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Governments worldwide buried in the Snowden avalanche

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By Jack Shafer

If the U.S. and British governments could stop the press from publishing stories based on the National Security Agency files leaked by Edward Snowden in June, they probably would have acted by now. Oh, the *Guardian* was coerced by the British government into destroying [2] the hard drives in London containing the leaked files, and London police used terrorism [3] law to detain [4] the partner of Glenn Greenwald — one of the journalists to whom Snowden leaked — at Heathrow Airport and confiscated computer media believed to contain leaked files.

But these measures were largely for show. As *Guardian* editor Alan Rusbridger had earlier reminded officials, other publications and individuals possess copies of the files, and "doomsday" copies exist [5] that will be released "if anything happens at all to Edward Snowden," said [5] Greenwald in June. Greenwald wasn't so much blackmailing the U.S. and British governments as promising retaliation, Capone-style, should harm come to his source.

Meanwhile, hardly a week has expired since June without the publication of a new Snowden revelation somewhere in the world, as this Wikipedia page [6] illustrates. Last week, the *Washington Post* reported [7] how the NSA pinches data from Yahoo and Google's worldwide data centers. On Sunday, the *New York Times* published [8] a laundry list of NSA operations, demonstrating the agency's pervasiveness. "The N.S.A. seems to be listening everywhere in the world, gathering every stray electron that might add, however minutely, to the United States government's knowledge of the world," wrote reporter Scott Shane.

From the sidelines, the U.S. and British governments appear to be helpless, pitiful giants, to steal a phrase from Richard Nixon [9], when it comes to the NSA disclosures. Traditionally, the U.S. government has been more or less successful in getting the press to delay — or at least reduce the octane — of their most explosive national security stories, as these Shorenstein Center papers by Jack Nelson [10] (pdf) and Allan Siegal [11] (pdf) attest. Failing to daunt or cajole the press, the government can try other behavior-mod strategies. It can deter future leakers by aggressively prosecuting current leakers, as the Obama administration has [12] done. It can intimidate reporters who refuse to surrender their confidential sources in criminal proceedings with threats of contempt and jail time, an outcome *New York Times* reporter James Risen [13] seems resigned to. (Gabriel Schoenfeld, author of *Necessary Secrets* [14], made the case for why Risen deserves jail in 2010 in the Daily Beast [15].)

Those techniques won't work against the reporters writing about the Snowden leaks: Snowden outed himself as the source of the NSA files — essentially confessing to the espionage charge [16] against him — so prosecutors can't retaliate against Greenwald, the *Washington Post*'s Barton Gellman, or filmmaker Laura Poitras, early recipients of the Snowden leaks, by using the courts to expose their sources.

What else can the Anglo-American spymasters do? Thanks to the high bar the Supreme Court set for prior restraint in the Pentagon Papers case [17], the U.S. government would have to make an incredible case to the court to prevent the *Post*, the *Times*, and other American news organizations from continuing to mine the Snowden files — said to exceed 50,000 documents — for stories. And even if they could block American media from publishing, the stories will run in Brazil, where Greenwald is based, or in Germany, home to Poitras, or wherever Snowden's doomsday device detonates.

Alternately, prosecutors could invoke Section 798 [18] of the Espionage Act of 1917, which criminalizes the disclosure of "communications intelligence of the United State or any foreign government," against all the reporters and editors and copy editors who have squired the Snowden files into print. As Schoenfeld wrote [19] in his book, "this statute is completely unambiguous," and could have been used against the *New York Times* in 2005 [20] when it published a previous series on the NSA. But as I argued back in 2006 [21] in Slate, Section 798 is

untested against works of journalism and in a showdown between it and the First Amendment, it's hard to imagine Section 798 winning. Also, it's hard to imagine that President Barack Obama wishes to perfume his legacy with such a crackdown against a gang that buys its ink and pixels by the container ship.

The Snowden genie-out-of-the-bottle has so depressed American intelligence that Bobby R. Inman, who ran the NSA from 1977 to 1981, recently advised [8] his old agency comrades to fold. Release to the press "everything you think Snowden has," he said, because "bad news doesn't get better with age. The sooner they get it out and put it behind them, the faster they can begin to rebuild."

It's hard to imagine the national security establishment capitulating that easily, but it holds some appeal compared to taking a weekly beating in the press. For now, at least until the United States gets hit again, the press corps has pinned the U.S. government in a stalemate.

[1] Image: http://blogs.reuters.com/jackshafer/files/2013/11/antenna.jpg
[2] destroying: http://www.theguardian.com/world/2013/aug/20/nsa-snowden-files-drives-destroyed-london
[3] terrorism: http://www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule7-danger-reporters
[4] detain: http://www.theguardian.com/world/2013/aug/18/glenn-greenwald-guardian-partner-detained-heathrow
[5] exist: http://www.thedailybeast.com/articles/2013/06/25/greenwald-snowden-s-files-are-out-there-if-anything-happens-to-him.html
[6] page: http://en.wikipedia.org/wiki/2013_global_surveillance_disclosures
[7] reported: http://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd_story.html
[8] published: http://www.nytimes.com/2013/11/03/world/no-morsel-too-minuscule-for-all-consuming-nsa.html?pagewanted=all
[9] Richard Nixon: http://vietnam.vassar.edu/overview/doc15.html
[10] Jack Nelson: http://shorensteincenter.org/wp-content/uploads/2012/03/2003_01_nelson.pdf
[11] Allan Siegal: http://shorensteincenter.org/wp-content/uploads/2012/03/2007_02_siegal.pdf
[12] has: http://www.cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php
[13] James Risen: http://www.nytimes.com/2013/10/16/us/court-rejects-appeal-bid-by-writer-in-leak-case.html
[14] Necessary Secrets: http://www.nytimes.com/2010/05/30/books/review/Dershowitz-t.html?pagewanted=all
[15] Daily Beast: http://www.thedailybeast.com/articles/2010/05/07/send-this-reporter-to-jail.print.html
[16] charge: http://articles.washingtonpost.com/2013-06-21/world/40116763_1_hong-kong-nsa-justice-department
[17] case: http://www.law.cornell.edu/supct/cases/403us713.htm
[18] Section 798: http://www.law.cornell.edu/uscode/text/18/798

[19] wrote:
http://books.google.com/books?id=lyjgxO1IArAC&pg=PA253&lpg=PA253&dq=%22this+statu te+is+completely+unambiguous,%22&source=bl&ots=WtL3WCyoLq&sig=SmiND3kCRHfJea belolH_IJyYbk&hl=en&sa=X&ei=aah6Uou6JLCgyAH87ICIDA&ved=0CC4Q6AEwAA#v=on epage&q=%22this%20statute%20is%20completely%20unambiguous%2C%22&f=false

[20] 2005: http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all

[21] 2006:
http://www.slate.com/articles/news_and_politics/press_box/2006/03/bill_keller_in_chains.html

[22] preaches: http://nationalinterest.org/blog/paul-pillar/dont-surrender-leakers-9303?page=show

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