



## **The Impact of U.S. Government Policies on Freedom of Expression and Freedom of the Press**

**Contacts:** Katy Glenn Bass (PEN American Center), +1 212 334 1660 x 109, [kglennbass@PEN.org](mailto:kglennbass@PEN.org)  
Sara Rafsky (The Committee to Protect Journalists), +1 212 300 9015, [srafsky@cpj.org](mailto:srafsky@cpj.org)  
Sarah Clarke (PEN International), +44 20 7405 0338, [sarah.clarke@pen-international.org](mailto:sarah.clarke@pen-international.org)

The [Committee to Protect Journalists](#) (CPJ), [PEN American Center](#) and [PEN International](#) welcome the opportunity provided by the Office of the High Commissioner on Human Rights to comment on the climate for free expression and press freedom in the United States. This joint submission serves to underscore our shared concern over the worsening situation for press freedom and free expression during the last several years.

### **I. INTRODUCTION**

1. President Barack Obama came into office promising to make his administration the most transparent in American history. Instead, the government's aggressive prosecutions of leakers of classified information, broad electronic surveillance programs, and moves to stem the routine disclosure of information to the press have created a chilling effect on journalistic reporting and free speech and have made it one of the most closed-off administrations in recent U.S. history. By diminishing its international standing as an example of press freedom and free expression, the U.S. has weakened its ability to advocate for these issues around the world.
2. This submission relies upon extensive research by the Committee to Protect Journalists (CPJ) and PEN American Center. Much of the research originated from CPJ's report "[The Obama Administration and the Press: Leak Investigations and Surveillance in Post-9/11 America](#)," written by former *Washington Post* executive editor Leonard Downie Jr., and PEN American Center's report "[Chilling Effects: The Impact of US Government Surveillance on Writers: Findings From a Survey of PEN Membership](#)," both from October 2013.

## II. Crackdown on leakers

### A. Prosecutions under the Espionage Act

3. Since 2009, the Obama administration has prosecuted eight leaks of classified information to the press as criminal felonies under the 1917 Espionage Act—a law originally designed to sanction spying for foreign governments--compared with three under all previous presidents combined, according to CPJ research.<sup>1</sup> Still more criminal investigations into leaks are under way. Some of the accused leakers have potentially faced decades in jail.
4. The government has said that it considers exposing “waste, fraud and abuse” to be whistleblowing. But exposing questionable government policies and actions, even if they could be illegal or unconstitutional, is often considered to be leaking that must be stopped and punished. This greatly reduces the potential for the press to help hold the government accountable to citizens and runs counter to Art. 19 of the International Covenant on Civil and Political Rights (ICCPR), which protects the right to freedom of expression and freedom of information, and to which the United States is a State Party. Art. 19 of the Universal Declaration of Human Rights also protects the right to freedom of expression and the right to “seek, receive and impart information and ideas through any media.”

### B. Subpoenaing journalists and their communications

5. Journalists and media outlets have also been ensnared in leak investigations and prosecutions.
6. In May 2013 the Justice Department told The Associated Press that it had secretly seized all records for 20 of the wire service's telephone lines and switchboards three months earlier as part of an investigation into leaked information about a disrupted terrorist plot in 2012.<sup>2</sup>
7. Later that month, it was revealed that the Justice Department had also subpoenaed the emails and phone records of Fox News reporter James Rosen. The FBI affidavit filed in support of the successful federal court application for the secret subpoena said there was probable cause to believe the journalist was an “abettor and/or co-conspirator,” suggesting he could be criminally charged for receiving the information.<sup>3</sup>
8. After being widely criticized for its actions in the Associated Press and Fox News cases, the Justice Department revised its guidelines on press subpoenas and the Senate revived a debate

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<sup>1</sup> Leonard Downie Jr. with reporting by Sara Rafsky, The Committee to Protect Journalists (CPJ), “The Obama Administration and the Press: Leak investigations and surveillance in post-9/11 America,” October 10, 2013, <https://www.cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php> .

<sup>2</sup> The Committee to Protect Journalists (CPJ), “CPJ alarmed by US seizure of AP phone records,” May 14, 2013, <https://cpj.org/2013/05/us-justice-department-obtained-ap-phone-records.php>.

<sup>3</sup> The Committee to Protect Journalists (CPJ), “CPJ alarmed by U.S. Justice scrutiny of Fox News reporter,” May 21, 2013, <https://cpj.org/2013/05/cpj-alarmed-by-us-justice-scrutiny-of-fox-news-rep.php>.

on a federal shield law that would allow journalists greater protection for their sources. Despite the revised guidelines, as of the date of this submission, the Justice Department has refused to withdraw a subpoena seeking to force *New York Times* journalist James Risen to give testimony that would reveal a confidential source. The federal government has sought to compel Risen multiple times to reveal his source for his book *State of War* in conjunction with its criminal case against a former CIA officer accused of disclosing classified information about a botched operation to sabotage Iran's alleged nuclear program.<sup>4</sup> Risen, invoking his rights under the U.S. Constitution's First Amendment, has said he will not comply with the subpoena. As he has exhausted his legal avenues, he could be found in contempt of court and sentenced to jail and/or receive a hefty fine.<sup>5</sup>

### C. Curbing all unauthorized contact between officials and the press

9. The government's pursuit of leakers extends beyond prosecutions. An "Insider Threat Program" being implemented in every government department requires all federal employees to help prevent unauthorized disclosures of information by monitoring the behavior of their colleagues.
10. *McClatchy* newspapers reported in June 2013 that government documents about the Insider Threat Program, enacted the previous November, "illustrate how some agencies are using that latitude to pursue unauthorized disclosures of any information, not just classified material... They also show how millions of federal employees and contractors must watch for 'high-risk persons or behaviors' among co-workers and could face penalties, including criminal charges, for failing to report them. Leaks to media are equated with espionage."<sup>6</sup>
11. The move to stem contact between officials and the press has been particularly pronounced in the intelligence community. In June 2012, the director of national intelligence, James Clapper, announced that employees of all 16 U.S. intelligence agencies—including the Central Intelligence Agency, National Security Agency, Federal Bureau of Investigation and Defense Intelligence Agency—would be asked during routine polygraph examinations whether they had disclosed any classified information to anyone. He also announced that the Inspector General for the Intelligence Community, with jurisdiction over all its agencies, would investigate leak cases that had not produced prosecutions by the Justice Department to determine what alternative action should be taken.<sup>7</sup> In March 2014, Director Clapper signed a directive barring any communication between intelligence community officials and a

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<sup>4</sup> Sara Rafsky, The Committee to Protect Journalists, "Appeal against Risen keeps source protection in focus," October 25, 2011, <https://cpj.org/blog/2011/10/appeal-against-risen-keeps-source-protection-in-fo.php>.

<sup>5</sup> The Committee to Protect Journalists, "US government should withdraw Risen subpoena," June 2, 2014, <https://cpj.org/2014/06/us-government-should-withdraw-risen-subpoena.php>.

<sup>6</sup> Marisa Taylor and Jonathan S. Landay, *McClatchy DC*, "Obama's crackdown views leaks as aiding enemies of U.S.," June 20, 2013, [http://www.mcclatchydc.com/2013/06/20/194513\\_obamas-crackdown-views-leaks-as.html?rh=1](http://www.mcclatchydc.com/2013/06/20/194513_obamas-crackdown-views-leaks-as.html?rh=1).

<sup>7</sup> Office of the Director of National Intelligence News Release No. 9-12, "Director Clapper Announces Steps to Deter and Detect Unauthorized Disclosures," <http://www.dni.gov/index.php/newsroom/press-releases/96-press-releases-2012/586-director-clapper-announces-steps-to-deter-and-detect-unauthorized-disclosures>.

member of the media without express permission.<sup>8</sup> The prohibition extends to all intelligence-related sources, methods and activities and makes no distinction between classified and unclassified information.<sup>9</sup>

12. Even outside the realm of national security, officials are clamping down on any unauthorized contact between officials and the press. Recent reports by news outlets and journalist organizations have revealed extensive investigations seeking the source of leaks related to a U.S. Securities and Exchange Commission decision,<sup>10</sup> and moves to limit communication between journalists and members of agencies like the Environmental Protection Agency<sup>11</sup> and the Food and Drug Administration.<sup>12</sup>
13. The result of the aggressive prosecutions of leakers and policies enacted to reveal and stem leaks has been an intense chilling effect on officials who now fear any unauthorized contact with the press. Dozens of experienced Washington, D.C., journalists interviewed for CPJ's 2013 special report said this environment has seriously compromised their ability to report aggressively on government activities and hold officials accountable, both on matters of national security and less sensitive issues also in the public interest.<sup>13</sup>

#### **D. Controlling the message**

14. As a means of complementing its efforts to prevent unauthorized leaks, the Obama administration is extremely cautious and controlling about what information it voluntarily shares with the press. Journalists and transparency advocates say the White House curbs routine disclosure of information and deploys its own media to evade scrutiny by the press, according to CPJ research.<sup>14</sup> While the administration has notably used social media, videos, and its own sophisticated websites to provide the public with administration-generated information about its activities, it discloses too little of the information most needed by the press and public to hold the administration accountable for its policies and actions.

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<sup>8</sup> Intelligence Community Directive 119, March 20, 2014, <http://fas.org/irp/dni/icd/icd-119.pdf>.

<sup>9</sup> Steven Aftergood, Federation of American Scientists, "Intelligence Directive Bars Unauthorized Contacts with News Media," April 21, 2014, <http://fas.org/blogs/secretcy/2014/04/media-contacts/>.

<sup>10</sup> Paritosh Bansal and Jason Lange, Reuters, "SEC launched extensive probe to identify sources in Reuters stories," July 31, 2014, [http://news.yahoo.com/sec-launched-extensive-probe-identify-sources-reuters-stories-003305388--finance.html?soc\\_src=mediacontentstory](http://news.yahoo.com/sec-launched-extensive-probe-identify-sources-reuters-stories-003305388--finance.html?soc_src=mediacontentstory).

<sup>11</sup> The Society of Professional Journalists, Letter to the Honorable Gina McCarthy, August 12, 2014, <http://spj.org/pdf/epa-sab-letter-8-12-14.pdf>.

<sup>12</sup> Margaret Sullivan, *The New York Times*, "When Sources Set the Ground Rules," May 3, 2014, [http://www.nytimes.com/2014/05/04/opinion/sunday/when-sources-set-the-ground-rules.html?ref=opinion&\\_r=0](http://www.nytimes.com/2014/05/04/opinion/sunday/when-sources-set-the-ground-rules.html?ref=opinion&_r=0).

<sup>13</sup> Downie, CPJ, <http://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php>.

<sup>14</sup> Downie, CPJ, <http://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php>.

15. An Associated Press study in March found the government refused more Freedom of Information Act requests in 2013 than in previous years. The aversion to releasing information was shared across agencies, but national security in particular was cited to “withhold information a record 8,496 times--a 57 percent increase over a year earlier and more than double Obama's first year.”<sup>15</sup>
16. The government has sought to limit access to sensitive national security-related trials and documents like the court martial of Chelsea Manning,<sup>16</sup> ongoing terrorism cases<sup>17</sup> at Guantánamo Bay,<sup>18</sup> photographs taken at military facilities in Iraq and Afghanistan that may contain images of torture<sup>19</sup> and the Justice Department memorandum<sup>20</sup> that provided the administration's legal justification for using drone strikes to kill U.S. citizens.<sup>21</sup>
17. These policies have left the American public deprived of information on key issues of public interest, matters ranging from environmental policies to the some of the most pressing national security debates of the post-9/11 era.

### **III. Revelations on surveillance deepen the chill**

#### **A. Background on revealed policies**

18. Documents leaked by former U.S. National Security Agency contractor Edward Snowden in 2013 have revealed far more than was previously known about the breadth and scope of the mass surveillance programs conducted by various United States government agencies. The U.S. government collects communications records (metadata) and the content of billions of communications around the world under several legal authorities, including Section 215 of the USA PATRIOT Act, Section 702 of the FISA Amendments Act, and Executive Order 12333. The full extent of its surveillance programs is unknown, but includes the bulk collection of

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<sup>15</sup> Ted Bridis and Jack Gillum, The Associated Press, “US Cites Security More to Censor, Deny Records,” March 16, 2014, <http://bigstory.ap.org/article/us-cites-security-more-censor-deny-records>.

<sup>16</sup> Joel Simon, The Committee to Protect Journalists, “Transparency, accountability at stake in Manning trial,” May 16, 2013, <http://www.cpj.org/blog/2013/05/transparency-accountability-at-stake-in-manning-tr.php>.

<sup>17</sup> James L. Pohl, The Associated Press, “Judge: No TV broadcast of Guantanamo 9/11 trial,” January 3, 2013, <http://bigstory.ap.org/article/judge-no-tv-broadcast-guantanamo-911-trial>.

<sup>18</sup> Carol Rosenberg, *The Miami Herald*, “‘Transparent’ detention at Guantánamo? Not anymore,” January 4, 2014, <http://www.miamiherald.com/2014/01/04/3852565/transparent-detention-at-guantanamo.html>.

<sup>19</sup> The Editorial Board, *The New York Times*, “Stop Hiding Images of American Torture,” August 30, 2014, <http://www.nytimes.com/2014/08/31/opinion/sunday/stop-hiding-images-of-american-torture.html?smid=nytcore-iphone-share&smprod=nytcore-iphone>.

<sup>20</sup> The Editorial Board, *The New York Times*, “Transparency on Targeted Killings,” April 21, 2014, <http://www.nytimes.com/2014/04/22/opinion/transparency-on-targeted-killings.html>

<sup>21</sup> Sara Rafsky, The Committee to Protect Journalists, “Obama Transparency Record Remains Unimpressive,” May 5, 2014, <https://cpj.org/blog/2014/05/obama-transparency-record-remains-unimpressive.php>.

U.S. call detail records and the collection of “apparently most e-mails and other text-based communications” that travel across the U.S. border.<sup>22</sup>

19. The United States is a State Party to the International Covenant on Civil and Political Rights (ICCPR). The ICCPR’s Art. 17 protects the international human right to privacy, and Art. 19 protects the rights to freedom of expression and freedom of information. These rights are also protected by the Universal Declaration of Human Rights under Arts. 12 and 19 respectively.
20. The Human Rights Committee, which oversees states’ implementation of the ICCPR, has elaborated on the interrelationship between the right to privacy and the right to freedom of expression in its General Comment 34.<sup>23</sup> The link between these rights has also been acknowledged in numerous decisions by the U.S. Supreme Court.<sup>24</sup> At the regional level, the right to privacy is protected by Art. 11 of the American Convention on Human Rights, which the United States signed in 1977.<sup>25</sup> International human rights mechanisms, such as the United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, have also stressed the need to ensure that the “interception, collection and use of personal information, including all limitations on the right of the affected person to access this information, be clearly authorized by law in order to protect them from arbitrary or abusive interference with their private interests.” They have reiterated that the law “must establish limits with regard to the nature, scope and duration of these types of measures; the reasons for ordering them; the authorities with power to authorize, execute and monitor them; and the legal mechanisms by which they may be challenged.”<sup>26</sup>
21. Both the UN Office of the High Commissioner for Human Rights and the UN Human Rights Committee have affirmed the extraterritorial applicability of state obligations under the

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<sup>22</sup> Ellen Nakashima, “Verizon providing all call records to U.S. under court order,” *Washington Post*, June 6, 2013, [http://www.washingtonpost.com/world/national-security/verizon-providing-all-call-records-to-us-under-court-order/2013/06/05/98656606-ce47-11e2-8845-d970ccb04497\\_story.html](http://www.washingtonpost.com/world/national-security/verizon-providing-all-call-records-to-us-under-court-order/2013/06/05/98656606-ce47-11e2-8845-d970ccb04497_story.html); Charlie Savage, “N.S.A. Said to Search Content of Messages To and From U.S.,” *New York Times*, Aug. 8, 2013, <http://www.nytimes.com/2013/08/08/us/broader-sifting-of-data-abroad-is-seen-by-nsa.html?pagewanted=all>.

<sup>23</sup> UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, Sep. 12, 2011, para. 10.

<sup>24</sup> See, e.g., *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 314 (1972) (“The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power.”); *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (concurrence).

<sup>25</sup> American Convention on Human Rights, art. 11, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm); list of signatories to ACHR available online at [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm).

<sup>26</sup> Joint Statement of the United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, June 21, 2013, para. 8; see also UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Frank LaRue, April 2013.

ICCPR, challenging the U.S. government's position that its human rights obligations apply only within its borders and to its citizens.<sup>27</sup>

22. The United States accepted, in part, two recommendations pertaining to surveillance after its 2010 Universal Periodic Review, including a recommendation that it “legislate appropriate regulations to prevent the violations of individual privacy... as well as eavesdropping of communications, by its intelligence and security organizations,” and that it “guarantee the right to privacy and stop spying on its citizens without judicial authorization.”<sup>28</sup>

## **B. Surveillance, the chilling effect and self-censorship**

### **i. Journalists and their sources**

23. At the time of this submission, no connection has been established between the Snowden-revealed NSA surveillance programs and the many leak investigations being conducted by the Obama administration—but the surveillance has added to the fearful atmosphere surrounding contacts between American journalists and government officials and has cast doubt on journalists’ ability to protect the identity of those sources.<sup>29</sup> Metadata surveillance is particularly dangerous to journalists because it means the government can quickly pinpoint their sources.
24. This fear has further chilled communications between journalists and government officials and has impeded basic methods of newsgathering. Many of the more than 30 journalists interviewed for CPJ’s 2013 special report said their sources are so worried about surveillance that they are reluctant to discuss even unclassified information. Journalists and their sources often avoid communicating by phone or email even for routine conversations out of concern that they might leave a digital trail that would make it easier for the government to monitor their contacts. Many journalists have started using privacy-protective technologies such as encryption, which can be labor-intensive and impair journalists’ ability to freely gather and disseminate information.<sup>30</sup>
25. The work of foreign journalists could be especially vulnerable to surveillance by the NSA or other U.S. intelligence agencies. The German magazine *Der Spiegel*, citing documents from

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<sup>27</sup> Report of the UN High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, June 2014, paras. 32-33, [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37\\_en.pdf](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf); UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Mar. 29, 2004, para. 10.

<sup>28</sup> U.S. State Department, *U.S. Response to UN Human Rights Council Working Group Report*, para. 14, Mar. 10, 2011, available at <http://www.state.gov/j/drl/upr/archive/157986.htm>

<sup>29</sup> Frank Smyth, The Committee to Protect Journalists, “Secrecy, Scale of Prism Raises Alarms,” June 7, 2013, <https://cpj.org/blog/2013/06/secracy-scale-of-prism-raises-alarms.php>.

<sup>30</sup> Downie, CPJ, <http://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php>.

Snowden, reported in August 2013 that the NSA had hacked into internal communications of the Qatar-based international news organization Al-Jazeera.<sup>31</sup> The NSA has not commented publicly on the report.

26. As part of its surveillance activities, the NSA has been building up its capabilities to collect and retain communications data. The retention of surveillance data poses a unique threat to journalism in the digital age, according to CPJ research.<sup>32</sup> Technological advances allow the NSA and other intelligence agencies to store indefinitely not only the transactional details of all communications--as many experts believe is already the case--but also huge amounts of the content of phone calls, texts, and emails. By keeping a record of all communications transactions swept up in its dragnet, and then linking those transactions to content, the U.S. government could recreate a reporter's research, retrace a source's movements, and even retroactively listen in on communications that would otherwise have evaporated forever. It could soon be possible to uncover sources with such ease as to render meaningless any promise of confidentiality a journalist may attempt to provide--and if an interaction escapes scrutiny in the first instance, it could be reconstructed later.<sup>33</sup>
27. Journalists' electronically-stored data is also particularly vulnerable to being searched, copied or even seized when crossing a U.S. border, according to CPJ research.<sup>34</sup> U.S. journalist and documentary filmmaker Laura Poitras says she has been detained and questioned and had her electronic devices searched more than 40 times since 2006<sup>35</sup>—long before she was first contacted by Edward Snowden-- when her film about an Iraqi doctor critical of the U.S.-led occupation of his nation was released. *New York Times* journalists C.J. Chivers and Mac William Bishop were detained before leaving on a reporting trip for Syria in 2013, and Bishop was detained on his way back into the U.S.<sup>36</sup> Journalists who are citizens of other nations enjoy no effective protections from having their data searched upon entering or leaving the United States.
28. Whether journalists are targeted for surveillance or merely swept up in the NSA's vast dragnet, the resulting chilling effect endangers press freedom around the world<sup>37</sup> in an era

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<sup>31</sup> Der Spiegel, "Snowden Document: NSA Spied On Al Jazeera Communications," August 31, 2013-, <http://www.spiegel.de/international/world/nsa-spied-on-al-jazeera-communications-snowden-document-a-919681.html>.

<sup>32</sup> Geoffrey King, The Committee to Protect Journalists, "The NSA Puts Journalists Under a Cloud of Suspicion," February, 2014, <https://cpj.org/2014/02/attacks-on-the-press-surveillance-storage.php>.

<sup>33</sup> King, CPJ, <https://cpj.org/2014/02/attacks-on-the-press-surveillance-storage.php>.

<sup>34</sup> Frank Smyth, The Committee to Protect Journalists, "Knowing how law and technology meet at U.S. borders," October 3, 2013, <https://cpj.org/blog/2013/10/knowning-how-law-and-technology-meet-at-us-borders.php>.

<sup>35</sup> Glenn Greenwald, Salon, "U.S. filmmaker repeatedly detained at border," April 8, 2012, [http://www.salon.com/2012/04/08/u\\_s\\_filmaker\\_repeatedly\\_detained\\_at\\_border/](http://www.salon.com/2012/04/08/u_s_filmaker_repeatedly_detained_at_border/).

<sup>36</sup> Hadas Gold, *Politico*, "New York Times reporters sue DHS," December 9, 2013, <http://www.politico.com/blogs/media/2013/12/new-york-times-reporters-sue-dhs-179190.html>.

<sup>37</sup> Joel Simon, The Committee to Protect Journalists, "We must fight to preserve journalists' right to report in digital age," Septemebr 8, 2014, <https://cpj.org/blog/2014/09/right-to-report-in-the-digital-age.php>.

when the Internet has become the primary means through which news is disseminated globally and digital communication has become essential to newsgathering.<sup>38</sup>

### **i. Privacy and the threat to free expression**

29. The U.S. government's collection and storage of not only metadata on, but also the content of, the communications of millions of people around the world intrudes upon a personal zone of privacy that is essential to freedom of expression and association, and creates a powerful chilling effect on free expression. At present, writers and journalists know that the content of their emails, phone calls, and other overseas communications are likely intercepted by the U.S. government. The fact that the public does not know precisely what is done with the communications information gathered further adds to the chill. As detailed below, this is prompting writers to engage in self-censorship in their communications and writing, a deeply troubling bellwether for free expression. Writers are the "canary in the coal mine" for free expression. Evidence that a government's actions are chilling writers' speech is a strong indication that there will be a broader chilling effect produced on the society in which those writers live.
30. To make original contributions to public discourse, writers must be confident that they are protected by a zone of privacy. The freedom to communicate with whomever one chooses, away from the prying eyes of the state, is an essential condition for creativity and critical writing, and especially for the expression of dissent.
31. The prospect that the government can collect an individual's communications information without cause, and then use that information to identify the entire web of that individual's associations and interactions – and the contacts of all the individual's contacts – limits and deters valuable interactions.
32. In October 2013 PEN American Center undertook a survey of over 520 American writers as an opportunity to better understand the specific ways in which awareness of far-reaching surveillance programs impacts writers' thinking, research, and writing, including their sense of whether their own communications are being monitored, and the extent to which they are moderating their behavior as a result.<sup>39</sup> The full report has been included in this submission as an Appendix, and the survey's key findings are summarized here.

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<sup>38</sup> Maya Taal, The Committee to Protect Journalists, "CPJ Risk List: Where Press Freedom Suffered," February, 2014, <https://cpj.org/2014/02/attacks-on-the-press-cpj-risk-list-1.php>.

<sup>39</sup> PEN American Center, *Chilling Effects: The Impact of US Government Surveillance on Writers: Findings From a Survey of PEN Membership* (October 31, 2013), [http://www.pen.org/sites/default/files/Chilling%20Effects\\_PEN%20American.pdf](http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf), at 1-10. Note that the *Chilling Effects* report contains an appendix presenting the complete survey results, including the questions asked of respondents.

33. The survey results show that writers are overwhelmingly worried about government surveillance, and are consequently engaging in self-censorship. Fully 85% of writers responding to PEN's survey are worried about government surveillance of Americans, and 73% of writers have never been as worried about privacy rights and freedom of the press as they are today.<sup>40</sup> 76% of writers believe increased government surveillance is particularly harmful to writers because it impinges on the privacy they need to create freely. Nearly 90% are concerned about the NSA's program to collect and analyze metadata, and many writers now assume that their communications are monitored.<sup>41</sup> A large majority of respondents believe that the gathered data may be mismanaged or abused for years to come.<sup>42</sup>
34. Many writers report that they have avoided discussing or writing about controversial topics as result of the presumed monitoring. They have curtailed certain types of research; they have taken extra steps to mask their identities and the identities of sources; they have avoided contacting people if those people could be endangered if it became known that they were speaking to a writer; and some have even declined to meet with people who might be seen as security threats. Writers reported self-censoring on subjects including U.S. military affairs, the Middle East-North Africa region, drug policies, the study of certain languages, and, most troubling, criticism of the U.S. government. The fear of surveillance, and uncertainty regarding the government's use of the data it gathers, have prompted writers to change their behavior in numerous ways that curtail their freedom of expression and restrict the free flow of information.
35. The survey indicated that respondents are particularly concerned about communicating with individuals outside the United States. Writers expressed fear that contact with friends or sources abroad could result in harm either to themselves or to their friends or sources, further evidence that U.S. mass surveillance programs cast a shadow over writers' daily communications. 44% of writers thought it was "very likely" that an email to someone abroad who was affiliated with an anti-American organization would be read by the government, and another 48% described it as "realistically possible".<sup>43</sup> 39% of writers thought it was "very likely" that a phone call made to someone living in an area of the world known for its antipathy to the U.S. would be monitored and recorded by government officials, and another 52% thought it was "realistically possible."
36. As freedom of expression suffers, so too does freedom of information. The impact extends beyond curtailing writers' everyday freedom of speech. It affects their work, and the harm done to their work impacts society at large, because "[w]riters develop ideas through conversations, including conversations with radicals, dissidents, pariahs, victims of violence, and others who may be endangered if their communications become known. Chilling their

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<sup>40</sup> *Id.* at 3.

<sup>41</sup> *Id.* at Appendix.

<sup>42</sup> *Id.* at Appendix.

<sup>43</sup> *Id.* at 8.

exchanges impoverishes thought.”<sup>44</sup> The results of the survey regarding forms of self-censorship were particularly striking, and troubling:

- 28% have curtailed or avoided social media activities, and another 12% have seriously considered doing so;
- 24% have deliberately avoided certain topics in phone or email conversations, and another 9% have seriously considered it;
- 16% have avoided writing or speaking about a particular topic, and another 11% have seriously considered it;
- 16% have refrained from conducting Internet searches or visiting Web sites on topics that may be considered controversial or suspicious, and another 12% have seriously considered it;
- 13% have taken extra steps to disguise or cover their digital footprints, and another 11% have seriously considered it;
- 3% have declined opportunities to meet (in person, or electronically) people who might be deemed security threats by the government, and another 4% have seriously considered it.<sup>45</sup>

37. The survey also included open-ended questions allowing writers to offer comments on surveillance. These comments provide insight into the reasons for this changing behavior. One writer notes having already “dropped stories . . . and avoided research on the company telephone due to concerns over wiretapping or eavesdropping.”<sup>46</sup> Another indicates, “the writers who feel most chilled, who are being most cautious, are friends and colleagues who write about the Middle East.”<sup>47</sup> The self-censorship extends not just to writing and speaking but to other activities essential to creative and productive expression, as writers limit their research, steer clear of certain topics, and avoid communicating with sources and colleagues. In the words of one respondent:

“I was considering researching a book about civil defense preparedness during the Cold War: what were the expectations on the part of Americans and the government? What would have happened if a nuclear conflagration had taken place? . . . How did the pall of imminent disaster affect Americans? But as a result of recent articles about the NSA, I decided to put the idea aside. . . .

And another:

“I write books, most recently about civil liberties, and to protect the content of certain interviews, I am very careful what I put in emails to sources, even those who are not

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<sup>44</sup> Brief of Amicus Curiae PEN American Center in Support of Appellants, *ACLU v. Clapper*, at 21, available at <https://www.aclu.org/sites/default/files/assets/clapper-ca2-pen-amicus.pdf>.

<sup>45</sup> *Id.* at 6.

<sup>46</sup> *Id.* at 6.

<sup>47</sup> *Id.*

requesting anonymity. I'm also circumspect at times on the phone with them—again, even though they may not be requesting anonymity and the information is not classified.”<sup>48</sup>

38. Among survey respondents who are journalists, 30% reported having taken extra precautions to protect sources' anonymity.<sup>49</sup>

#### **IV. A tarnished model for global press freedom and free expression**

39. While the measures discussed in this submission pale in comparison to the government controls, censorship, repression, physical danger, and even death that writers, journalists and their sources face daily in many countries throughout the world, the United States' history, with its unique constitutional guarantees of free speech and a free press—essential to its tradition of government accountability—means it is held to a higher standard. The Obama administration has sought to champion press and Internet freedom globally, but cannot do so effectively if its record is being consistently challenged. In an interview for CPJ's 2013 special report, *Financial Times* correspondent Richard McGregor said, “If the U.S. starts backsliding, it is not only a bad example for more closed states, but also for other democracies that have been influenced by the U.S.” to make their governments more transparent.<sup>50</sup>

#### **V. Recommendation to U.S. authorities from CPJ**

- Affirm and guarantee that journalists will not be at legal risk or prosecuted for receiving confidential and/or classified information.
- Be more forthcoming about the scope and nature of the National Security Agency's and other surveillance activities as they are being applied to domestic and international journalists. Issue a presidential policy directive limiting the surveillance of journalists' communications to ensure the integrity of a journalist's right to protect his or her sources.
- Implement revised Justice Department guidelines and prevent the filing of unnecessary, overly broad, and/or secret subpoenas to obtain journalists' records.
- Withdraw a subpoena seeking to force journalist James Risen to give testimony that would reveal a confidential source.
- End the practice of bringing espionage charges against people who leak classified information to journalists, which could create a severe chilling effect and thwart the free flow of information on matters of public interest.

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<sup>48</sup> *Id.* at 7-8.

<sup>49</sup> *Id.* at 8.

<sup>50</sup> Downie, CPJ, <http://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php>.

- Make good on promises to increase transparency of government activities and end government intimidation of officials who might speak to the press. Enforce prompt and less restrictive responses to FOIA requests and more systematic and far-reaching efforts to reduce over-classification. Encourage administration officials to be open and responsive to press inquiries.

## **VI. Recommendation to U.S. authorities from PEN American Center and PEN International**

- Publicly recognize and restore full privacy protections for both U.S. citizens and non-U.S. nationals, in recognition of U.S. legal obligations under Articles 17-19 of the International Covenant on Civil and Political Rights to respect the human rights to privacy, freedom of expression, and freedom of thought of all persons, regardless of nationality.
- Immediately end indiscriminate, warrantless surveillance programs that collect either communications metadata or content.
- Enact stricter, public standards for the collection, use and storage of communications information, including both metadata and content.
- Implement more meaningful judicial oversight of surveillance programs to ensure their conformity with domestic and international law, including due process protections.
- Declassify more information about the interpretation and use of the various legal authorities under which U.S. surveillance programs are conducted, to allow for clear and meaningful public understanding of the scope of U.S. surveillance programs and to facilitate a fully informed public debate on these issues, including both information about past and current programs.
- Declassify relevant documents and decisions of the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review.
- Allow technology and communications companies to make public more information about the government orders they receive.