

Obama DOJ formally accuses journalist in leak case of committing crimes

Yet another serious escalation of the Obama administration's attacks on press freedoms emerges

By: Glenn Greenwald – May 20, 2013

It is now well known that the Obama justice department has prosecuted more government leakers under the 1917 Espionage Act *than all prior administrations combined* - in fact, *double* the number of all such prior prosecutions. But as last week's controversy over the DOJ's pursuit of the phone records of AP reporters illustrated, this obsessive fixation in defense of secrecy also targets, and severely damages, journalists specifically and the newsgathering process in general.

New revelations emerged yesterday in the Washington Post that are perhaps the most extreme yet when it comes to the DOJ's attacks on press freedoms. It involves the prosecution of State Department adviser Stephen Kim, a naturalized citizen from South Korea who was indicted in 2009 for allegedly telling Fox News' chief Washington correspondent, James Rosen, that US intelligence believed North Korea would respond to additional UN sanctions with more nuclear tests - something Rosen then reported. Kim did not obtain unauthorized access to classified information, nor steal documents, nor sell secrets, nor pass them to an enemy of the US. Instead, the DOJ alleges that he merely communicated this innocuous information to a journalist - something done every day in Washington - and, for that, this arms expert and long-time government employee faces more than a decade in prison for "espionage".

The focus of the Post's report yesterday is that the DOJ's surveillance of Rosen, the reporter, extended far beyond even what they did to AP reporters. The FBI tracked Rosen's movements in and out of the State Department, traced the timing of his calls, and - most amazingly - obtained a search warrant to read two days worth of his emails, as well as all of his emails with Kim. In this case, said the Post, "investigators did more than obtain telephone records of a working journalist suspected of receiving the secret material." It added that "court documents in the Kim case reveal how deeply investigators explored the private communications of a working journalist".

But what makes this revelation particularly disturbing is that the DOJ, in order to get this search warrant, insisted that not only Kim, but also Rosen - the journalist - committed serious crimes. The DOJ specifically argued that by encouraging his source to disclose classified information - something investigative journalists do every day - Rosen himself broke the law. Describing an affidavit from FBI agent Reginald Reyes filed by the DOJ, the Post reports [emphasis added]:

"Reyes wrote that there was evidence *Rosen had broken the law, 'at the very least, either as an aider, abettor and/or co-conspirator'*. That fact distinguishes his case from the probe of the AP, in which the news organization is not the likely target. Using italics for

emphasis, Reyes explained how Rosen allegedly used a 'covert communications plan' and quoted from an e-mail exchange between Rosen and Kim that seems to describe a secret system for passing along information. . . . However, it remains an open question whether it's ever illegal, given the First Amendment's protection of press freedom, for a reporter to solicit information. No reporter, including Rosen, has been prosecuted for doing so."

Under US law, it is not illegal to publish classified information. That fact, along with the First Amendment's guarantee of press freedoms, is what has prevented the US government from ever prosecuting journalists for reporting on what the US government does in secret. This newfound theory of the Obama DOJ - that a journalist can be guilty of crimes for "soliciting" the disclosure of classified information - is a means for circumventing those safeguards and criminalizing the act of investigative journalism itself. These latest revelations show that this is not just a theory but one put into practice, as the Obama DOJ submitted court documents accusing a journalist of committing crimes by doing this.

That same "solicitation" theory, as the New York Times reported back in 2011, is the one the Obama DOJ has been using to justify its ongoing criminal investigation of WikiLeaks and Julian Assange: that because Assange solicited or encouraged Manning to leak classified information, the US government can "charge [Assange] as a conspirator in the leak, not just as a passive recipient of the documents who then published them." When that theory was first disclosed, I wrote that it would enable the criminalization of investigative journalism generally:

"Very rarely do investigative journalists merely act as passive recipients of classified information; secret government programs aren't typically reported because leaks just suddenly show up one day in the email box of a passive reporter. Journalists virtually always take affirmative steps to encourage its dissemination. They try to cajole leakers to turn over documents to verify their claims and consent to their publication. They call other sources to obtain confirmation and elaboration in the form of further leaks and documents. Jim Risen and Eric Lichtblau described how they granted anonymity to 'nearly a dozen current and former officials' to induce them to reveal information about Bush's NSA eavesdropping program. Dana Priest contacted numerous 'U.S. and foreign officials' to reveal the details of the CIA's 'black site' program. Both stories won Pulitzer Prizes and entailed numerous, active steps to cajole sources to reveal classified information for publication.

"In sum, investigative journalists routinely — really, by definition — do exactly that which the DOJ's new theory would seek to prove WikiLeaks did. To indict someone as a criminal 'conspirator' in a leak on the ground that they took steps to encourage the disclosures would be to criminalize investigative journalism every bit as much as charging Assange with 'espionage' for publishing classified information."

That's what always made the establishment media's silence (or even support) in the face of the criminal investigation of WikiLeaks so remarkable: it was so obvious from the start that the theories used there could easily be exploited to criminalize the acts of mainstream journalists. That's why James Goodale, the New York Times' general counsel during the paper's historic press freedom fights with the Nixon administration, has been warning that "the biggest challenge to the press today is the threatened prosecution of WikiLeaks, and it's absolutely frightening."

Indeed, as Harvard Law Professor Yochai Benkler noted recently in the New Republic,

when the judge presiding over Manning's prosecution asked military lawyers if they would "have pressed the same charges if Manning had given the documents not to WikiLeaks but directly to the New York Times?", the prosecutor answered simply: "Yes, ma'am". It has long been clear that this WikiLeaks-as-criminals theory could and would be used to criminalize establishment media outlets which reported on that which the US government wanted concealed.

Now we know that the DOJ is doing exactly that: applying this theory to criminalize the acts of journalists who report on what the US government does in secret, even though there is no law that makes such reporting illegal and the First Amendment protects such conduct. Essentially accusing James Rosen of being an unindicted co-conspirator in these alleged crimes is a major escalation of the Obama DOJ's already dangerous attacks on press freedom.

It is virtually impossible at this point to overstate the threat posed by the Obama DOJ to press freedoms. Back in 2006, Bush Attorney General Alberto Gonzales triggered a major controversy when he said that the New York Times could be prosecuted for having revealed the Top Secret information that the NSA was eavesdropping on the communications of Americans without warrants. That was at the same time that right-wing demagogues such as Bill Bennett were calling for the prosecution of the NYT reporters who reported on the NSA program, as well as the Washington Post's Dana Priest for having exposed the CIA black site network. But despite those public threats, the Bush DOJ never went so far as to formally accuse journalists in court filings of committing crimes for reporting on classified information. Now the Obama DOJ has.

This week, the New Republic's Molly Redden describes what I've heard many times over the past several years: national security reporters have had their ability to engage in journalism severely impeded by the Obama DOJ's unprecedented attacks, and are operating in a climate of fear for both their sources and themselves. Redden quotes one of the nation's best reporters, the New Yorker's Jane Mayer, this way: "It's a huge impediment to reporting, and so chilling isn't quite strong enough, it's more like freezing the whole process into a standstill."

Redden says that "the DOJ's seizure of AP records will probably only exacerbate these problems." That's certainly true: as surveillance expert Julian Sanchez wrote in Mother Jones this week, there is ample evidence that the Obama DOJ's seizure of the phone records of journalists extends far beyond the AP case. Recall, as well, that the New York Times' Jim Risen is currently being pursued by the Obama DOJ, and conceivably faces prison if he refuses to reveal his source for a story he wrote about CIA incompetence in Iran. Said Risen:

I believe that the efforts to target me have continued under the Obama Administration, which has been aggressively investigating whistleblowers and reporters in a way that will have a chilling effect on the freedom of the press in the United States."

If even the most protected journalists - those who work for the largest media outlets - are being targeted in this way, and are saying over and over that the Obama DOJ is preventing basic news gathering from taking place without fear, imagine the effect this all has on independent journalists who are much more vulnerable.

There is simply no defense for this behavior. Obama defenders such as Andrew Sullivan claim that this is all more complicated than media outrage suggests because of a necessary "trade-off" between press freedoms and security. So do Obama defenders believe that George Bush and Richard Nixon - who never prosecuted leakers like this or formally accused journalists of being criminals for reporting classified information - were excessively protective of press freedoms and insufficiently devoted to safeguarding secrecy? To ask that question is to mock it. Obama has gone so far beyond what every recent prior president has done in bolstering secrecy and criminalizing whistleblowing and leaks.

Goodale, the New York Times' former general counsel, was interviewed by Democracy Now last week and said this:

AMY GOODMAN: "You say that President Obama is worse than President Nixon.

JAMES GOODALE: "Well, more precisely, I say that if in fact he goes ahead and prosecutes Julian Assange, he will pass Nixon. He's close to Nixon now. The AP example is a good example of something that Obama has done but Nixon never did. So I have him presently in second place, behind Nixon and ahead of Bush II. And he's moving up fast. . . .

"Obama has classified, I think, seven million — in one year, classified seven million documents. Everything is classified. So that would give the government the ability to control all its information on the theory that it's classified. And if anybody asks for it and gets it, they're complicit, and they're going to go to jail. So that criminalizes the process, and it means that the dissemination of information, which is inevitable, out of the classified sources of that information will be stopped.

JUAN GONZÁLEZ: "What about the—

JAMES GOODALE: "It's very dangerous. That's why I'm — I get excited when I talk about it."

That was before it was known that the Obama DOJ read James Rosen's emails by formally labeling him in court an unindicted co-conspirator for the "crime" of reporting on classified information. This all just got a lot more dangerous.

UPDATE

Even journalists who are generally supportive of Obama - such as the New Yorker's Ryan Lizza - are reacting with fury over this latest revelation:

Ryan Lizza @RyanLizza

WP piece about another DOJ leak investigation is absolute must-read:

http://m.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/obc473de-be5e-11e2-97d4-a479289a31f9_story.html ... Tactics used against Fox's Rosen are outrageous.

8:01 AM - 20 May 2013

Lizza added:

Ryan Lizza @RyanLizza

Case against Fox's Rosen, in which O admin is criminalizing reporting, makes all of the other "scandals" look like giant nothing burgers.

8:23 AM - 20 May 2013

The Daily Beast's Eli Lake said this:

Eli Lake @EliLake

Serious idea. Instead of calling it Obama's war on whistleblowers, let's just call it what it is: Obama's war on journalism.

7:56 AM - 20 May 2013

Any journalist who doesn't erupt with serious outrage and protest over this ought never again use that title to describe themselves.

UPDATE II

Several other journalists have made some excellent points about the dangers presented by these actions, beginning with the Washington Post's Karen Tumulty:

Karen Tumulty ✓ @ktumulty

The alternative to "conspiring" with leakers to get information: Just writing what the government tells you. @JamesRosenFNC

10:08 AM - 20 May 2013

That, of course, is *precisely* the point of the unprecedented Obama war on whistleblowers and press freedoms: to ensure that the only information the public can get is information that the Obama administration wants it to have. That's why Obama's one-side games with secrecy - *we'll prolifically leak when it glorifies the president and severely punish all other kinds* - is designed to construct the classic propaganda model. And it's good to see journalists finally speaking out in genuine outrage and concern about all of this.

Meanwhile, to convey just how warped this all is: it really is true that this very behavior of trying to criminalize national security reporting was a driving force of the worst elements on the Right during the Bush years; back then, I wrote constantly about the dangers to press freedoms such threats, by themselves, posed. Please just watch this 4-minute segment from a 2006 Meet the Press episode where the Washington Post's Dana Priest explains to Bill Bennett, who had called for her imprisonment, exactly what press freedoms and the law actually provide; Bill Bennett is who - and what - the Obama DOJ and its defenders are channeling today:

UPDATE III

Here's an amazing and revealing fact: after Richard Nixon lost the right to exercise prior restraint over the New York Times' publication of the Pentagon Papers, he was desperate to punish and prosecute the responsible NYT reporter, Neil Sheehan. Thus, recounted the NYT's lawyer at the time, James Goodale, Nixon concocted a theory:

"Nixon convened a grand jury to indict the New York Times and its reporter, Neil Sheehan, for conspiracy to commit espionage . . . The government's 'conspiracy' theory centered around how Sheehan got the Pentagon Papers in the first place. While Daniel Ellsberg had his own copy stored in his apartment in Cambridge, the government believed Ellsberg had given part of the papers to anti-war activists. It apparently theorized further that the activists had talked to Sheehan about publication in the Times, all of which it believed amounted to a conspiracy to violate the Espionage Act."

As Goodale notes, this is exactly "the same charge Obama's Justice Department is investigating Assange under today," and it's now exactly the same theory used to formally brand Fox's James Rosen as a criminal in court.