

**MYTH, PARADOX & THE OBLIGATIONS OF LEADERSHIP**

Edward Snowden, Bradley Manning and the Next Leak

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Counterintelligence—my old business—has the difficult job of stopping spies from stealing our secrets. Of course they don't have to steal them when Americans like Bradley Manning and Edward Snowden throw them out the window and into the laps of waiting journalists. The purpose of this paper is to do three things:

- \* Expose a myth
- \* Confront a paradox
- \* Appeal for some much-needed leadership, something more than riding the waves of popular outrage

## THE MYTH

It is a myth that leaks don't really cause any harm.<sup>1</sup> News flash: our adversaries read newspapers and watch TV. And they have internet access. The average American may see some secret revealed, and find it remarkable or informative or objectionable or maybe could care less. By contrast, everything that hostile governments and terrorists learn about U.S. intelligence and other national security secrets gets pieced together as part of a larger whole, helping to feed their ability to hide what they are doing, or to deceive us, or to carry out the next attack without warning.

For example, in 1998 there was a leak that NSA had the ability to listen to Osama bin Laden's satellite phone conversations. And then Bin Laden stopped using that phone. Who knows whether there might have been a chance to prevent the terrorist attack on September 11 four years later had that line not gone dark?

The volumes of secret cables that Private Bradley Manning passed to Wikileaks have had repercussions across the world, breaching confidences, embarrassing friends and allies,

undermining US credibility, putting the lives of American soldiers and Afghan informants in danger and operations at risk. That's just for starters<sup>2</sup>. Who do you suppose will be willing to talk to US intelligence now, seeing all those secrets out in the open and the finger potentially pointing back at them as the source? That includes liaison intelligence services, which have found that trusting the Americans to keep secrets secret has become a far riskier proposition.

Manning will serve the next 35 years in jail for what he did (which works out to about one year for every twenty thousand classified documents he exposed).<sup>3</sup>

Edward Snowden is in another class altogether. To call him a whistleblower is an insult to anyone who has actually come forward to expose wrongdoing. Nor is his crime merely "leaking" as serious as that charge may be.

Here's a man who steals who knows how many gigabytes of highly classified documents and absconds to a safe house in Hong Kong. People on the far right and far left in America join together to call him a hero. The Chinese are seen as the good guys for giving him sanctuary and helping him escape to Moscow, of all places. The United States is criticized around the world for invading people's privacy and NSA gets pelted with accusations that it has been spying on Americans at home. The Chinese are portrayed as cyber victims. The Europeans are up in arms, Putin mocks and belittles us, and the terrorists become even more difficult to find. Reasonable people may be forgiven for wondering what is really going on here.

What *is* really going on here?

Let's start with what Snowden took and how he took it. He told the world that he applied for a job as an IT administrator for NSA precisely to gain access to material that he wanted to take; and at some point along the way he started to get outside help and direction. The deeper questions are when and from whom.

Looking back, his early leaks appeared well chosen to inflame public opinion, which served as cover for later disclosures that had nothing to do with privacy concerns at all. For example, Snowden passed information about top-secret plans to counter Chinese cyber-attack capabilities, along with detailed budget justifications touching everything NSA does. These are just the leaks the press reported (which includes a fair dose of disinformation); then there is also whatever else he stole.

In the Bush Administration, I was responsible for conducting the damage assessments from espionage cases and other compromises of national security information, including leaks. The potential damage here is staggering. Whether or not there are automated audit trails we can only guess; if not, there may be no way of bounding what may have been com-

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Edward Snowden, Bradley Manning and the Next Leak

promised. And if the damage assessment teams cannot identify what secrets may have been lost, they cannot assess who or what may be at risk. It is this shattering uncertainty that our adversaries prize most of all.

As is almost always the case in talking about the damage from leaks, the most compelling evidence of how badly we have been hurt is and must stay classified. But let me give you a taste of what will happen, thanks to Snowden, and some before him, and I fear compromises yet to come.

US intelligence will continue to erode. There will be future attacks that we do not see coming, which otherwise might have been prevented. We will not see threats we should have seen, never mind opportunities. We will not be able to protect people and operations we should have been able to protect. The President will not have the facts he needs to have for crucial decisions. Nor will the Congress. This is the slope we are on.

## THE PARADOX

One of our most cherished freedoms is the freedom of speech. But America's defense requires that we be able to protect those things that must stay secret. In other words, limitations on speech are necessary to preserve freedom of speech – and our other freedoms as well. One such limitation, with a particularly deep and meticulously scrubbed legal history, concerns those fragile secrets protecting communications intelligence – the business of NSA.

In 1931, a book was published providing a detailed account of American successes in breaking Japanese diplomatic codes<sup>4</sup> – but breaking no law because back then there wasn't one to break. So the Japanese changed their codes and encryption techniques, sending U.S. cryptanalysts back to the drawing board to work their MAGIC (literally). After the war, the Joint Congressional Committee for the Investigation of the Attack on Pearl Harbor recommended that legislation be considered along the lines of Britain's Official Secrets Act to make it a crime to reveal any classified information.

While there have been similar proposals in more recent years,<sup>5</sup> the U.S. has chosen not to go down the path of an Official Secrets Act – except for one category of classified information: Title 18 of the US Code Section 798, sometimes called the "COMINT" statute – featured prominently in the indictment against Snowden.<sup>6</sup>

This section of the espionage laws is unique. It protects information about communications intelligence or COMINT activities from "knowing and willful publication

or any other revelation” period. Unlike Sec 793 (prohibiting the release of national defense information to unauthorized persons), §798 does not require any showing of specific intent to harm the United States or benefit a foreign government. The prohibition is intended to bar public speech, flat out. Why? Because, as the House Judiciary Committee report explained, COMINT activities are “both vital and vulnerable to an almost unique degree.”<sup>7</sup> Those words were written in 1950 but they are still true today, to a degree most people do not appreciate.

Daily, the President and Congress must deal with widely disparate threats to the United States and our allies – the threats of radical Islam, the threats of an unstable and uncertain Middle East, the threats of the Euro crisis, the threats of a backward-looking Russia, the threats of a bellicose China. Generations of Americans have taken seriously the duties of leader of the free world, for which we built a nuclear umbrella that held the Soviet Union in check, a Navy that has ensured Freedom of the Seas, and regional defense alliances in every quadrant of the globe.

The unquestioned qualitative edge and global reach of U.S. intelligence have been as essential to defending this country and preserving our freedom as have the forces we have built to arm and equip our military. At its heart are the exceptional resources of NSA.

No other country has comparable capabilities. From its establishment by President Truman in 1952, successive Presidents and Congresses have judged NSA’s singular mission to be vital to our nation’s security. They have protected the vital secrets that enable its collection programs to succeed, as have those in U.S. business and industry who have been integral to their success.

Now the advent of the Digital Age has upended old assumptions, challenging NSA’s core business as never before. China has become both a cyber-power and a cyber-predator, attacking computer systems throughout the world for the information they can extract and the control features they can implant. Through espionage, Russia and other adversaries have long targeted the essential secrets of U.S. technical collection capabilities in order to be able to defeat them. And now they are getting help from the likes of Snowden and Wikileaks.

So what should be done?

By way of a modest beginning, the clearance process is overwhelmed and needs to be fixed. The change from need to know to “need to share” – whatever that warm fuzzy phrase means – has meant an explosion of access to classified information with no standards for deciding who really needs clearances and who doesn’t. With nearly 5 million people holding security clearances or in the queue, investigators’ in-boxes are on constant overload. So

**MICHELLE VAN CLEAVE: MYTH, PARADOX  
& THE OBLIGATIONS OF LEADERSHIP**

Edward Snowden, Bradley Manning and the Next Leak

the metrics became how fast can we move these things? Last year the Obama administration reported great progress in reducing the backlogs. They cut initial background investigation processing time down from 189 days (in 2005) to just 44 in 2012.

The result has been insufficiently trained personnel. Some inevitable short cuts and possibly worse, judging from some of the recent reports that have surfaced in the course of a much-needed Congressional look into the out-sourcing of background investigations. (One investigator claimed to have interviewed someone who in fact had been dead for ten years.<sup>8</sup>) And it is a fair bet that somewhere out there, purposeful spies are taking advantage of these systemic vulnerabilities to advance their own ends. That is, after all, what they do.

Some say we need tougher laws. Maybe; but the fact that the COMINT statute is on the books did not stop Snowden. Nor has there been any talk of prosecuting the *Guardian*, or the *Washington Post*, or any other journal that published the communications intelligence he revealed – even though under a common sense reading of Sec. 798 (which is the one part of the espionage laws that criminalizes the *publication* of classified information) they could be prosecuted.<sup>9</sup>

In fact, no member of the press has ever been prosecuted for publishing classified information – which may be one reason why most reporters show little to no reluctance in soliciting it. If the choice is between national security and the independence of the Fourth Estate, we choose the freedom of the press every time.

But why should that have to be the only choice? Lawyers like me can get disbarred for violating their ethical obligations, and rightly so. Isn't it time that the media developed a code of professional ethics that included some accountability for respecting the laws protecting the Nation's security?<sup>10</sup>

The Society of Professional Journalists adopted a Code of Ethics that is not binding on any member of the profession, but is offered as a guide to making ethical decisions.<sup>11</sup> It is utterly silent on any duty of conscience or legal obligation, much less patriotism, on the matter of protecting national security secrets – not a balancing test or even a whiff of concern for lives that may be put at risk.

Yet individual journalists and their editors are called upon to make these judgments time and time again. And the sheer volume of what IT storage media now makes possible – not to mention the ubiquity of information distribution – has brought us to the doorstep of a crisis demanding action. I don't say that squaring the values of a free press with the needs of secrecy is an easy call; but the need for some thoughtful guidance to responsible journalists in making tough calls is precisely why there is a model code of ethics in the first place.

Perhaps a Congressional hearing or two would help spark some long overdue self-searching debate. So would prosecuting clear violations of the law.

## OBLIGATIONS OF LEADERSHIP

Americans expect their government to be in their corner, and to do all the things that need to be done, consistent with our Constitution, to protect the Nation and to advance freedom. To protect and advance freedom is precisely why we have invested so much time and treasure and ingenuity in building the unparalleled intelligence capabilities we have today.

That is why any rupture between public confidence and the U.S. intelligence enterprise is so destructive. It is also why America's adversaries have long sought to provoke one – as the Cold War history of Soviet disinformation and active measures to discredit CIA makes clear. And here we go again. For in addition to all the other harm Snowden has done, the secrets he disclosed have been used to discredit U.S. intelligence among the very democratic populations that depend most on the American defense umbrella.

What may be even worse is the reaction among some sectors of the American public here at home, where the Snowden story has been reduced to “NSA is spying on innocent Americans.” No they are not—although that may be the title of Vladimir Putin's next op ed.

This is not the IRS coloring outside the lines. NSA's collection programs are the most rigorously scrubbed and carefully bounded activities of the U.S. Government, as anyone who has bothered to read the reams of FOIA and other disclosures can attest. That includes the 7 year old Foreign Intelligence Surveillance Court opinion that was released in early September taking NSA to task for making mistakes or not correcting them quickly enough. Before, critics were calling the court a rubber stamp that just did the government's bidding; now they're pointing to this adverse ruling as evidence the government is out of control. It's damned if you do, damned if you don't.

In fact, the decisions of our democracy whether NSA's activities were right and proper and necessary have been and continue to be made by the Executive, the Congress and the courts acting in accordance with their Constitutional responsibilities and the authorities we the people have entrusted to them.

It is not always easy for our democracy to make decisions about things that must by their nature be secret in order to help keep us free. But the central decision behind the U.S.

**MICHELLE VAN CLEAVE: MYTH, PARADOX  
& THE OBLIGATIONS OF LEADERSHIP**

Edward Snowden, Bradley Manning and the Next Leak

telephony metadata collection program (Sec. 215 of the Patriot Act) is straightforward commonsense. If you want to know who the terrorists are talking to, you've got to check the phone logs. It's dot-connecting 101.

There is no question that the loss of privacy in today's digital world is deeply troubling. But it's difficult for me to work up a sense of violation when my phone number is one among billions the NSA computers process, searching for terrorists' footprints. Especially when this is something that we need the government to do to help keep us safe. And I think that the vast majority of Americans would agree.

Yet I fear we were spring-loaded to react with suspicion and distrust when these leaks appeared in the press. Why? Because of the lies about Benghazi. The abuse of power by the IRS. Unilateral decisions by the President to enforce some laws but not others, or to assert "we can't wait" for Congress except when it's more expedient that way as with Syria. Little wonder people were prepared to believe the worst, when they have seen the public's trust so repeatedly broken.

It is up to the leaders in Congress to make sure that U.S. intelligence does not become collateral damage of Obama's failed presidency. Instead of the 19 or more bills pending to curtail NSA and the FISA court, or the near-disaster of the Amash amendment, Congress should be doing everything in its power to try to find ways to help our Nation recover from the harm Snowden has caused.



## References

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- <sup>1</sup> James Bruce, “The Consequences of Permissive Neglect” *Studies in Intelligence* Vol 47 No 4 (Washington DC: Center for the Study of Intelligence) 2000.
- <sup>2</sup> Osama bin Laden had digital copies of all 90,000 leaked Afghanistan battlefield reports in his possession when he was killed by a Navy SEAL team in May 2011.
- <sup>3</sup> Manning’s disclosures included more than 700,000 documents, including combat strategies, State Department cables and terrorism detainee assessments.
- <sup>4</sup> Herbert O. Yardley, *The American Black Chamber* (New York :Ballantine Books) 1931. A planned sequel was banned by Congress—the first and only such ban.
- <sup>5</sup> e.g., Senator Shelby’s proposal in 2001, Senator Bond’s in 2006,
- <sup>6</sup> Snowden has been charged with three violations: theft of government property and two offenses under the espionage statutes, specifically giving national defense information to an authorized person 18 USC 793(d) and revealing classified information about "communications intelligence." 18 USC 798(a)3
- <sup>7</sup> The initial proposal would have penalized the “revelation or publication not only of direct information about US codes & ciphers themselves but of information transmitted in US codes and ciphers.” Such a measures would have covered the bulk of military and diplomatic dispatches, such as those disclosed by Manning.
- <sup>8</sup> Chris Strohm and Nick Taborek, “Dead Interviewed in Fake U.S. Government Background Checks”, *The Washington Post*, 8 July 2013  
<http://washpost.bloomberg.com/Story?docId=1376-MPDGQ907SXXKX01-4JBI725EODK4QRJ9H3G6FN7DOA>
- <sup>9</sup> In 1986, NBC disclosed that accused Soviet spy Robert Pelton had given the Soviet Union information about a program called “Ivy Bells,” a top secret NSA operation conducted by U.S. submarines in Soviet territorial waters. Soon thereafter, the *Washington Post* published a report that the *Post* chairman received a telephone call from the President assuring the newspaper that he would support prosecution if they proceeded with plans to publish technical details about the program; in apparent response, the *Post* delayed publication and later redacted portions of the article. DCI William Casey pushed for prosecution of NBC, the *Post* and *Newsweek* for its related coverage; but the Justice Department elected not to pursue the cases.
- <sup>10</sup> According to the Society of Professional Journalists: “American citizens’ constitutional rights to free speech and a free press are vulnerable, and they are placed in jeopardy whenever we allow them to be confused with or limited by the professional responsibility to act ethically. Instead, we encourage the exposure of unethical journalism as a means for rooting

**MICHELLE VAN CLEAVE: MYTH, PARADOX  
& THE OBLIGATIONS OF LEADERSHIP**

Edward Snowden, Bradley Manning and the Next Leak

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it out; more speech is the most effective counter measure.”

<http://www.spj.org/ethicscode.asp> But if it is not considered unethical to publish national security secrets in the first place, then what countermeasure remains?

<sup>11</sup> The SPJ code had its genesis in a similar code first adopted by the American Society of Newspaper Editors in 1926, which is on record having supported the passage of the COMINT statute.