

Sagar sees Constitution at work in AP phone records seizure

May 27 2013, by Michael Hotchkiss

The Justice Department's controversial seizure of Associated Press phone records highlights a messy but effective constitutional balancing act that ultimately benefits the country, said Rahul Sagar, an assistant professor of politics at Princeton University.

The Justice Department obtained records from the personal and work telephones of several reporters and editors for the news cooperative, in addition to records from phone lines at AP offices in New York, Washington and Hartford, Conn. The records covered April and May 2012, and the AP learned of the seizure this month. The AP protested the [seizure](#) as a "massive and unprecedented intrusion" into the AP's newsgathering activities. The [Justice Department](#) says the records were needed for a [criminal investigation](#) into a leak to the AP of classified information about a highly secret covert operation against al-Qaeda.

"The AP case is only the latest instance in what has been termed the 'unruly contest' between the president and the press, which involves the press trying to ferret out classified information and the executive trying to keep that very same information secret," Sagar said.

While some see a potential constitutional crisis in the collision of those interests, Sagar said, he believes the collision is intended and desirable.

Sagar, who studies political theory, recently finished a book on the complex relationships among executive power, national security and secrecy. "Secrets and Leaks" will be released in August by Princeton

University Press.

Sagar explains the Constitution's role in engendering this collision of interests and why it is good for the country:

"The 'unruly contest' between the president and the press is a product of the Constitution. Because the [First Amendment](#) prohibits prior restraint, save in extreme cases where publication will cause immediate and irreparable harm, the press is permitted to publish whatever it can get its hands on. At the same time, because the Constitution makes the president responsible for ensuring national security, it permits him to do his utmost to prevent the press from getting its hands on information that, if disclosed, could endanger the nation.

"Though it may not be apparent, this 'unruly contest', as Alexander Bickel termed it, is actually desirable, because Congress and the courts do not have the information or the expertise needed to closely monitor what the president does in secret. The persons most knowledgeable about the misuse of [secrecy](#) tend to be, not surprisingly, those who are employed within the executive branch. As a result, the practice of leaking allows us to keep tabs on the presidency.

"At the same time, though, we don't want to allow subordinate officials to disclose classified information whenever they feel like it, because they might then do so rashly or maliciously. Hence, the Constitution leaves open the possibility that they will be punished if they are caught. In theory, this arrangement should lead officials to think twice before they disclose [classified information](#). It encourages them to only leak information when they have reason to believe that it reveals wrongdoing so serious that the government will be too embarrassed to investigate or punish them for leaking.

"As such, then, the 'unruly contest' between the president and the press

represents a messy but quite effective way of balancing two crucial interests: our interest in an effective and energetic presidency on the one hand, and our interest in preventing the concealment of wrongdoing on the other. From this perspective, the AP investigation is nothing to be alarmed about. It is simply part of the cat-and-mouse 'game' established by the Constitution.

"We would only have reason to be concerned if the government were vindictively probing confidential sources that have revealed genuine wrongdoing. But that does not seem to be the case here. It is also not clear why we should be concerned about the use of secret subpoenas. Because the government cannot always track down leakers using internal investigations, it may be justified in using subpoenas in the most egregious cases. Remember, if the government fails to take all possible steps to investigate troubling leaks, then subordinate officials will be emboldened to make disclosures whenever they please, leading to unwarranted disclosures.

"So, in sum, though critics would like to depict the AP subpoenas as an unprecedented threat to the freedom of the press, it is in fact part of a longer term dynamic in American politics, and is consonant with the spirit of the law."

Provided by Princeton University

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