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DON'T FEAR THE LEAKER: THOUGHTS ON BUREAUCRACY AND ETHICAL WHISTLEBLOWING

Glenn Harlan Reynolds*

It has now been over a year since Edward Snowden's leaks shook the National Security Agency and the intelligence world.[1] Now other leakers have begun coming forward as well.[2] To the intelligence community this is a disaster, but I believe that it is actually an opportunity for the rest of us. Though the natural instinct of intelligence bureaucrats is understandaby to plug leaks, I suggest that leaks – and, more importantly, the possibility of leaks – can offer a useful reassurance that agency misbehavior hasn't gotten out of control.

In this brief Essay, I argue that rather than trying to eliminate leaks entirely, which experience demonstrates is impossible, we should instead try to channel leaks so that they provide the maximum benefit to transparency while reducing risks to national security and other secrecy concerns. I also offer some preliminary suggestions about how to accomplish this goal.

Size and Supervision

In modern times, the federal government has become so large and complex that most of its actions are effectively beyond democratic control. In fact, Presidential defenders in such matters as the IRS scandals or the NSA spying scandals have stressed that the federal government is too big for the President to really supervise.[3] That is entirely true. Likewise, congressional oversight doesn't appear to be adequate to the task, with efforts to investigate the CIA over allegations of torture

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* Beauchamp Brogan Distinguished Professor of Law, University of Tennessee. This piece is based on remarks delivered at the Information Systems Security Association's annual conference in November, 2013 – and, quite helpfully, on discussions with various participants at that conference.

1 Glenn Greenwald, Ewen MacAskill & Laura Poitras, Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations, The Guardian, June 9, 2013, available at http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance?guni=Network%20front:network-front%20full-width-1%20bento-box:Bento%20box:Position1.

2 Arit John, U.S. Officials Say There's A Second Snowden Leaking Documents, Yahoo News, August 5, 2014, available at http://news.yahoo.com/u-officials-theres-second-snowden-leaking-security-documents-194510051.html.

3 In the words of White House adviser David Axelrod, "Part of being president is there's so much beneath you that you can't know because the government is so vast." Al Cardenas, The GOP's 2014 Challenge: Proving Limited Government Works, U.S. News & World Report, January 8, 2014, available at http://www.usnews.com/opinion/blogs/al-cardenas/2014/01/08/republicans-must-make-2014-the-year-of-limited-government

and other misconduct not only meeting stiff resistance, but even being marked by CIA spying aimed at Senate investigators. (Then, to twist the knife, the CIA lied about the spying).[4]

But if the President and Congressional oversight committees can't know what everyone is doing within the federal government, then who can? There's only one group that knows everything that the federal government is doing: The people within the federal government who are doing it.

Bureaucracy being what it is, it's impossible to do much of anything within the federal government without a lot of people knowing. And, in fact, a major source of legitimacy for government as it exists is the assumption that if something really bad is going on, someone will blow the whistle. But for this assumption to be true, some conditions have to hold. First, the people in the federal government have to be, in general, ethical enough that there is a reasonable chance someone will speak out. Second, the chances of successful whistleblowing – that is, whistleblowing that leads to corrective action – have to be high enough that it will be worth the trouble. And third, the dangers of whistleblowing have to be low enough that a normal, ethical person will be willing to run the risk.

At present, things seem to be heading in the wrong direction. The federal government's "Insider Threat" program is designed to squelch whistleblowing. So, too, is the disturbing practice of surveilling journalists to identify their contacts within the bureaucracy. If journalists have to go to John Le Carre-like lengths to protect their sources, we will see less whistleblowing, not more.[5]

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[4] Glenn Harlan Reynolds, Public Servants Acting As Public Masters, USA Today, August 3, 2014, available at http://www.usatoday.com/story/opinion/2014/08/03/public-servants-masters-cia-sentors-privacy-column/13542065/.

[5] Leonard Downie, Jr. In Obama's War On Leaks, Reporters Fight Back, Washington Post, October 4, 2013, available at http://www.washingtonpost.com/opinions/in-obamas-war-on-leaks-reporters-fight-back/2013/10/04/70231e1c-2aeb-11e3-b139-029811dbb57f_story.html ("Relying on the 1917 Espionage Act, which was rarely invoked before President Obama took office, this administration has secretly used the phone and e-mail records of government officials and reporters to identify and prosecute government sources for national security stories."). See also, Brett LoGiurato, Why The Obama Administration Wants This Journalist In Jail, Business Insider, August 30, 2014, available at http://finance.yahoo.com/news/why-obama-administration-wants-journalist-131441875.html;_ylt=AwrBEiE1QP9TDDgAnxPQtDMD (Quoting New York Times reporter James Risen, who faces prison for refusing to reveal whistleblowing sources' names: ""A lot of people still think this is some kind of game or signal or spin. They don't want to believe that Obama wants to crack down on the press and whistleblowers. But he does. He's the greatest enemy to press freedom in a generation.")

To the extent that these kinds of efforts succeed over the long term in reducing leaks, I suggest that they will make the federal government's operations less legitimate in the eyes of the public. The greater the ability to keep secrets, the greater the ability to do wrong undetected. This may be acceptable to bureaucrats, who I suspect tend to dislike accountability more than they crave legitimacy, but it shouldn't be okay with the rest of us.

It's true that leaks can do great damage – and it's certainly true that not all leaks are whistleblowing – but without at least the serious possibility of misconduct leaking out, government officials are more likely to do wrong. The less leaky the government is, then, the greater likelihood that there's misconduct we don't know about, and thus the less reason there is to trust the government. This probably means that there is an optimum level of both whistleblowing, and anti-leak precautions, but it's doubtful if we're at that level now. If the government wants to be trusted, as it should given Gallup polls suggesting that trust in government is lower than it was during the Watergate era,[6] then it needs to be clearly possible for people in the government who uncover wrongdoing to make that wrongdoing public. The Department of Homeland Security advises us: "If you see something, say something." The same should hold true within the government as without it.

Law and Ethics

So what should we – by which I mean, the American polity – do to promote accountability and to foster ethical whistleblowing? We need two kinds of change, one cultural, the other in legal rules. Both are important, but each poses its own difficulties.

A Culture of Ethical Whistleblowing

For a culture of ethical whistleblowing to develop, workers must be clear on what kind of conduct is legitimate and what is not. Leaking is only "whistleblowing" if it exposes wrongdoing, and in general the wrongdoing must be severe enough to justify any collateral harm that might result. Where there are doubts, they should probably be resolved in favor of keeping quiet, since a whistleblower may not foresee all the consequences of talking, especially in national security areas. (Where, say, the Department of Agriculture is concerned, this may be less true).

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[6] Gallup.com, Trust In Government, available at http://www.gallup.com/poll/5392/Trust-Government.aspx. See also Paul Steinhauser, CNN Poll, Trust In Government At All-Time Low, CNN.com, August 8, 2014, available at http://politicalticker.blogs.cnn.com/2014/08/08/cnn-poll-trust-in-government-at-all-time-low-2/comment-page-3/. ("Just 13% of Americans say the government can be trusted to do what is right always or most of the time, with just over three-quarters saying only some of the time and one in 10 saying they never trust the government, according to the poll.")

Does ethical whistleblowing require efforts to address the problem internally to the agency before going public? That's a notion that seems appealing, and that might have some role, but given the tendency to identify even people who raise problems internally as "troublemakers,"[7] a prudent whistleblower who notices something serious enough to go public with might well fear that raising it internally would result in reprisals, surveillance, or other measures that might make it more difficult to go public later.

Ethical whistleblowing, I submit, does require an ethic of minimalism: That is, the material made public should be the material needed to expose wrongdoing, and no more than is needed to do so. This is one area where Edward Snowden has been criticized by other whistleblowers. Prior NSA whistleblower William Binney, for example, who approves of Snowden's decision to go straight to the press because internal appeals, in Binney's experience, were futile, nonetheless thinks Snowden went too far:

> Binney criticizes Snowden's leaking of documents not directly related to the NSA's surveillance of American citizens and violation of constitutional rights. Binney believes that the NSA is vital to national security but has been become unmoored due to technological advances that vastly extend its capabilities and leadership that has no use for limits on government power. "They took that program designed [to prevent terrorist attacks] and used it to spy on American citizens and everyone else in the world," flatly declares Binney.[8]

Whatever the merits of this criticism in Snowden's case, this principle of minimalism seems a good one, aimed at minimizing collateral damage from exposing bad behavior.

So to be legitimate, a "whistleblowing" disclosure must be (1) related to genuine wrongdoing, and wrongdoing that is severe enough to justify the inevitable collateral damage that will occur; (2) about wrongdoing that is unlikely to be corrected via internal channels; and (3) as narrow as feasible under the circumstances, to minimize collateral damage.

How do we go about creating a climate of ethical whistleblowing? One doubts that it will come from inside the agencies, many of which, even outside of the intelligence

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[7] See, e.g., Nick Gillespie & Amanda Winkler, Before Edward Snowden, There Was William Binney: An NSA Whistleblower Tells All, Reason, January 12, 2014, available at http://reason.com/blog/2014/01/12/before-edward-snowden-there-was-william ("We are a clear example that [going through] the proper channels doesn't work.")

[8] Id.

world, come down hard on leaks.[9] Though many corporations and government agencies have been successful at making cultural changes in the name of safety, encouraging employees, even low-level employees, to intervene to prevent dangerous practices,[10] it seems doubtful that they will work as hard at empowering low-level employees to point out wrongdoing by their bosses. So any change will have to come from outside.

To some degree, that is already happening. When Edward Snowden is featured on the cover of *Wired,* holding a flag that once draped Pamela Anderson,[11] it seems pretty clear that whistleblowing has arrived as a cultural phenomenon. Such celebrity may serve to encourage others to go public with evidence of agency misbehavior; it certainly ensures that the thought will at least cross the minds of agency employees.

Beyond popular culture, there is the culture of agencies and of the professionals within them. While one doubts that covert agents will be authoring journal articles on whistleblowing for professional journals, many professionals – in information technology, for example – are already discussing these very issues. Over time, these discussions might well produce a general agreement on when whistleblowing is appropriate, and when it is not.[12]

But beyond culture, the legal environment isn't very friendly to whistleblowers either. A government employee who goes public – even to report indisputable misbehavior – is all too likely to face retaliation, ostracism, and a variety of formal and informal punishments. That, too, needs to change.

Whistleblower Protection

At present, those who reveal governmental wrongdoing to the public – or even to Congressional overseers – are at risk in numerous ways. Whistleblowers typically face reprisals that range from the petty (such as having one's office relocated to a

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[9] Sheila Coronel, SEC Aggressively Investigates Media Leaks, Columbia Journalism Review, August 13, 2014, available at http://www.cjr.org/the_kicker/sec_investigation_media_leaks_reuters.php?page=all .

[10] Rachel Feintzeig & Alexandra Berzon, Safety Cops Patrol The Office For High Heels, Wall St. J. , July 27, 2014, available at http://online.wsj.com/articles/offices-adopt-safety-protocols-meant-for-the-field-1406515193 (describing efforts to spread safety culture in corporate settings).

[11] Scott Daditch, Call Me Ed: A Day With Edward Snowden, Wired, August 13, 2014, available at http://www.wired.com/2014/08/scott-dadich-snowden. (Describing how Snowden posed with "an American flag (actually, the same flag brandished by Pamela Anderson in Platon's iconic 1998 *George* magazine cover).")

[12] Increased political diversity in government agencies is also probably a good idea. A political monoculture is otherwise likely to give some abuses an undeserved pass.

broom closet)[13] to severe consequences such as termination, and even prosecution. And at present, the legal protections for whistleblowers are quite limited.

The federal Whistleblower Protection Act[14] purports to protect federal whistleblowers from retaliation. However, its protections are quite limited in practice, requiring a tedious exhaustion of administrative remedies before they are enforceable in court and, in practice, having been rather narrowly interpreted by the court charged with the Act's enforcement, the United States Court of Appeals for the Federal Circuit.[15] In addition, the Act in its original form did not protect employees working in a national security capacity.

To address some of these problems, Congress passed the Whistleblower Protection Enhancement Act of 2012, which somewhat expanded protections, and President Obama issued a Presidential Policy Directive, PPD-19, which purports to ensure that whistleblower protections extend to "any employee serving in an Intelligence Community Element." (Though as *Washington Post* columnist Joe Davidson pointed out, the directive wouldn't have protected Edward Snowden, despite White House claims to the contrary, because Snowden was a contractor, not an employee).[16]

Nonetheless, these protections are regarded by experts as inadequate.[17] And, whether or not Edward Snowden could have claimed protection under the Act and Directive, he would (and does) still face criminal prosecution, a consideration that is likely to loom larger in the minds of potential whistleblowers than personnel action.

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[13] David Fahrentold, For whistleblowers, a bold move can be followed by one to department basement, Washington Post, August 3, 2014, available at http://www.washingtonpost.com/politics/for-whistleblowers-bold-move-can-be-followed-by-one-to-department-basement/2014/08/03/39d12656-182f-11e4-9e3b-7f2f110c6265_story.html.

[14] 5 U.S.C. sec. 1201 et seq., Pub L. 101-12, 103 Stat 16 (1989).

[15] For a summary of the Act and its limits, see Jocelyn Patricia Bond, Efficiency Considerations And The Use Of Taxpayer Resources: An Analysis of Proposed Whistleblower Protection Act Revisions, 19 Fed. Cir. B.J. 107 (2009).

[16] Joe Davidson, Obama's 'Misleading' Comment On Whistleblower Protections, Washington Post, August 12, 2013, available at http://www.washingtonpost.com/politics/federal_government/obamas-misleading-comment-on-whistleblower-protections/2013/08/12/eb567e3c-037f-11e3-9259-e2aafe5a5f84_story.html.

[17] According to Steven Kohn of the National Whistleblowers Center, "The bill contains important reforms, but federal employee still lack most of the basic rights available to whistleblowers in the private sector. . . . This is a small but meaningful step." National Whistleblowers Center, Federal Whistleblower Protection Enhancement Act Becomes Law, November 27, 2012, available at http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1429&Itemid=71.

Crime and Justification

How to deal with the threat of criminal prosecution? On the one hand, disclosure of classified material is a crime, and often with good reason. On the other hand, over-classification is a legendary problem within the federal government, and secrecy is used to cover up governmental misconduct often enough that one cannot simply assume that every leak is inherently damaging.

A whistleblower protection statute with real teeth would allow whistleblowers to defend against criminal prosecution as well as firing or on-the-job retaliation on the basis that their leaking was justified. Perhaps whistleblowers should be able to plead a statutory defense akin to common law necessity, arguing to a jury that the disclosure was necessary to prevent a greater harm to the public. Thus when charged with violating laws relating to espionage or the handling of classified material, a whistleblower could argue that his or her action to publicize official misbehavior was, as described above, related to genuine wrongdoing that was unlikely to be addressed through internal channels, and that the data released was no more than reasonably necessary to draw public attention to the problem. Just as "good faith" immunity shields government officials from liability in many circumstances because that immunity is regarded as essential to the performance of their jobs, so too a sort of good faith immunity for whistleblowers may be essential to ensuring that the federal government does not overstep its legal bounds. In addition, the presence of such rules defining "good" whistleblowing might actually make it easier to prosecute "bad" leakers who don't conform to the ethical whistleblowing definitions.

In addition, increased power – and independence – for departmental inspectors general might be a good idea. To the extent that such watchdogs could be trusted to investigate wrongdoing on their own, the need for whistleblowing by employees would be reduced. At present, according to the inspectors themselves, that's not the case.[18]

Conclusion

Leaks are inevitable. So, it seems, is a government too large and complex to be overseen properly by either the President or Congress. Rather than trying to overcome either of these problems by main force, perhaps it makes sense to address one of these phenomena via the other. While top-down oversight will never be

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[18] Jim Mitchell, A Threat To Independent Inspectors, Wall St. J., Aug. 20, 2014, available at http://online.wsj.com/articles/a-threat-to-independent-inspectors-letters-to-the-editor-1408565958?KEYWORDS=inspectors+general (describing letter sent to Congress by 47 serving Inspectors General complaining of barriers to their independent review of agencies.)

sufficient to do the job, empowering the "little people" of government to blow the whistle on illegalities is likely to limit the worst excesses.

If Congress is serious about limiting illegal activities by government agencies, legal reforms to encourage and protect ethical whistleblowing should be easy enough to enact. And if the rest of us are serious about limiting illegal activities by government agencies, we can begin building a culture of ethical whistleblowing right now.