POST, Apr. 15, 2011, at B5 (explaining the content of the proposed legislation).

143. See *id.* Although the bill passed in the House unanimously, and both parties agreed to the removal, House Republican leadership secretly asked Senate Republican leadership to block the legislation’s passage.

144. Scott Shane, *Obama Steps Up Prosecution of Leaks to the News Media*, N.Y. TIMES, June 12, 2010, at A1.

145. See Editorial, *A Case That Could be Overkill Against a Whistleblower?*, WASH. POST, June 6, 2011, at A16, available at [http://www.washingtonpost.com/opinions/a-case-that-could-be-overkill-against-a-whistleblower/2011/06/03/AG2DemJH\\_story.html](http://www.washingtonpost.com/opinions/a-case-that-could-be-overkill-against-a-whistleblower/2011/06/03/AG2DemJH_story.html).