BEYOND THE RAMPARTS ALONE: SECURING FREEDOM OF THE PRESS FROM ESPIONAGE PROSECUTIONS

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> The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know.
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> Judge Murray Irwin Gurfein, *United States v. N.Y. Times Co.*[1]

INTRODUCTION

In this century, the American public has learned about many of the most important and most troubling actions of its government officials the same way: from leaks to journalists. Reporting based on unauthorized leaks informed the public that the Central Intelligence Agency ("CIA") was illegally holding suspects in secret "black sites" overseas[2] and torturing them;[3] that the Bush administration had authorized the National Security Agency ("NSA") to wiretap Americans;[4] that the NSA had continued to conduct mass surveillance of American phone

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[1] 328 F. Supp. 324, 331 (S.D.N.Y. 1971) (denying the government's request for an injunction restraining further publication of the Pentagon Papers).

[2] *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST (Nov. 2, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html. One of President Barack Obama's first acts in office was issuing an executive order to close these black sites. Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 27, 2009).

[3] *See* Jane Mayer, *The Black Sites*, NEW YORKER (Aug. 13, 2007), https://www.newyorker.com/magazine/2007/08/13/the-black-sites. Obama's 2009 executive order also banned the interrogation techniques reportedly used at the black sites. *See* Exec. Order No. 13491, *supra* note 2.

[4] *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html.

records[5] and internet companies;[6] that President Obama kept a "kill list" to authorize extrajudicial assassinations by drone[7] which had killed American citizens;[8] that the FBI and the CIA were investigating communications between the Trump campaign and Russian operatives on the eve of the 2016 election,[9] among other revelations of intense public concern and great constitutional importance. The journalists who wrote these articles so vital to our public debate simply could not have done so without leaks of classified information implicating national defense matters.[10]

But all of these journalists have been vulnerable to prosecution under a broad—but plain-text—reading of the Espionage Act.[11] Generally, § 793 of the Act prohibits the receipt or communication of national defense information "to any person not entitled to receive it," whether or not the communicator was authorized to have the information in the first place, if the communicator has "intent or reason to believe that the information is to be used to the injury of the United

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[5] *See* Glenn Greenwald, *NSA collecting phone records of millions of verizon customers daily*, THE GUARDIAN (June 6, 2013, 6:05 AM), https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order.

[6] *See* Barton Gellman & Laura Poitras, *U.S., British intelligence mining data from nine U.S. internet companies in broad secret program*, WASH. POST (June 7, 2013), https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html.

[7] *See* Greg Miller, *Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists*, WASH. POST (Oct. 23, 2012), https://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408fbe6a4b_story.html.

[8] While President Obama publicly announced that the United States had killed an American terror suspect, Anwar al-Awlaki, news that his 16-year-old son, Abdulrahman al-Awlaki, had later been killed was revealed only through unauthorized leaks. *See* Craig Whitlock, *U.S. airstrike that killed American teen in Yemen raises legal, ethical questions*, WASH. POST (Oct. 22, 2011), https://www.washingtonpost.com/world/national-security/us-airstrike-that-killed-american-teen-in-yemen-raises-legal-ethical-questions/2011/10/20/gIQAdvUY7L_story.html.

[9] *See, e.g.*, David Corn, *A Veteran Spy Has Given the FBI Information Alleging a Russian Operation to Cultivate Donald Trump*, MOTHER JONES (Oct. 31, 2016), https://www.motherjones.com/politics/2016/10/veteran-spy-gave-fbi-info-alleging-russian-operation-cultivate-donald-trump/.

[10] *Cf.* ERIC LICHTBLAU, BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE 311 (2008) ("[C]onfidential sources . . . are also essential to producing what Bob Woodward once called 'the best obtainable version of the truth.' Without them, this story could not have been told.").

[11] 18 U.S.C. §§ 792–98 (2017). The statute of limitations is 10 years. *See* Act of Sept. 23, 1950, ch. 1024, §19, 64 Stat. 1005.

States, or to the advantage of any foreign nation."[12] Anyone who conspires to violate § 793 is subject to the same punishment as someone who has actually violated it—a fine or up to ten years imprisonment.[13]

Legal scholars have long been concerned that, armed with a poorly-drafted statute and limited judicial precedent, a creative prosecutor could charge a journalist with espionage for publishing embarrassing documents that the journalist would have "reason to believe" would "be used to the injury of the United States or to the advantage of a foreign nation."[14] As early as 1973, Professors Harold Edgar and Benno C. Schmidt called the Espionage Act "a loaded gun pointed at newspapers and reporters who publish foreign policy and defense secrets."[15] Thus far, prosecutorial discretion—or failing that, prosecutorial incompetence—has spared journalists this fate. But as Russian playwright Anton Chekhov's famous maxim holds, "If in the first chapter you mention a rifle hanging on the wall, in the second or third chapter a shot must be fired with that rifle."[16] Journalists and First Amendment litigators should prepare for the possibility that someday soon, the Espionage Act could be used to prosecute Americans for engaging in legitimate newsgathering on matters of public concern.[17]

That day may come sooner than many had thought. After nearly a decade of declining to prosecute, in May 2019 the Justice Department charged Julian Assange with espionage for publishing troves of classified documents on his website, Wikileaks.[18] Whether Assange is a journalist remains the subject of a heated, but arguably irrelevant, debate—because the *New York Times* and other established American media outlets

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[12] 18 U.S.C. § 793 (2017).
[13] *Id.* § 793(f)–(g). *See also id.* §§ 794(b), 798.
[14] *See* Ofer Raban, *Some Observations on the First Amendment and the War on Terror*, 53 TULSA L. REV. 141, 144 (2018) ("In short, the possibility of prosecuting journalists for Espionage Act violations is both real and substantial."); *see also* David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, 48 HARV. C.R.-C.L. L. REV. 473, 501 (2013) ("Left unclear as well is whether the Espionage Act, as applied to a publisher, would be found unconstitutional under the First Amendment."); William E. Lee, *Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes*, 36 AM. J. CRIM. L. 129, 167–76 (2009) (analyzing publisher liability under the Espionage Act).
[15] Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 936 (1973).
[16] VALENTINE TSCHEBOTARIOFF BILL, CHEKHOV: THE SILENT VOICE OF FREEDOM 79 (1987).
[17] *See, e.g.*, Raban, *supra* note 14, at 144 ("In short, the possibility of prosecuting journalists for Espionage Act violations is both real and substantial.").
[18] *See infra* notes 306–21 and accompanying text.

published many of the same documents.[19] If Assange could be liable under the Espionage Act, so could the Gray Lady.[20]

The current President has made no secret of his hostility towards the press.[21] He has called the media "the enemy of the American people" countless times,[22] revoked a White House correspondent's press pass because of the reporter's aggressive questioning,[23] praised a congressional candidate's physical assault on a reporter,[24] threatened to revoke network news licenses over negative coverage,[25] sent a cease-and-desist letter to an author of an unflattering book about his administration,[26] and has repeatedly blasted press criticism and reporting as "fake."[27] Near the very beginning of his presidency, FBI director James Comey alleges the President privately suggested throwing journalists in jail.[28]

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[19] *See infra* Section II.D.4; *infra* notes 196–198 and accompanying text.

[20] *See, e.g.*, Editorial Board, *Julian Assange's Indictment Aims at the Heart of the First Amendment*, N.Y. TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/opinion/julian-assange-wikileaks.html; Deanna Paul, *How the indictment of Julian Assange could criminalize investigative journalism*, WASH. POST (May 27, 2019), https://www.washingtonpost.com/national-security/2019/05/27/how-indictment-julian-assange-could-criminalize-investigative-journalism/?utm_term=.2ac3fcc7aa30.

[21] Due to space constraints, this list of the President's spats with the press is far from exhaustive. *See generally* Laura Handman & Eric Feder, *Foreward: Syracuse First Amendment Symposium Introduction*, 68 SYRACUSE L. REV. 509 (2018) (reviewing news and legal developments in media law during the first two years of the Trump presidency).

[22] *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), https://twitter.com/realDonaldTrump/status/832708293516632065 ("The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!"); *see also* Andrew Higgins, *Trump Embraces 'Enemy of the People,' a Phrase with a Fraught History*, N.Y. TIMES (Feb. 26, 2017), https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html.

[23] *See* Cable News Network, Inc. v. Trump, Docket No. 1:18-cv-02610-TJK (D.D.C. Nov. 13, 2018). Press Secretary Sarah Sanders also tweeted a doctored video that made Acosta's behavior appear more aggressive to justify the decision to revoke his pass. Sarah Sanders (@PressSec), TWITTER (Nov. 7, 2018, 10:33 PM), https://twitter.com/PressSec/status/1060374680991883265.

[24] *See* Kyle Griffin (@kylegriffin1), TWITTER (Oct. 18, 2018, 6:30 PM), https://twitter.com/kylegriffin1/status/1053096071231164416 (posting the video of President Trump saying of Greg Gianforte: "Any guy that can do a body slam, he's my kind of guy").

[25] *See* Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 5:09 PM), https://twitter.com/realDonaldTrump/status/918267396493922304.

[26] *See* Cristiano Lima, *Trump Lawyer Sends 'Cease and Desist' Letter to 'Fire and Fury' Author, Publisher*, POLITICO (Jan. 4, 2018), https://www.politico.com/story/2018/01/04/trump-cease-and-desist-michael-wolff-fire-and-fury-book-324023.

[27] *E.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 30, 2017, 2:36 PM), https://twitter.com/realDonaldTrump/status/947235015343202304.

[28] *See* Michael M. Grynbaum, Sydney Ember & Charlie Savage, *Trump's Urging That Comey Jail Reporters Denounced as an 'Act of Intimidation'*, N.Y. TIMES (May 17, 2017),

While some of these incidents may seem silly, journalists cannot assume that the President will never follow through on his intimidations. In August 2017, Attorney General Jeff Sessions announced that the Justice Department had "more than tripled the number of active leak investigations."[29] That November, Sessions told the House Judiciary Committee there were twenty-seven ongoing investigations.[30] While Sessions did not invoke the Espionage Act specifically, he called the "release of classified information contrary to law" a "very grave offense."[31] He further told the committee, "We intend to get to the bottom of these leaks. I think it has reached epidemic proportions."[32] At the time of this writing, the Trump Justice Department has charged four people under the Espionage Act for leaking to reporters and charged two other leakers under other statutes.[33] If Trump turns his ire towards journalists themselves, a metaphorical loaded gun is at his disposal.[34]

President Trump would hardly be the first to consider this option. Presidential threats to prosecute journalists for espionage are a surprisingly time-honored American tradition.[35] While working in the Ford Justice Department in 1975, Chief of Staff Donald Rumsfeld and Deputy Chief of Staff Dick Cheney considered charging Seymour Hersh with espionage for reporting that U.S. submarines were secretly spying on Soviets; they ultimately chose not to do so.[36] In 1981, the Reagan Justice

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https://www.nytimes.com/2017/05/17/business/media/trumps-urging-that-comey-jail-reporters-denounced-as-an-act-of-intimidation.html.

[29] Press Release, U.S. Dep't of Justice, Attorney General Jeff Sessions Delivers Remarks at Briefing on Leaks of Classified Materials Threatening National Security (Aug. 4, 2017), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-delivers-remarks-briefing-leaks-classified-materials.

[30] *Oversight of Department of Justice: Hearing Before House Comm. on the Judiciary*, 115th Cong. (2017) (testimony of Att'y Gen. Jeff Sessions).

[31] *Id.*

[32] *Id.*

[33] *See* Charlie Savage & Mitch Smith, *Ex-Minneapolis F.B.I. Agent Is Sentenced to 4 Years in Leak Case*, N.Y. TIMES (Oct. 18, 2018), https://www.nytimes.com/2018/10/18/us/politics/terry-albury-fbi-sentencing.html.

[34] In his confirmation hearing, Attorney General William P. Barr did not rule out prosecuting reporters. *See* Erik Wemple, *William Barr on Jailing Journalists: 'I Know There Are Guidelines in Place,'* WASH. POST (Jan. 15, 2019), https://www.washingtonpost.com/opinions/2019/01/15/william-barr-jailing-journalists-i-know-there-are-guidelines-place/?noredirect=on&utm_term=.bda50b397ae9.

[35] *See* Peter Sterne, *How the Espionage Act Morphed Into a Dangerous Tool Used to Prosecute Sources and Threaten Journalists*, FREEDOM PRESS FOUND. (June 19, 2017), https://freedom.press/news/how-espionage-act-morphed-dangerous-tool-used-prosecute-sources-and-threaten-journalists/.

[36] *See id.*; Lowell Bergman & Marlena Telvick, *Dick Cheney's Memos from 30 Years Ago*, FRONTLINE (Feb. 13, 2007),

Department threatened to prosecute James Bamford under the Espionage Act for refusing to return documents he had lawfully obtained via the Freedom of Information Act; eventually the administration backed down.[37] The Reagan administration also internally discussed prosecuting the *New York Times*, the *Washington Post*, *Time* magazine, and the *Washington Times*, and personally threatened *Post* publisher Ben Bradlee.[38] Those threats were empty.[39] After the *New York Times* broke the NSA wiretapping story in 2006, Attorney General Alberto Gonzales said the Bush administration was investigating whether to charge the journalists under the Espionage Act, but never did.[40]

Other administrations went further in their attempts—even as far as empaneling grand juries. In 1942, a grand jury refused to indict the *Chicago Tribune* for publishing a story that suggested the United States had broken the Japanese code in World War II.[41] Thirty years later, the *Times* was so certain the Nixon administration would charge reporter Neil Sheehan with espionage for publishing the Pentagon Papers that the newspaper pre-wrote a press release condemning the indictment.[42] Instead, the prosecutors gave up. Ultimately, no journalist has yet been convicted under the Espionage Act for publishing national security information.[43]

In fact, Espionage Act prosecutions were generally rare until the Obama administration, when the Justice Department

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https://www.pbs.org/wgbh/pages/frontline/newswar/preview/documents.html; *see also* Seymour M. Hersh, *Submarines of U.S. Stage Spy Missions Inside Soviet Waters*, N.Y. TIMES (May 25, 1975), https://www.nytimes.com/1975/05/25/archives/submarines-of-us-stage-spy-missions-inside-soviet-waters-submarines.html.

[37] *See* James Bamford, *The NSA and Me*, INTERCEPT (Oct. 2, 2014), https://theintercept.com/2014/10/02/the-nsa-and-me/; *see also* JAMES BAMFORD, THE PUZZLE PALACE (Penguin Books, 1983) (reporting the details of the contested documents).

[38] *See* James Kelly, *Press: Shifting the Attack on Leaks*, TIME (May 19, 1986), http://content.time.com/time/subscriber/article/0,33009,961418,00.html.

[39] *See* Sterne, *supra* note 35.

[40] *See* Risen & Lichtblau, *supra* note 4; *see also* Walter Pincus, *Prosecution of Journalists Possible in NSA Leaks*, WASH. POST (May 22, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/21/AR2006052100348.html; *see generally* GABRIEL SCHOENFELD, NECESSARY SECRETS 255 (W.W. Norton & Co., 2010) (explaining why the Bush administration declined to prosecute).

[41] *See infra* Section II.D.1.

[42] *See* James C. Goodale, *WikiLeaks Probe: Pentagon Papers Injustice Déjà Vu*, DAILY BEAST (June 12, 2011), https://www.thedailybeast.com/wikileaks-probe-pentagon-papers-injustice-deja-vu; *see also infra* Section II.D.3.

[43] *See* Bruce Brown & Selina MacLaren, *Holding the Presidency Accountable: A Path Forward for Journalists and Lawyers*, 12 HARV. L. & POL'Y REV. 89, 104 (2018).

charged eight people for leaking national defense information.[44] Some critics of President Obama see these prosecutions as part of a larger attack on the press.[45] It wasn't only that Obama's Justice Department prosecuted leakers. The Obama Justice Department also named a Fox News reporter as an unindicted co-conspirator in an Espionage Act prosecution.[46] Obama's Director of National Intelligence further called the journalists who reported on Edward Snowden's leaks "accomplices;"[47] Snowden himself has been charged with violating the Espionage Act.[48]

But perhaps in an era of increasing government secrecy, universal access to digital publishing tools, and expanding opportunities for cyber espionage, a reckoning was inevitable. Technological advances have created national security risks unimaginable to the drafters of the Espionage Act of 1917, and likely unimaginable to anyone but the few officials authorized to receive executive intelligence briefings.[49] All but the most ardent transparency advocates would admit that under these circumstances, government secrets are necessary. At the same time, secrets have become harder to keep—a modern leaker can disseminate thousands of pages of top-secret documents with little more than the click of a button. Moreover, politically motivated leaks and cyberattacks are having a destabilizing influence on governments around the world.[50] But in this context, it is all the more important for American law to distinguish between those seeking to undermine democracy, and those essential to maintaining it.

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[44] *See* Raban, *supra* note 14, at 142.

[45] *See, e.g.*, James Risen, *If Donald Trump Targets Journalists, Thank Obama*, N.Y. TIMES (Dec. 30, 2016), https://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html.

[46] *See infra* notes 182–188 and accompanying text.

[47] *See Annual Open Hearing on Current and Projected National Security Threats to the United States*, before the *Sen. Select Comm. on Intel*., 113th Cong. 600 (2014), https://www.intelligence.senate.gov/hearings/open-hearing-current-and-projected-national-security-threats-against-united-states (statement of James Clapper, Director Nat'l Intel.).

[48] *See infra* note 215 and accompanying text.

[49] *See, e.g.*, DANIEL KLAIDMAN, KILL OR CAPTURE 21–35 (Houghton Mifflin Harcourt, 2012) (describing President Obama's first intelligence briefings as president-elect, including a briefing about a credible bomb threat targeting the 2009 inauguration).

[50] *See, e.g.*, Melissa Eddy, *Hackers Leak Details of German Lawmakers, Except Those on Far Right*, N.Y. TIMES (Jan. 4, 2019), https://www.nytimes.com/2019/01/04/world/europe/germany-hacking-politicians-leak.html; Kim Willsher & Jon Henley, *Emmanuel Macron's Campaign Hacked On Eve of French Election*, GUARDIAN (May 6, 2017), https://www.theguardian.com/world/2017/may/06/emmanuel-macron-targeted-by-hackers-on-eve-of-french-election.

Against this backdrop, this Article contends that the Espionage Act is, and has always been, an existential threat to the American free press. Thus far, prosecutorial forbearance has obscured the seriousness of this problem. But if the "unspoken bargain" between the presidency and the press ever breaks down[51]—as it may well have already—this Article argues the press should act affirmatively to take the Espionage Act off the books.

Part I examines the legislative history of the Espionage Act, with assistance from Edgar and Schmidt's foundational article on the subject.[52] Part II recounts the short history of Espionage Act litigation, including the few aborted attempts to prosecute journalists throughout our nation's history. Part III evaluates the strengths and weaknesses of various legal frameworks for finding that the Espionage Act, as applied to journalists, is unconstitutional. Part IV concludes that the best defense may be an offense, and proposes affirmative litigation challenging the Espionage Act as facially overbroad.

In other words, this Article argues that rather than wait to be prosecuted, journalists should seek declaratory judgment that the Espionage Act is unconstitutional. An affirmative strategy would no doubt be risky. But considering the quickly evolving meaning of the Espionage Act—and the weak defenses against it—it is clear that waiting entails its own risks. As a result, this Article argues the press should bring a pre-enforcement challenge to strike down the Espionage Act under the First Amendment.

I. LEGISLATIVE HISTORY OF THE ESPIONAGE ACT

After the publication of the Pentagon Papers in 1971, Edgar and Schmidt undertook a searching inquiry into the legislative history of the Espionage Act to analyze how the statute might apply to public disclosure of national defense secrets. The Espionage Act was introduced two days after the severance of diplomatic relations with Germany in 1917 and addressed concerns about enemy spying at the start of World War I.[53] It turns out when the law was written, Congress had the same debate we've been having for the century since—how to

[51] *See* McCraw & Gikow, *supra* note 14, at 476 (describing the "unspoken bargain of self-restraint" that has governed the relationship between the government and the press).
[52] *See generally* Edgar & Schmidt, *supra* note 15.
[53] *See id.* at 940.

balance national security interests with our constitutional commitment to freedom of the press.[54]

Ultimately, Edgar and Schmidt argue persuasively that "the clear message of the 1917 and 1950 legislative histories [is] that publication of defense information for the purpose of selling newspapers or engaging in public debate is not a criminal act."[55] Yet the statute itself seems to suggest just the opposite. Edgar and Schmidt are withering in their criticism of the Act's legislative drafting, calling it "inartful,"[56] "incomprehensible,"[57] "entirely opaque as to any particular narrow meaning,"[58] and "almost certainly unconstitutionally vague and overbroad."[59] But despite their apparent frustration, their work provides the most comprehensive exploration of what Congress meant to do.

A. Section 794

Although § 794 is unlikely to apply to journalists, the heated debate over this section—and what it eventually left out—is the heart of what Edgar and Schmidt call the "most important and extensive debate on freedom of speech and the press" in more than 100 years.[60] Today, § 794(b) punishes anyone who "collects, records, *publishes*, or communicates, or attempts to elicit . . . any other information relating to the public defense, which might be useful to the enemy."[61]

But in the first and many subsequent drafts, the very next subsection created a censorship regime that empowered the president to draft regulations criminalizing the publication of certain defense information.[62] The Senate initially passed a bill including this censorship provision but was "bombarded" with public outcry, including a petition signed by a million people.[63] After considerable debate, the provision was struck from the legislation by close votes in both the Senate and the House, only to be reinserted in the conference report.[64] On the eve of the final vote, President Woodrow Wilson sent a personal letter to

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[54] *See, e.g.*, *id.* at 963–64 (quoting 54 CONG. REC. 3140 (1917)).
[55] *Id.* at 1001–02.
[56] *Id.* at 940.
[57] *Id.* at 934.
[58] Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1000 (1973).
[59] *Id.*
[60] *Id.* at 941.
[61] 18 U.S.C. § 794(b) (2018) (emphasis added).
[62] *See* Edgar & Schmidt, *supra* note 15, at 947 (quoting S. 8148, 65th Cong., 1st Sess. § 2(c) (1917)).
[63] *Id.* at 1013.
[64] *See id.* at 956, 961–62.

Chairman Edwin Webb urging Congress to enact the censorship regime, which Webb read to the House.[65] Nevertheless, immediately after the president's letter was read into the record, Congress voted to strike the provision for a third time, and the Espionage Act was signed into law without it.[66]

Opponents of Wilson's censorship provision objected to it on three main grounds, which inform our understanding of their reading of the rest of the legislation. First, opponents attacked the censorship provision as a system of prior restraint on publication.[67] In the words of Senator Hiram Borah, "Does it not clearly provide in advance of publication that unless the censor—to wit, the President—consents, either direct or through his regulations, that upon certain subjects publication shall not be had[?]"[68] Even fourteen years before the Supreme Court first found that prior restraints violate the First Amendment,[69] and fifty-four years before the Court found President Nixon could not enjoin publication of the Pentagon Papers,[70] this argument was so persuasive that proponents of the bill effectively conceded it, arguing that the provision would not actually prevent publication but only impose punishment after the fact.[71]

Second, opponents argued that giving the president power to promulgate regulations about what could and could not be discussed would be a repudiation of the First Amendment. One of the most vocal opponents, Senator Albert Cummins, argued the legislation gave the president the power to "suppress every suggestion concerning the national defense in every newspaper of the land," making it "an absolute overthrow of a free press."[72] Senator Frank Brandegee added that the provision would give the President "authority to make any regulations he sees fit about what people say to each other . . . [and about] what information newspaper reporters shall obtain."[73] The legislative debate clearly reflects anxiety about this potential expansion of executive power.

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[65] *See id.* at 964 (quoting 55 CONG. REC. 3144).
[66] *See id.* at 964–65 (citing 55 CONG. REC. 3144–45).
[67] *Id.* at 950–51; *see also id.* at 959 (noting that the House debate paralleled the Senate debate).
[68] *Id.* at 951 n.50 (citing 55 CONG. REC. 779 (1917)).
[69] *See* Near v. Minnesota, 283 U.S. 697, 723 (1931).
[70] *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).
[71] *See* Edgar & Schmidt, *supra* note 15, at 951 n.51 (quoting 55 CONG. REC. 786 (1917) (statement of Sen. Walsh)).
[72] *Id.* at 947 n.43 (citing 54 CONG. REC. 3492 (1917)).
[73] *Id.* at 952 (quoting 55 CONG. REC. 784 (1917)).

Third, and most consequentially, legislators worried that the censorship regime contained no culpability standard.[74] While the subsection that became § 794(b) required that publishers have "intent" that "information relating to the public defense" "shall be communicated to the enemy," the censorship provision contained no such language.[75] Edgar and Schmidt infer from this objection that the legislators understood other sections of the Espionage Act to require malicious intent.[76] In fact, even proponents of the censorship provision said it was necessary because the rest of the legislation did *not* criminalize good-faith publication.[77] Senator Thomas J. Walsh argued,

> An energetic and enterprising newspaper reporter, with no purpose at all to aid the enemy, but simply with the very commendable purpose of extending the circulation of his paper, collects a whole mass of this information and publishes it. . . . We ought to go to the man who incautiously does it, without any such deliberate purpose, but whose acts really are as destructive to our interests as the acts of the man who went about to do it for the very purpose of having the information communicated to the enemy.[78]

The strongest opponent of the measure in the House, Representative George Graham, also argued anyone "with a guilty purpose can be caught and dealt with under the preceding sections of the bill," while anyone acting with a sense of "duty by way of criticism ought not to be prosecuted nor punished under any portion of the bill."[79] Ultimately, Edgar and Schmidt conclude that the main reason Congress rejected the censorship provision was concern that it would punish publishers who had no malicious intent.[80]

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[74] *See id.* at 951.
[75] *Id.* at 944 (quoting 18 U.S.C. § 794 (b) (1970)).
[76] *See id.* at 948.
[77] Admittedly, not all senators had this view. *See id.* at 954 n.59 (quoting 55 CONG. REC. 834 (1917)). Some senators also shifted their assessments throughout the course of the debate. *See id.* at 956–58. But viewing the record as a whole, Edgar and Schmidt concluded that Walsh's assessment likely represented the understanding of the Senate. *See id.* at 953–54.
[78] *Id.* at 953 (quoting 55 CONG. REC. 787 (1917)).
[79] *Id.* at 960 (quoting 55 CONG. REC. 1719 (1917)).
[80] *Id.* at 958; *see also id.* at 960–61.

B. Section 793

In light of the intense, thorough, and principled debate over § 794, the legislative history of § 793 is remarkably sparse. Edgar and Schmidt call § 793(d)–(e) "the statutes that pose the greatest threat to the acquisition and publication of defense information by reporters and newspapers."[81] In particular, § 793(e) punishes "unauthorized possession" of "information relating to the national defense" that "the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation," that the possessor "willfully communicates," "causes to be communicated," "attempts to communicate," or "willfully retains."[82] Section 793(d) is almost identical, except that it punishes those with lawful possession of the national defense information.[83] Subsection (c) punishes receipt and attempts to receive information.[84] Edgar and Schmidt conclude, "If these statutes mean what they seem to say and are constitutional, public speech in this country since World War II has been rife with criminality."[85]

But Congress paid surprisingly little attention to these subsections, from the moment they were first drafted as part of the Defense of Secrets Act of 1911, to when they were incorporated in the Espionage Act of 1917, to when they were amended in 1950.[86] Damningly, Edgar and Schmidt write, "The legislative history raises serious doubts as to whether Congress had even a vague understanding of [§ 793(d)–(e)] by the time the final votes were cast."[87] Congressional neglect of these provisions can be attributed in part to the intense debate over other, more concerning parts of the bill, particularly Wilson's censorship regime.[88] Considering the statute and legislative debate as a whole, Edgar and Schmidt conclude that these subsections were meant to cover only speech by government employees.[89] However, they admit that the record is ambiguous.[90]

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[81] *Id.* at 998.
[82] 18 U.S.C. § 793(e) (2018).
[83] *Id.* § 793(d).
[84] *Id.* § 793(a)–(c); *see also* Edgar & Schmidt, *supra* note 15, at 968, 1058.
[85] Edgar & Schmidt, *supra* note 15, at 1000.
[86] *See id.* at 1002 (analyzing the Defense of Secrets Act of 1911); *id.* at 1005 (analyzing the Espionage Act of 1917); *id.* at 1021 (analyzing the 1950 Act).
[87] *Id.* at 1006.
[88] *See id.*
[89] *See id.* at 1003 (analyzing the Defense of Secrets Act of 1911); *id.* at 1015 (analyzing the Espionage Act of 1917); *id.* at 1031 (analyzing the 1950 Act).
[90] *E.g.*, *id.* at 1017 (quoting 55 Cong. Rec. 1603 (1917)).

Congress did debate the meaning of "information relating to the national defense," with some legislators worrying the phrase was dangerously broad.[91] Senator Cummins, who also opposed Wilson's censorship regime, said of the term "national defense," "I have heard it applied . . . to agriculture . . . . I have heard it applied to schools. . . . I do not believe it will be asserted here that the words 'national defense' do extend to these things, but no one can tell to what they extend."[92] Supporters of the term countered it would be impossible to define "national defense" further without compromising sensitive information.[93] The term made it into the final Act, but no consensus on the definition ever emerged.[94]

Likewise, while Congress debated the culpability standard in § 793—"intent or reason to believe that [national defense information] is to be used to the injury of the United States or to the advantage of a foreign nation"—the Act provides no definition of these terms, and legislators never considered how the standard could apply to the press.[95] If anything, Congress appeared worried about the prosecution of ordinary citizens for discussing defense issues, and added the culpability standard in an attempt to protect them.[96] Viewing the debate as a whole, Edgar and Schmidt believed Congress meant the culpability standard to function as a good-faith defense.[97] As Representative Graham explained, "[T]he Government must prove affirmatively . . . that the person obtaining [national defense information] had a guilty purpose, to wit, to injure the United States."[98] But unfortunately, Edgar and Schmidt note, that is not the plain meaning of the text.[99]

When Congress amended the Espionage Act in 1950, it only exacerbated the uncertainty by breaking this section into the two subsections, (d) and (e), that are on the books today. Section 793(d) applies to those who have lawful possession of national defense information; section 793(e) applies to those who have unauthorized possession. The House Report justified separating the provisions because "[e]xisting law provide[d] no penalty for

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[91] *See, e.g.*, *id.* at 970 n.103 (quoting 46 CONG. REC. 2030 (1911)) (statements of Rep. Bennet and Rep. Hobson).
[92] *Id.* at 971 n.107 (quoting 54 CONG. REC. 3495 (1917)).
[93] *Id.* (quoting 54 Cong. Rec. 3485 (1917)).
[94] *See id.* at 972.
[95] *See id.* at 986, 991.
[96] *See id.* at 992–94 (quoting 54 CONG. REC. 3487–88 (1917)0 (statement of Sen. Cummins)).
[97] *See id.* at 996.
[98] *Id.* (quoting 55 CONG. REC. 1717–18).
[99] *Id.* at 990.

the unauthorized possession of such items unless a demand for them is made by a person entitled to receive them."[100] But by focusing only on the prohibition on *retention*, Congress inadvertently created a standalone provision that seems to punish the *communication* of national defense information by ordinary citizens.[101]

This time, one senator sounded the alarm on behalf of the press. Senator Harley Kilgore wrote to the sponsor of the bill to warn that the language "might make practically every newspaper in the United States and all the publishers, editors, and reporters into criminals without their doing any wrongful act."[102] The Legislative Reference Service responded that no publishers could be liable under § 793 "where they were acting in the normal course of their duties and without wrongful intent"[103]—an analysis Edgar and Schmidt call "remarkable and indubitably wrong."[104] Attorney General William Ramsey Clark also reassured Senator Kilgore that "nobody other than a spy, saboteur, or other person who would weaken the internal security of the Nation need have any fear of prosecution . . . ."[105] But what won over Senator Kilgore was the insertion of a provision that read:

> Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect.[106]

With that addition, the amendments were enacted.

Edgar and Schmidt conclude that while Congress never intended for § 793 to apply to journalists, legislators did not understand the legislation they passed, which makes it nearly impossible to read their actual intent into the statutory

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[100] *Id.* at 1024 (quoting H.R. Rep. No. 647, 81st Cong., 1st Sess. (1949)).
[101] *See id.* at 1022.
[102] *Id.* at 1025 (quoting 95 Cong. Rec. 9747 (1949)).
[103] *Id.* (quoting 95 Cong. Rec. 9748 (1949)).
[104] *Id.* at 1026.
[105] *Id.* (quoting 95 Cong. Rec. 9749 (1949)).
[106] *Id.* at 1027 (quoting Internal Security Act of 1950, 64 Stat. 987 (1950)).

language.[107] So Edgar and Schmidt propose a different solution: Rewrite § 793 of the Espionage Act entirely.[108]

C. Section 798

Section 798 poses the opposite problem for journalists: It is too well-drafted. Congress enacted this provision, sometimes called the Comint Act, contemporaneously with the 1950 amendments to the Espionage Act in response to public revelations that the United States had broken enemy codes.[109] The House Report argued § 798 was necessary because preexisting law required an intent to injure the United States[110]—an argument belied by the fact that the Justice Department had in fact attempted to prosecute the *Chicago Tribune* for revealing national defense information during World War II.[111] Regardless, § 798(a) now punishes anyone who "knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or *publishes*" "any classified information" about the "cryptographic system" or "communication intelligence activities" of "the United States or any foreign government[.]"[112]

Edgar and Schmidt call § 798 "a model of precise draftsmanship."[113] Unlike § 793, it has a clear culpability standard ("knowingly"), includes publishing, and more clearly demarcates what information is restricted.[114] However, § 798's clarity makes it all the more dangerous to journalists, as it clearly criminalizes reporting on matters of public concern.[115] For example, some commentators suggested the *New York Times* was

[107] *See id*. at 1031–58 (considering, and rejecting, several ways to construe the statute to avoid the overbreadth problem).
[108] *See id.* at 1076–87; *see also infra* note 117.
[109] *See id.* at 1064 n.371; SCHOENFELD, *supra* note 40, at 55–59. As both statutes are sections of Title 18 of the U.S. Code and were amended almost simultaneously, this Article refers to § 798 as a section of the Espionage Act.
[110] Edgar & Schmidt, *supra* note 15, at 1020.
[111] *See infra* Part II, Section D.1.
[112] 18 U.S.C. § 798(a) (2012) (emphasis added).
[113] Edgar & Schmidt, *supra* note 15, at 1065.
[114] *Id.*; *see also* 18 U.S.C. § 798(b) (defining the terms "classified information," "code," "cipher," "cryptographic system," "foreign government," "communication intelligence," and "unauthorized person"); *see generally* Mark R. Alson, *Someone Talked! The Necessity of Prohibitions Against Publishing Classified Financial Intelligence Information*, 42 VAL. U.L. REV. 1277, 1302–04 (2008) (comparing § 793 and § 798).
[115] *See* Andrew Croner, *A Snake in the Grass?: Section 798 of the Espionage Act and Its Constitutionality as Applied to the Press*, 77 GEO. WASH. L. REV. 766, 770 (2009).

liable under § 798 for reporting on NSA wiretapping of Americans.[116]

Many have suggested amending the Espionage Act to resolve lingering ambiguities about how it may apply to journalists.[117] While Senator Ron Wyden and Representative Ro Khanna recently introduced an Espionage Act reform bill,[118] there is still reason to be pessimistic about legislative changes in this Congress or the next.[119] Moreover, the last time Congress considered amending the Espionage Act, lawmakers drafted a bill that would have increased—rather than decreased—publishers' risk of prosecution.[120] For those reasons, this Article

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[116] *See* Gabriel Schoenfeld, *Has the "New York Times" Violated the Espionage Act?*, COMMENTARY (Mar. 2006), https://www.commentarymagazine.com/articles/has-the-new-york-times-violated-the-espionage-act/.

[117] *See* Edgar & Schmidt, *supra* note 15, at 1083–85 (suggesting the Espionage Act be amended to create different categories for bona fide spies, government employees, and private citizens including journalists); Josh Zeman, *"A Slender Reed Upon Which to Rely": Amending the Espionage Act to Protect Whistleblower*s, 61 WAYNE L. REV. 149, 165 (2015) (suggesting "amend[ing] the Espionage Act to specifically preclude prosecution for those who leak information to the media"); Lindsay B. Barnes, *The Changing Face of Espionage: Modern Times Call for Amending the Espionage Act*, 46 MCGEORGE L. REV. 511, 537–41 (2014) (suggesting various amendments); Candice M. Kines, *Aiding the Enemy or Promoting Democracy? Defining the Rights of Journalists and Whistleblowers to Disclose National Security Information*, 116 W. VA. L. REV. 735, 779 (2013) (suggesting amending the Espionage Act to require the government prove imminent harm); Robert D. Epstein, *Balancing National Security and Free-Speech Rights: Why Congress Should Revise the Espionage Act*, 15 COMMLAW CONSPECTUS 483, 511–15 (2007) (suggesting that Congress change the knowledge requirement in the Espionage Act from "reason to believe" to "knew," and narrow the Act to apply to any "enemy" of the United States, not just any "foreign nation"); Joe Bant, *United States v. Rosen: Pushing the Free Press onto a Slippery Slope?*, 55 KAN. L. REV. 1027 (2007) (suggesting that Congress more precisely define "information relating to the national security" and "injury of the United States," among other revisions); Emily Posner, *The War on Speech in the War on Terror: An Examination of the Espionage Act Applied to Modern First Amendment Doctrine*, 25 CARDOZO ARTS & ENT. L.J .717, 745 (2007) (calling for Congress to revise the Espionage Act).

[118] Espionage Act Reform Act of 2020, S. 3402, H.R. 6114, 116th Cong. (2020); *see also* Carrie DeCell & Meenakshi Krishnan, *The Espionage Act Reform Bill Addresses Key Press Concerns*, JUST SECURITY (March 18, 2020), https://www.justsecurity.org/69232/the-espionage-act-reform-bill-addresses-key-press-concerns/.

[119] Of note, arguably the biggest legislative priority for the press—a federal "media shield" law—has languished in Congress for over a decade. *E.g.*, Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007) (passed the House but died in the Senate).

[120] In response to WikiLeaks, Sen. Joseph Lieberman introduced legislation to expand § 798 of the Espionage Act to prohibit publishing the "identity of a classified source or informant of an element of the intelligence community of the United States." *See* Securing Human Intelligence and Enforcing Lawful Dissemination Act (SHIELD Act), H.R. 703, 112th Cong. (2011); *see also* Kevin Poulsen, *Lieberman Introduces Anti-WikiLeaks Legislation*, WIRED (Dec. 2, 2010), https://www.wired.com/2010/12/shield/ ("Leaking such information in the first place is already a crime, so the measure is aimed squarely at publishers.").

will turn instead to the lessons we can learn from the Espionage Act's litigation history.

II. LITIGATION HISTORY OF THE ESPIONAGE ACT

The litigation history of the Espionage Act is a story of mission creep. Through enforcement, §§ 793 and 798 have become something akin to what Congress feared § 794 would be: a classification system demarking what can and cannot be discussed, used to prosecute Americans with no intent to harm the United States. While no publisher has yet been convicted under these provisions, much of the legal scholarship understates how close we've come. Simply, if the legislative history suggests the Act should not be used against journalists, the litigation history lays the groundwork to do so anyway.

A. Espionage Act Prosecutions of War Protesters

In a way, the Espionage Act is the mother of the modern civil liberties movement and First Amendment jurisprudence itself. The American Civil Liberties Union was founded in direct response to the Espionage Act, and one of its first endeavors was defending dissidents prosecuted under the law.[121] Though those defendants were charged under a different section of the Espionage Act than the sections most likely to be applied to journalists today, their cases built the early foundation of modern First Amendment doctrine that could protect journalists from liability now.

In a series of cases heard in the winter of 1919, the Supreme Court repeatedly upheld an Espionage Act provision—still on the books—that punishes those who attempt to cause "insubordination, disloyalty, mutiny, or refusal of duty" during a time of war.[122] Justice Oliver Wendell Holmes Jr., writing for the majority, upheld the indictments of a Socialist who distributed leaflets about resisting the draft,[123] a newspaper publisher who criticized U.S. involvement in World War I,[124] and Eugene V. Debs for giving a speech advocating socialism.[125] The test, as Holmes articulated it, was whether the proscribed

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[121] *See* Sylvia A. Law, *Crystal Eastman: Organizer for Women's Rights, Peace, and Civil Liberties in the 1910s*, 28 VAL. U.L. REV. 1305, 1324 (1994) (calling the founding of the ACLU a "direct consequence[] of the war and the Espionage Act").
[122] *See* 18 U.S.C. § 2388 (2012).
[123] *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.).
[124] *See* Frohwerk v. United States, 249 U.S. 204, 209 (1919) (Holmes, J.).
[125] *See* Debs v. United States, 249 U.S. 211, 216 (1919) (Holmes, J.).

speech created a "clear and present danger."[126] Again and again, he found that it did. But later that same year, something remarkable happened: Holmes changed his mind.[127]

In *Abrams v. United States*, the majority upheld the espionage convictions of Russian immigrants for conspiring to publish anti-American pamphlets.[128] In a stirring dissent, Holmes instead articulated the principles that came to form the basis of First Amendment jurisprudence for the century to come: "that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]"[129] Holmes did not directly repudiate his majority opinions.[130] But, he said, "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."[131]

Holmes went on to join the dissent in decisions upholding the Espionage Act indictments of German language newspaper publishers and antiwar pamphleteers.[132] In his dissent in *Gitlow v. New York*, he even defended the First Amendment rights of an anarchist who advocated overthrow of the government, arguing, "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."[133] This was only six years after he compared know-your-rights pamphlets to "falsely shouting fire in a theatre."[134]

The rest of the Court took longer but eventually followed Holmes's change of heart. In 1969, the Court overturned the conviction of a Ku Klux Klan leader who organized a rally calling for "revengeance [*sic*]" on behalf of the "white, Caucasian race."[135] The Court said the State could only censor speech that was likely to incite "imminent lawless action"—a standard the

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[126] *Schenck*, 249 U.S. at 52.
[127] *See generally* THOMAS HEALY, THE GREAT DISSENT (2013) (explaining why Holmes changed his position and his effect on First Amendment jurisprudence).
[128] 250 U.S. 616, 624 (1919).
[129] *Id.* at 630 (Holmes, J., dissenting).
[130] *See id.* at 627.
[131] *Id.* at 628.
[132] *See* Schaefer v. United States, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting); Pierce v. United States, 252 U.S. 239, 272 (1920) (Brandeis, J., dissenting).
[133] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).
[134] Schenck v. United States, 249 U.S. 47, 52 (1919).
[135] Brandenburg v. Ohio, 395 U.S. 444, 446 (1969).

defendant's speech had not yet met.[136] Today, this high threshold for censorship remains the bedrock of First Amendment jurisprudence.

B. Espionage Act Prosecutions of Leakers

Meanwhile, the Espionage Act has remained "good law." But despite Attorney General Clark's assurances, the Justice Department has brought Espionage Act charges against people who were not spies, saboteurs, or others bent on weakening the internal security of the Nation.[137] Namely, the Justice Department has gone after "leakers," or government employees who disclose national security information to the press.

1. Prosecution of Daniel Ellsberg

The modern history of the Espionage Act begins with the Pentagon Papers. Starting in 1969, a Defense Department analyst named Daniel Ellsberg painstakingly photocopied a 47-volume top secret study of U.S. decision-making in Vietnam called the Pentagon Papers, then leaked the files to the *New York Times*, *Washington Post*, and over a dozen other newspapers.[138] When the *Times* published stories based on the documents, the Nixon administration sought an injunction restraining further publication but was denied in the landmark case, *New York Times Co. v. United States*.[139] But while the Justice Department was going after the journalists, it also went after their source.

After evading the FBI for two weeks, Ellsberg was indicted for violation of Espionage Act § 793(e).[140] Ellsberg's prosecution was the first leak prosecution of any kind in American history.[141] His lawyer, Leonard Boudin, believed Ellsberg had not broken any law, including and especially the Espionage Act.[142] But the government's legal theory in this case was never put to the test. During Ellsberg's trial, Watergate prosecutor Earl Silbert informed the judge that White House "plumbers" Gordon Liddy and Howard Hunt had burglarized

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[136] *Id.* at 447.
[137] *See* Edgar & Schmidt, *supra* note 15 and accompanying text.
[138] *See* DANIEL ELLSBERG, SECRETS, vii (2002); DEPARTMENT OF DEFENSE, UNITED STATES–VIETNAM RELATIONS, 1945–1967 (2011), https://www.archives.gov/research/pentagon-papers.
[139] 403 U.S. 713 (1971).
[140] *See* ELLSBERG, *supra* note 138, at 406–10; *In re* Ellsberg, 446 F.2d 954, 955 (1st Cir. 1971).
[141] *See* ELLSBERG, *supra* note 138, at 429–30.
[142] *Id.* at 431.

Ellsberg's psychiatrist's office looking for dirt on Ellsberg.[143] On May 11, 1973, Ellsberg's lawyers moved for dismissal with prejudice based on "the totality of governmental misconduct . . . ."[144] In a searing statement from the bench, Judge William Matthew Byrne Jr. granted the motion for dismissal, and Ellsberg escaped prosecution.[145]

Nevertheless, this botched trial had lasting implications for the future of the Espionage Act, in that it opened the door to prosecution of good-faith leakers. What's more, before the charges were dismissed, Judge Byrne refused to let Ellsberg make a good-faith defense—or even explain to the jury his motivation for copying the Pentagon Papers in the first place.[146]

2. Prosecution of Samuel Moring Morison

The Reagan administration brought the next leak prosecution, which created most of the substantive case law we have on the Espionage Act. Samuel Moring Morison was an analyst at the Naval Intelligence Support Center who, with the Navy's permission, also freelanced for an English publication called *Jane's Defence Weekly*.[147] In 1984, Morison was arrested for sending his editor photos of a Soviet aircraft carrier stamped "Secret," which were then published in *Jane's Defence Weekly* and the *Washington Post*.[148] While Morison denied being the source of the photographs, he was not particularly skilled in clandestine operations—his fingerprint was found on one of the photographs, his work typewriter ribbon revealed incriminating correspondence with *Jane's*, and he bragged on a tapped phone line that the government would never catch him.[149] A jury ultimately convicted him of violating § 793(d) and (e).[150] With over thirty media outlets and nonprofits as amicus, he appealed his conviction to the Fourth Circuit.

Morison made three main arguments challenging the Espionage Act. First, he argued that Congress did not intend for

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[143] *See id.* at 444.
[144] *See id.* at 454.
[145] *See id.* at 454–56.
[146] *See* Daniel Ellsberg, *Snowden Would Not Get a Fair Trial—and Kerry is Wrong*, GUARDIAN (May 30, 2014), https://www.theguardian.com/commentisfree/2014/may/30/daniel-ellsberg-snowden-fair-trial-kerry-espionage-act.
[147] *See* United States v. Morison, 844 F.2d 1057, 1060 (4th Cir. 1988).
[148] *See id.* at 1061.
[149] *See id.* at 1061–62.
[150] *See id.* at 1062–63.

§ 793(d) and (e) to reach his conduct.[151] The court disagreed,[152] and in so doing, explicitly rejected Edgar and Schmidt's reading of the legislative history.[153] Moreover, while the court acknowledged that Morison's conviction was the first of its kind, it said that "the rarity of prosecution under the statutes does not indicate that the statutes were not to be enforced as written."[154] Edgar and Schmidt viewed this development in case law as a repudiation of congressional intent, writing, "[F]or government employees at least, the *Morison* court creates a general crime of willful revelation of classified information, which Congress has consistently refused to enact when asked to do so by the Executive."[155]

Second, Morison argued that application of the Espionage Act to his case violated his First Amendment rights.[156] The Fourth Circuit likewise rejected this argument out of hand. The court pointed to a series of related cases to find that a government employee charged with leaking government secrets to the press "is not entitled to invoke the First Amendment as a shield to immunize his act of thievery."[157] The court's conclusion was absolute: "Actually we do not perceive any First Amendment rights to be implicated here."[158]

Third, the Fourth Circuit rejected Morison's contentions that the Espionage Act is unconstitutionally vague and overbroad. The court found the provisions were not unconstitutionally vague as applied to Morison, "an experienced intelligence officer" who "had been instructed on all the regulations concerning the security of secret national defense materials."[159] Furthermore, the Fourth Circuit found the Espionage Act statutes are "expressions of an important and vital governmental interest and have a direct relation to the interests

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[151] *Id.* at 1063.
[152] *Id.* at 1065.
[153] *See id.* at 1066 n.15. The court found it unnecessary to look to legislative history at all, finding it "difficult to conceive of any [statutory] language more definite and clear," but concluded the legislative history did not support Morison's position regardless. *See id.* at 1063–64.
[154] *Morison*, 844 F.2d at 1066-67.
[155] Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 399 (1986) (referring specifically to the district court's holding in *Morison*, not the Fourth Circuit's holding).
[156] *See Morison*, 844 F.2d at 1068.
[157] *Morison*, 844 F.2d at 1068–69 (citing Branzburg v. Hayes, 408 U.S. 665 (1972), then United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972), and then Snepp v. United States, 444 U.S. 507, 508 (1980)).
[158] *Id.* at 1068.
[159] *Id.* at 1073.

involved," which meant they could not be voided for overbreadth.[160]

In concurrences, Judges J. Harvie Wilkinson III and James Dickson Phillips Jr. were far more sympathetic to the First Amendment concerns.[161] Phillips in particular called the First Amendment issues "real and substantial," and believed they could only be addressed by refusing to treat classification as dispositive of whether information was damaging to the United States, "to avoid converting the Espionage Act into [a] Government Secrets Act."[162] Like many before and since, Phillips ultimately concluded that Congress should rewrite the Espionage Act altogether.[163]

Although Morison lost his appeal, President Bill Clinton pardoned him in 2001.[164] Senator Daniel Patrick Moynihan had previously written a letter on Morison's behalf, calling the prosecution "capricious at best."[165] He wrote, "What is remarkable is not the crime, but that [Morison] is the only one convicted of an activity which has become a routine aspect of government life: leaking information to the press in order to bring pressure to bear on a policy question."[166] Moynihan added a word of warning: "If ever there were to be widespread action taken, it would significantly hamper the ability of the press to function."[167]

3. Obama's Prosecutions

Soon after President Obama took office, it became apparent that his administration was going to take a far more aggressive approach to leak prosecutions than any previous administration.[168] The reason for this spike in prosecutions remains disputed. Some say the Obama administration inherited

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[160] *Id.* at 1075–76 (quoting Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1035 (1983)).
[161] *See id.* at 1081 (Wilkinson, J., concurring) ("The First Amendment interest in informed popular debate does not simply vanish at the invocation of the words 'national security.'").
[162] *Id.* at 1085–86 (Phillips, J., concurring).
[163] *Id.* at 1086.
[164] *See* Gabe Rottman, *Government Leaks to the Press Are Crucial to Our Democracy. So Why Are We Suddenly Punishing Them So Harshly?*, TIME (Nov. 1, 2018), http://time.com/5441770/government-leak-crackdown/.
[165] Letter from Sen. Daniel Patrick Moynihan, Chairman of the Commission on Protecting and Reducing Government Secrecy, to President Bill Clinton (Sept. 29, 1998), https://fas.org/sgp/news/2001/04/moynihan.html.
[166] *Id.*
[167] *Id.*
[168] *See, e.g.*, Scott Shane, *Obama Takes a Hard Line Against Leaks to Press*, N.Y. TIMES (June 11, 2010), https://www.nytimes.com/2010/06/12/us/politics/12leak.html.

a backlog of cases from Bush.[169] Others suggest that technological advances have made it easier to track leakers' communications.[170] Still others blame more malign motives on the part of the executive branch.[171] But regardless of the reason, the effect is clear: The Espionage Act has become a tool to be used against government officials who leak to the press.

Less than a year into the Obama presidency, the Justice Department charged FBI linguist Shamai Leibowitz under Section 798 for leaking classified information.[172] What exactly he leaked remains unclear.[173] Even the judge at Leibowitz's sentencing said, "I don't know what was divulged other than some documents, and how it compromised things, I have no idea."[174] Whatever the accusation, Leibowitz pleaded guilty and served twenty months in prison.[175]

Next, the Justice Department charged NSA employee Thomas Drake under § 793(e) for leaking information to the *Baltimore Sun* about mismanagement at the agency.[176] Drake

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[169] *See, e.g.*, Scott Shane & Charlie Savage, *Administration Took Accidental Path to Setting Record for Leak Cases*, N.Y. TIMES (June 20, 2012), https://www.nytimes.com/2012/06/20/us/politics/accidental-path-to-record-leak-cases-under-obama.html.

[170] *See, e.g.*, Adam Liptak, *A High-Tech War on Leaks*, N.Y. TIMES (Feb. 11, 2012), https://www.nytimes.com/2012/02/12/sunday-review/a-high-tech-war-on-leaks.html; *see also* David Cole, *Assessing the Leakers: Criminals or Heroes?*, 8 J. NAT'L SECURITY L. & POL'Y 107, 117 (2015) ("The increased prosecutions under Obama more likely reflect the fact that it is much easier to pinpoint the source of a leak than that President Obama cares little for press freedom.").

[171] *See, e.g.*, James Risen, *The Biggest Secret: My Life as a New York Times Reporter in the Shadow of the War on Terror*, INTERCEPT (Apr. 2, 2018), https://theintercept.com/2018/01/03/my-life-as-a-new-york-times-reporter-in-the-shadow-of-the-war-on-terror/.

[172] *See* Indictment, United States v. Leibowitz, Docket No. 8:09-cr-00632 (D. Md. Dec. 4, 2009); Press Release, Former FBI Contract Linguist Pleads Guilty to Leaking Classified Information to Blogger, U.S. Department of Justice (Dec. 17, 2009), https://www.justice.gov/opa/pr/former-fbi-contract-linguist-pleads-guilty-leaking-classified-information-blogger.

[173] The *New York Times* reported that Leibowitz disclosed information about the monitoring of the Israeli embassy in D.C., but Leibowitz later denied that report on his personal blog. Shamai Leibowitz, *Edward Snowden and the Crackdown that Backfired*, LEIBOWITZ BLOG (June 24, 2013), https://web.archive.org/web/20160307125448/https://www.shamaileibowitz.org/2013/06/edward-snowden-man-of-conscience.html.

[174] Transcript of Sentencing at 6–7, United States v. Leibowitz, Docket No. 8:09-cr-00632 (D. Md. May 24, 2010).

[175] *See* Maria Glod, *Former FBI Employee Sentenced for Leaking Classified Papers*, WASH. POST (May 25, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/05/24/AR2010052403795.html.

[176] *See* Indictment, United States v. Drake, Docket No. 1:10-cr-00181 (D. Md. Apr. 14, 2010); Siobhan Gorman, *Management Shortcomings Seen at NSA*, BALT. SUN (May 6, 2007), https://www.baltimoresun.com/news/nation-world/bal-nsa050607-story.html (allegedly based on material from Drake).

faced up to thirty-five years in prison.[177] Drake said about his case, "I did not tell secrets. I am facing prison for having raised an alarm, period. I went to a reporter with a few key things: fraud, waste, and abuse, and the fact that there were legal alternatives to the Bush Administration's 'dark side.'"[178] In a motion to dismiss, Drake argued § 793(e) was unconstitutionally vague and overbroad.[179] However, the District Court of Maryland found those arguments failed under *Morison*.[180] Ultimately, the government dropped the espionage charges and let Drake plead guilty to a misdemeanor—reportedly because Drake planned to show that the information he leaked was wrongfully classified.[181]

Third, the Justice Department charged State Department contractor Stephen Kim with violating § 793(d) for telling Fox News reporter James Rosen that North Korea intended to conduct another nuclear test.[182] It was later revealed that the Justice Department had named the reporter an unindicted co-conspirator in a search warrant related to the case,[183] a revelation that predictably caused an outrage among the Washington press corps.[184] Former Attorney General Eric Holder has since said the

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[177] *See* Jean Marbella, *Espionage Charges Dropped Against Ex-NSA Manager*, BALT. SUN (June 9, 2011), https://www.baltimoresun.com/news/maryland/bs-md-nsa-leak-case-20110609-story.html.

[178] Jane Mayer, *The Secret Sharer*, NEW YORKER (May 23, 2011), https://www.newyorker.com/magazine/2011/05/23/the-secret-sharer#ixzz1MXdUFeE9.

[179] *See* United States v. Drake, 818 F. Supp. 2d 909, 915–22 (D. Md. 2011).

[180] *See id.*

[181] *See* Marbella, *supra* note 177; Ellen Nakashima, *Ex-Federal Official Calls U.S. Classification System 'Dysfunctional,'* WASH. POST (July 21, 2012), https://www.washingtonpost.com/politics/ex-federal-official-calls-us-classification-system-dysfunctional/2012/07/21/gJQAfJ1o0W_story.html.

[182] *See* Indictment, United States v. Kim, Docket No. 1:10-cr-00225 (D.D.C. Aug 19, 2010); Peter Maass, *Destroyed by the Espionage Act*, INTERCEPT (Feb. 18, 2015), https://theintercept.com/2015/02/18/destroyed-by-the-espionage-act/; *see also* Fox News Staff, *North Korea Intends to Match U.N. Resolution With New Nuclear Test*, FOX NEWS (June 11, 2009), https://www.foxnews.com/politics/north-korea-intends-to-match-u-n-resolution-with-new-nuclear-test (allegedly incorporating information from Kim).

[183] *See* Application for Search Warrant at ¶ 5, In the Matter of the Search of E-mail Account [redacted]@gmail.com on Computer Servers Operated by Google, Inc., 1600 Amphitheatre Parkway, Mountain View, California, No. 1:10-291-mj-00291-AK (D.D.C. May 28, 2010), http://www.documentcloud.org/documents/702199-d-o-j-versus-james-rosen.html.

[184] *See* Risen, *supra* note 45; Fred Kaplan, *Obama's Other Secret War*, SLATE (May 20, 2013), http://www.slate.com/articles/news_and_politics/war_stories/2013/05/james_rosen_named_a_co_conspirator_why_is_barack_obama_s_justice_department.html; David Folkenflik, *Fox News Reporter James Rosen Caught Up in Federal Probe*, NPR (May 21, 2013), https://www.npr.org/2013/05/21/185688357/fox-news-reporter-james-rosen-caught-up-in-federal-probe.

incident was the one decision he wished he could do over again.[185] The reporter was never charged, but the prosecution against his source proceeded. Like Drake's challenge to § 793(e), Kim challenged § 793(d) as unconstitutionally vague and overbroad.[186] The District of D.C. rejected these arguments.[187] Kim eventually pleaded guilty and was sentenced to thirteen months in prison.[188]

Fourth, the Justice Department charged former CIA employee Jeffrey Sterling with violating § 793(d)–(e) by revealing information to *New York Times* reporter James Risen about a secret operation to disrupt Iran's nuclear programs.[189] To make its case, the government tried to force Risen to testify about his conversations with Sterling.[190] Risen fought the subpoena, claiming a reporters' privilege,[191] but the Fourth Circuit found no such privilege existed.[192] The Justice Department ultimately chose not to call Risen to testify,[193] and a jury convicted Sterling

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[185] Matt Wilstein, *Holder Admits He Regrets Labeling Fox's Rosen a 'Co-Conspirator'*, MEDIAITE (Oct. 29, 2014), https://www.mediaite.com/tv/holder-admits-he-regrets-labeling-foxs-rosen-a-co-conspirator/.

[186] *See* Motion to Dismiss Count One of The Indictment on Due Process and First Amendment Grounds, United States v. Kim, Docket No. 1:10-cr-00225 (D.D.C. Jan. 31, 2011).

[187] *See* United States v. Kim, 808 F. Supp. 2d 44, 50–57 (D.D.C. 2011).

[188] *See* Ann E. Marimow, *Ex-State Department Adviser Stephen J. Kim Sentenced to 13 Months in Leak Case*, WASH. POST (Apr. 2, 2014), https://www.washingtonpost.com/world/national-security/ex-state-dept-adviser-stephen-j-kim-sentenced-to-13-months-in-leak-case/2014/04/02/f877be54-b9dd-11e3-96ae-f2c36d2b1245_story.html.

[189] *See* Indictment, United States v. Sterling, Docket No. 1:10-cr-00485 (E.D. Va. Dec. 22, 2010); Matt Apuzzo, *C.I.A. Officer Is Found Guilty in Leak Tied to Times Reporter*, N.Y. TIMES (Jan. 26, 2015), https://www.nytimes.com/2015/01/27/us/politics/cia-officer-in-leak-case-jeffrey-sterling-is-convicted-of-espionage.html; *see also* JAMES RISEN, STATE OF WAR (2006) (detailing the covert operation at issue).

[190] *See* Government's Motion in Limine to Admit the Testimony of James Risen at 5, United States v. Sterling, No. 1:10-cr-00485 (E.D. Va. May 23, 2011). Sterling argued that he was not Risen's source on the story, and that he had only talked to Risen about his employment discrimination lawsuit against the CIA. *See* Apuzzo, *supra* note 189; *see also* Sterling v. Tenet, 416 F.3d 338, 348 (4th Cir. 2005) (affirming dismissal of Sterling's discrimination claim); James Risen, *Fired by C.I.A., He Says Agency Practiced Bias*, N.Y. TIMES (Mar. 2, 2002), https://www.nytimes.com/2002/03/02/us/fired-by-cia-he-says-agency-practiced-bias.html.

[191] *See* Brief in Support of Risen Motion to Quash at 19–32, United States v. Sterling, Docket No. 1:10-cr-00485 (E.D. Va. June 21, 2011). This redacted public filing also references two other subpoenas Risen received. *Id*. at 1.

[192] *See* U.S. v. Sterling, 724 F.3d 482, 492 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014).

[193] *See* Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, N.Y. TIMES (Jan. 12, 2015), https://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html.

anyway based on the circumstantial evidence.[194] Sterling served more than two years of his 42-month sentence.[195]

The fifth prosecution was the Army's court martial case against intelligence analyst Pfc. Chelsea Manning for leaking files to WikiLeaks.[196] Manning was the source of the video depicting a 2007 Baghdad airstrike that killed Reuters reporters,[197] the Iraq and Afghanistan "war logs" and "Guantanamo files" also published by the *New York Times*,[198] over 250,000 classified U.S. diplomatic cables,[199] and other classified documents.[200] Among other counts, Manning was charged with violating § 793(e) of the Espionage Act.[201] In 2013, she pleaded guilty to ten of the twenty-two charges, telling the court, "I believed that if the general public, especially the American public, had access to the information . . . this could spark a domestic debate on the role of the military and our foreign policy in general."[202] The military prosecuted Manning for the remaining charges. While she was acquitted of the most serious charge—"aiding the enemy"—she was convicted of six counts of espionage.[203] She was sentenced to thirty-five years in prison, but her sentence was commuted.[204]

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[194] *See* Verdict Form, United States v. Sterling, Docket No. 1:10-cr-00485 (E.D. Va. Jan. 26, 2015); *see also* United States v. Sterling, 860 F.3d 233, 241 (4th Cir. 2017).
[195] *See* Peter Maass, *Jeffrey Sterling, Convicted of Leaking About Botched CIA Program, Has Been Released From Prison*, INTERCEPT (Jan. 19, 2018, 3:07 PM), https://theintercept.com/2018/01/19/jeffrey-sterling-cia-leaking-prison/.
[196] *See* Charlie Savage, *Soldier Faces 22 New WikiLeaks Charges*, N.Y. TIMES (Mar. 2, 2011), https://www.nytimes.com/2011/03/03/us/03manning.html.
[197] *Collateral Murder*, WIKILEAKS (Apr. 5, 2010, 10:44 EST), https://collateralmurder.WikiLeaks.org/.
[198] *The War Logs*, N.Y. TIMES (last accessed Nov. 19, 2018), https://archive.nytimes.com/www.nytimes.com/interactive/world/war-logs.html; *The Guantánamo Files*, N.Y. TIMES (last accessed Nov. 19, 2018), https://archive.nytimes.com/www.nytimes.com/guantanamo-files/?module=inline; *see also* Charlie Savage, *Soldier Admits Providing Files to WikiLeaks*, N.Y. TIMES (Feb. 28, 2013), https://www.nytimes.com/2013/03/01/us/bradley-manning-admits-giving-trove-of-military-data-to-WikiLeaks.html.
[199] *Public Library of US Diplomacy*, WIKILEAKS, https://WikiLeaks.org/plusd/?qproject[]=cg&q=#result (last updated Nov. 28, 2016).
[200] *See* Kim Zetter and Kevin Poulsen, *U.S. Intelligence Analyst Arrested in WikiLeaks Video Probe*, WIRED (June 6, 2010, 09:31 PM), https://www.wired.com/2010/06/leak/.
[201] *See* Charge Sheet, DD Form 458 (July 5, 2010), https://fas.org/irp/news/2010/07/manning070510.pdf.
[202] *Bradley Manning Pleads Guilty to Some WikiLeaks Charges*, BBC (Feb. 28, 2013), https://www.bbc.com/news/world-us-canada-21610811.
[203] *See* Charlie Savage, *Manning Is Acquitted of Aiding the Enemy*, N.Y. TIMES (July 30, 2013), https://www.nytimes.com/2013/07/31/us/bradley-manning-verdict.html.
[204] *See* Charlie Savage, *Chelsea Manning to Be Released Early as Obama Commutes Sentence*, N.Y. TIMES (Jan. 17, 2017),

Encouraged by the Obama administration's interest in prosecuting leakers, the CIA asked the Justice Department to re-open an old case.[205] In 2007, former CIA interrogator John Kiriakou had spoken to ABC News about the waterboarding of Abu Zubaydah.[206] Kiriakou told ABC that while he had previously thought waterboarding was necessary, he had changed his mind.[207] He added, "As a country we have to decide if this is something that we wanna do as a matter of policy. I'm not saying now that we should. But at the very least we should be talking about it. It shouldn't be secret."[208] The CIA disagreed. Five years later, Kiriakou was charged with violating § 793(d) of the Espionage Act for disclosing classified information, including the name of a covert officer, to two reporters.[209] He pleaded guilty to one charge of violating the Intelligence Identities Protection Act and served twenty-three months in prison.[210]

After this series of prosecutions, the next leaker understood the risks. In 2013, former NSA contractor Edward Snowden leaked some 10,000 documents detailing government surveillance to the *Guardian*, the *Washington Post*, ProPublica, and other news outlets.[211] His disclosures showed that the NSA

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https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html.

[205] *See* John Kiriakou, *I Went to Prison for Disclosing the CIA's Torture. Gina Haspel Helped Cover It Up*, WASH. POST (Mar. 16, 2018), https://www.washingtonpost.com/outlook/i-went-to-prison-for-disclosing-the-cias-torture-gina-haspel-helped-cover-it-up/2018/03/15/9507884e-27f8-11e8-874b-d517e912f125_story.html.

[206] *See* Interview with John Kiriakou, CIA–Abu Zubaydah, ABC News (Dec. 10, 2007), https://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf; Joby Warrick & Dan Eggen, *Waterboarding Recounted*, WASH. POST (Dec. 11, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/12/10/AR2007121002091.html. In fact, Kiriakou had vastly understated the extent—and overstated the effectiveness—of the CIA's waterboarding techniques. *See also* Brian Stelter, *How '07 ABC Interview Tilted a Torture Debate*, N.Y. TIMES (Apr. 27, 2009), https://www.nytimes.com/2009/04/28/business/media/28abc.html.

[207] Interview with John Kiriakou, *supra* note 206, at 28–29.

[208] *Id.* at 31.

[209] *See* Complaint, United States v. Kiriakou, Docket No. 1:12MJ33 (E.D. Va. Jan. 23, 2012), https://www.justice.gov/archive/opa/documents/kiriakou-complaint.pdf; *see also* Charlie Savage, *Ex-C.I.A. Officer Charged in Information Leak*, N.Y. TIMES (Jan. 23, 2012), https://www.nytimes.com/2012/01/24/us/ex-cia-officer-john-kiriakou-accused-in-leak.html.

[210] *See* Michael S. Schmidt, *Ex-C.I.A. Officer Sentenced to 30 Months in Leak*, N.Y. TIMES (Jan. 25, 2013), https://www.nytimes.com/2013/01/26/us/ex-officer-for-cia-is-sentenced-in-leak-case.html; Kiriakou, *supra* note 205.

[211] *See*, *'Explosive' NSA Spying Reports Are Imminent*, SPIEGEL (July 19, 2013, 12:17 PM), http://www.spiegel.de/international/world/journalist-says-explosive-reports-coming-from-snowden-data-a-912034.html.

was collecting American phone records in bulk,[212] collecting communications from internet companies,[213] and had tried to undermine encryption standards adopted by software developers,[214] among other revelations. For these disclosures, Snowden was charged under both §§ 793 and 798 of the Espionage Act.[215] By the time of his indictment, he had already fled the country.[216] But his revelations eventually led to legislative changes and increased transparency in the Foreign Intelligence Surveillance Court.[217] Holder—the head of the Justice Department at the time of Snowden's indictment—later said, "We can certainly argue about the way in which Snowden did what he did, but I think that he actually performed a public service by raising the debate that we engaged in and by the changes that we made."[218] As of this writing, Snowden is still living in Russia to avoid prosecution in the United States.[219]

Despite all the journalism Snowden's disclosures generated, it was the Obama administration's eighth and final prosecution that underscored the risks that the Espionage Act creates for reporters. As part of an investigation into the source of a story about a bomb threat,[220] the Justice Department seized two months of phone records from more than 20 phone lines

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[212] *See* Greenwald, *supra* note 5.
[213] *See* Gellman & Poitras, *supra* note 6.
[214] *See* Jeff Larson, *Revealed: The NSA's Secret Campaign to Crack, Undermine Internet Security*, PROPUBLICA (Sept. 5, 2013, 3:08 PM EDT), https://www.propublica.org/article/the-nsas-secret-campaign-to-crack-undermine-internet-encryption.
[215] *See* Complaint, United States v. Snowden, No. 1:13-CR-265 (CMH) (E.D. Va. June 14, 2013), https://apps.washingtonpost.com/g/documents/world/us-vs-edward-j-snowden-criminal-complaint/496/.
[216] *See* Peter Finn & Sari Horwitz, *U.S. Charges Snowden with Espionage*, WASH. POST (June 21, 2013), https://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html.
[217] *See* USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., 18 U.S.C. and 50 U.S.C.); *see generally* Jay Rosen, *The Snowden Effect: Definition and Examples*, PRESSTHINK (July 5, 2013, 10:33 AM) http://pressthink.org/2013/07/the-snowden-effect-definition-and-examples/ (cataloguing the public policy consequences of Snowden's disclosures).
[218] *See* Matthew Jaffe, *Eric Holder Says Edward Snowden Performed a 'Public Service'*, CNN, https://www.cnn.com/2016/05/30/politics/axe-files-axelrod-eric-holder/index.html (last updated May 31, 2016, 5:41 PM ET).
[219] *See* Roland Oliphant, *Russia Extends Edward Snowden's Asylum 'Until 2020'*, TELEGRAPH (Jan. 18, 2017, 1:03 PM), https://www.telegraph.co.uk/news/2017/01/18/russia-extends-edward-snowdens-asylum-2020/.
[220] *See CIA 'Foiled Al-Qaida Bomb Plot' Around Anniversary of Bin Laden Death*, GUARDIAN (May 7, 2012, 16:30 EDT), https://www.theguardian.com/world/2012/may/07/cia-al-qaida-bomb-plot.

belonging to journalists at the Associated Press.[221] This outraged press freedom groups but also led the Justice Department to identify Donald Sachtleben as the AP's source.[222] Sachtleben pleaded guilty to leaking classified information in violation of § 793(d)-(e) and is currently incarcerated.[223]

4. Trump's Prosecutions

While the Obama administration brought eight cases in as many years, the Trump administration has picked up the pace. In March 2017, FBI agent Terry Albury was charged with espionage for leaking information to the *Intercept* about what he saw as discriminatory abuses of power in an FBI counterterrorism field office.[224] He pleaded guilty, and at his sentencing, he said, through tears, "I truly wanted to make a difference and never intended to put anyone in danger."[225] He was sentenced to four years in prison.[226]

Later, intelligence contractor Reality Winner was charged under § 793(e) for leaking to the *Intercept*.[227] Specifically, she was charged with disclosing a top-secret government report

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[221] *See* Charlie Savage & Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES (May 13, 2013), https://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html.

[222] *See* Statement of Offense, United States v. Sachtleben, Docket No. 1:13-cr-00200 (S.D. Ind. Sept. 23, 2013), https://www.documentcloud.org/documents/798936-sachtleben-donald-statement-of-offense-national.html; Charlie Savage, *Former F.B.I. Agent to Plead Guilty in Press Leak*, N.Y. TIMES (Sept. 23, 2013), https://www.nytimes.com/2013/09/24/us/fbi-ex-agent-pleads-guilty-in-leak-to-ap.html.

[223] *See* Savage, *supra* note 222. Sachtleben simultaneously pleaded guilty to child pornography charges. *See* Press Release, Former Federal Contractor Petitions to Plead Guilty to Unlawfullly (sic) Disclosing National Defense Information and Distributing Child Pornography, U.S. Department of Justice (Sept. 23, 2013), https://www.justice.gov/opa/pr/former-federal-contractor-petitions-plead-guilty-unlawfullly-disclosing-national-defense.

[224] *See* Felony Information, United States v. Albury, Docket No. 0:18-cr-00067 (D. Minn. Mar. 27, 2018); Savage & Smith, *supra* note 33; *see also* Cora Currier, *Hidden Loopholes Allow FBI Agents to Infiltrate Political and Religious Groups*, INTERCEPT (Jan. 31, 2017), https://theintercept.com/2017/01/31/hidden-loopholes-allow-fbi-agents-to-infiltrate-political-and-religious-groups/ (allegedly based on material from Albury).

[225] Savage & Smith, *supra* note 33.

[226] *Id.*

[227] *See* Complaint, United States v. Winner, Docket No. 1:17-cr-00034 (S.D. Ga. June 7, 2017).

on Russian hacking.[228] She also pleaded guilty and was sentenced to five years and three months in prison.[229]

In June 2018, Joshua Adam Schulte was charged with violating subsections 793(b), (d), and (e) for allegedly leaking a trove of documents detailing CIA hacking tools to WikiLeaks.[230] He was held without bail while his case was pending.[231] In March 2020, jurors deadlocked over the Espionage Act charges, but the government may still retry the case.[232]

In May 2019, Daniel Everette Hale became the third *Intercept* source charged with espionage, for leaking documents about a classified drone program.[233] With twenty-seven ongoing leak investigations as of November 2017, there are likely more prosecutions to come.[234]

C. The Espionage Act Prosecution of Private Citizens

The press might find comfort in the argument that a different legal theory should apply to these leakers. As Judge Colleen Kollar-Kotelly has said, government employees have a duty to safeguard state secrets pursuant to their employment and cannot "use the First Amendment to cloak [their] breach of that

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[228] *Id.*; Matthew Cole, Richard Esposito, Sam Biddle & Ryan Grim, *Top-Secret NSA Report Details Russian Hacking Effort Days Before 2016 Election*, INTERCEPT (June 5, 2017), https://theintercept.com/2017/06/05/top-secret-nsa-report-details-russian-hacking-effort-days-before-2016-election/ (allegedly based on material from Winner).

[229] *See* Dave Philipps, *Reality Winner, Former N.S.A. Translator, Gets More Than 5 Years in Leak of Russian Hacking Report*, N.Y. TIMES (Aug. 23, 2018), https://www.nytimes.com/2018/08/23/us/reality-winner-nsa-sentence.html.

[230] *See* Superseding Indictment, United States v. Schulte, Docket No. 1:17-cr-00548 (S.D.N.Y. June 18, 2018); Adam Goldman, *New Charges in Huge C.I.A. Breach Known as Vault 7*, N.Y. TIMES (June 18, 2018), https://www.nytimes.com/2018/06/18/us/politics/charges-cia-breach-vault-7.html. Schulte has also been indicted on child pornography charges. Press Release, Joshua Adam Schulte Charged with the Unauthorized Disclosure of Classified Information and Other Offenses Relating to the Theft of Classified Material from the Central Intelligence Agency, U.S. Department of Justice (June 18, 2018), https://www.justice.gov/opa/pr/joshua-adam-schulte-charged-unauthorized-disclosure-classified-information-and-other-offenses.

[231] *See* District Court Bail Appeal Order, United States v. Schulte, Docket No. 18-00145 (2d Cir. Jan. 17, 2018).

[232] *See* Nicole Hong, *Trial of Programmer Accused in C.I.A. Leak Ends in Hung Jury*, N.Y. TIMES (Mar. 9, 2020), https://www.nytimes.com/2020/03/09/nyregion/cia-wikileaks-joshua-schulte-verdict.html.

[233] *See* Press Release, Former Intelligence Analyst Charged with Disclosing Classified Information, U.S. Department of Justice (May 9, 2019), https://www.justice.gov/usao-edva/pr/former-intelligence-analyst-charged-disclosing-classified-information; Joel Simon, *The Real Threat to Press Freedom Is Prosecuting Leakers*, COLUM. JOURNALISM REV. (May 13, 2019), https://www.cjr.org/watchdog/daniel-hale-intercept-leakers.php.

[234] *See supra* note 29 and accompanying text.

duty."[235] But *United States v. Rosen* sent a chill through the media bar because it involved the prosecution of private citizens who had no such obligation.[236]

For years, the FBI surveilled lobbyists for the American Israel Public Affairs Committee (AIPAC), including Steven Rosen and Keith Weissman, on the erroneous suspicion that AIPAC had an espionage relationship with Israel.[237] In February 2003, the FBI observed Rosen and Weissman meeting with Lawrence Franklin, a Defense Department employee who disclosed classified information about Iran.[238] Rosen and Weissman shared the information they obtained from him with Israeli embassy officials, a fellow at a think tank, and a journalist.[239]

In June 2004, the FBI raided Franklin's house and found illegally retained classified documents, then convinced Franklin to cooperate in an investigation of Rosen and Weissman.[240] Wearing a wire, Franklin went to Weissman with a fake "classified" document reportedly alleging a lethal threat to Israeli operatives in Kurdistan.[241] Concerned about Israelis in danger, Weissman and Rosen passed the fake information to an Israeli diplomat.[242] They were charged with a conspiracy to violate § 793(e) and aid and abet Franklin in violating § 793(d).[243]

It was, in the words of presiding judge T.S. Ellis, III, "a very odd case."[244] It was especially troubling to media lawyers, since Rosen and Weissman had done little more than what members of the Washington press corps do every day—meet

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[235] United States v. Kim, 808 F. Supp. 2d 44, 57 (D.D.C. 2011).

[236] *See* United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006); *see generally* Peter Shapiro, *"Prologue to a Farce?" A Historical Perspective on the* AIPAC *Case and the Applicability of the Espionage Act to Journalists*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 237 (2007) (analyzing how *Rosen* could be applied to newsgathering); Bant, *supra* note 117 (same).

[237] *See Rosen*, 445 F. Supp. 2d at 602; SCHOENFELD, *supra* note 40, at 240–43. Schoenfeld attributes this suspicion to well-documented anti-Semitism within the FBI at the time. *See generally* Shapiro, *supra* note 236; Bant, *supra* note 117.

[238] *Rosen*, 445 F. Supp. 2d at 608–09.

[239] *See id.* at 609.

[240] *See* SCHOENFELD, *supra* note 40, at 242–43.

[241] *See id.*; *see also* Nathan Guttman, *Once Labeled An AIPAC Spy, Larry Franklin Tells His Story*, FORWARD (July 1, 2009), https://forward.com/news/108778/once-labeled-an-aipac-spy-larry-franklin-tells-his/.

[242] *See id.*

[243] *See Rosen*, 445 F. Supp. 2d at 610; *see also* Superseding Indictment, *United States v. Lawrence Anthony Franklin, Steven J. Rosen, Keith Weissman*, 1:05 Cr 225 (E.D. Va. Aug. 4, 2005), https://fas.org/irp/ops/ci/franklin0805.pdf. Franklin pleaded guilty to the charges against him. *See* Sentencing Hearing at 5–6, *United States v. Lawrence Anthony Franklin*, 1:05 Cr 225 (E.D. Va. Jan. 20, 2006), https://fas.org/sgp/jud/franklin012006.pdf.

[244] *See* Sentencing Hearing, *supra* note 243, at 7.

with sources, share information and news tips, and review government documents. Lest the naysayers be written off as overly paranoid, the *Washington Post* reported, "A lawyer familiar with the AIPAC case said administration officials 'want this case as a precedent so they can have it in their arsenal' and added: 'This as a weapon that can be turned against the media.'"[245]

Rosen and Weissman challenged the constitutionality of the Espionage Act on several grounds. But Judge Ellis found that the statute's intent requirement cured any constitutional deficiency.[246] The Espionage Act prohibits "willfully" communicating national defense information, which Judge Ellis interpreted to mean the defendants had to know "the information was closely held by the United States . . . [the] disclosure of this information might potentially harm the United States," and "the persons to whom the defendants communicated the information were not entitled under the classification regulations to receive the information."[247] Additionally, Judge Ellis interpreted "willfully" to require "a bad purpose either to disobey or to disregard the law."[248] The court noted that this intent standard would protect those "truly unaware that the information they are alleged to have received and disclosed was classified" or "truly ignorant of the classification scheme."[249]

Furthermore, the court found that the statute created an additional hurdle to prosecuting "disclosures of *information*" as opposed to disclosures of "classified *documents*."[250] Judge Ellis found for "intangible information," the statute requires defendants have "reason to believe [the information] could be used to the injury of the United States or to the advantage of any foreign nation"—which Judge Ellis interpreted to mean "bad faith purpose to either harm the United States or to aid a foreign government."[251]

While acknowledging that Rosen and Weissmann's conduct was "at the core of the First Amendment's guarantees," the court found that the government has an overriding interest in

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[245] Walter Pincus, *Senator May Seek Tougher Law on Leaks*, WASH. POST (Feb. 17, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/02/16/AR2006021602186.html.
[246] *Rosen,* 445 F. Supp. 2d at 618, 627.
[247] *Id.* at 625.
[248] *Id.* (quoting United States v. Morison, 844 F.2d 1057, 1071 (4th Cir. 1988)).
[249] *Id.*
[250] *Id.* at 626.
[251] *Id.*; *see also* 18 U.S.C. 793(d)-(e).

national security.[252] However, the court found that meant the government has the added burden of proving "national security is genuinely at risk."[253] As Professor Mary-Rose Papandrea summarizes, "[T]he disclosure of the information must be *objectively* harmful to the United States, and the defendant must be *subjectively* intending to cause that harm" (emphasis added).[254] So long as those limitations are met, Judge Ellis found that prosecution under the Espionage Act does not violate a defendant's First Amendment rights.[255] The defendants' overbreadth challenge failed for the same reason.[256]

After almost four years, the government gave up its multi-million dollar prosecution against Rosen and Weissmann, deciding Judge Ellis had articulated a standard that would be too difficult to meet at trial.[257] But the Justice Department would have had a particular challenge proving that national security was "genuinely at risk" in *Rosen*—because key "classified" information at issue was fake.[258] In a later essay, Judge Ellis addressed whether a journalist could be convicted of espionage for legitimate newsgathering under the standard he articulated in *Rosen*. He concluded, without lament, "the answer to this question is clearly, yes."[259]

D. Attempted Espionage Act Prosecutions of Publishers

Contrary to popular belief, espionage prosecutions of journalists are far from unprecedented. There have been at least four documented attempted prosecutions of publishers, one of which is ongoing as of this writing.[260] Although information about grand jury proceedings is necessarily limited, it is clear the Justice Department officially believes the Espionage Act applies to newsgathering on issues of public concern.

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[252] *Rosen*, 445 F. Supp. 2d at 630, 633–35.
[253] *Id.* at 639.
[254] Mary-Rose Papandrea, *National Security Information Disclosures and the Role of Intent*, 56 WM. & MARY L. REV. 1381, 1406 (2015).
[255] *Rosen*, 445 F. Supp. 2d at 641.
[256] *See id.* at 642–43.
[257] *See* Brown & MacLaren, *supra* note 43, at 106.
[258] Additional testimony defendants intended to offer showing "the governments of the United States and Israel routinely using AIPAC as a diplomatic 'back channel'" would have further complicated the prosecution's case. *See Rosen*, 445 F. Supp. 2d at 705.
[259] T.S. Ellis, III, Essay, *The National Security Trials: A Judge's Perspective*, 99 VA. L. REV. 1607, 1626 (2013).
[260] *See infra* Section II.D.

1. Attempted Prosecution of the *Chicago Tribune*

In 1942, Stanley Johnston was embedded with U.S. forces in the Pacific as a war correspondent for the *Chicago Tribune*.[261] During his assignment, Johnston befriended a naval officer who allowed him to read secret dispatches.[262] On June 7, 1942, the *Tribune* published a short article written by Johnston reporting that the Navy had defeated the Japanese in the decisive Battle of Midway in part thanks to "advance information" about Japanese plans.[263] Although the article never explicitly said so, a reader could have inferred that the Navy had broken the Japanese codes.[264] Military officials were incensed.[265] It didn't help that the owner-publisher of the *Tribune*, Colonel Robert R. McCormick, was a vocal critic of the Roosevelt administration and had previously published a confidential report on U.S. war plans in Europe.[266]

After the Navy conducted its own inquiry, U.S. Attorney General Francis Biddle ordered a federal grand jury investigation of the *Tribune* and Johnston on espionage charges.[267] McCormick publicly blasted the investigation as a crackdown on free speech, "the latest step in the administration's 'Get the *Tribune* Offensive.'"[268] The grand jury began on August 14, 1942 to indict the *Tribune*.[269] Prosecutors ran into two main problems. First, jurors were alarmed by evidence that a naval officer was negligent in "letting a copy of a secret dispatch lie around," but prosecutors did not want to call the officer himself to testify. [270] Second, the Justice Department opted not to present evidence Johnston had seen secret navy dispatches.[271] The Navy had

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[261] *See* Larry J. Frank, *The United States Navy v. the* Chicago Tribune*,* 42 HISTORIAN 284–86 (1980).
[262] *See id.* at 286–88.
[263] Stanley Johnson, *Navy Had Word of Jap Plan to Strike at Sea*, CHI. TRIB., June 7, 1942, at 1.
[264] *See id.*
[265] *See* Frank, *supra* note 261, at 285.
[266] *See id.* at 290–92 (citing Chesly Manly, *F.D.R.'s War Plans*, CHI. TRIB., Dec. 4, 1941, at 1). While the Roosevelt Justice Department publicly considered charging McCormick with espionage for publishing these European war plans, Pearl Harbor and America's subsequent entry into the war quickly made the controversy moot. *See* SCHOENFELD, *supra* note 40, at 127–32.
[267] *See* Frank, *supra* note 261, at 290–92.
[268] *Id.* at 297 (quoting David Camelon, *McCormick Lays Charges Against Tribune to Politics,* BOS. HERALD-AMERICAN, Aug. 10, 1942, at 1).
[269] *Id.* at 299.
[270] *Id.* (quoting Letter from William D. Mitchell, Attorney, Justice Department, to Francis Biddle, U.S. Attorney General (Aug. 24, 1942) (on file with Naval Historical Center)).
[271] *Id.*

become afraid that the investigation would tip off the Japanese, if the *Tribune* story had not already.[272] (In fact, as the Navy later realized, Japan never did change its code in response to the *Tribune*'s reporting.[273]) On the government's meager evidence, the grand jury dropped the investigation.[274]

Debate continues today about whether a prosecution against the *Tribune* could have been successful.[275] Regardless, the episode suggests the Justice Department considers such a prosecution permissible, and perhaps even desirable. As Assistant Solicitor General Oscar S. Cox wrote in a now-public 1942 Office of Legal Counsel memo, "The reporter's conduct in taking and copying a dispatch of immense importance—as this one seems obviously to have been—is characterized by real turpitude and disregard of his obligations as a citizen. . . . He thoroughly deserves punishment."[276]

2. Attempted Prosecution of *Amerasia*

Unsurprisingly, the Espionage Act also became a tool of the Red Scare. *Amerasia* was a small, Communist-leaning magazine published in the 1940s by a man named Philip Jaffe.[277] In February 1945, the Office of Strategic Services, a predecessor to the CIA, realized an *Amerasia* article quoted directly from one of its secret reports.[278] Government agents raided *Amerasia*'s offices and found some 300 "Top Secret" and "Secret" government documents.[279] The FBI arrested Jaffe and five of his staffers on espionage charges.[280] But the D.C. grand jury declined

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[272] *Id.* (quoting Letter from William D. Mitchell, Attorney, Justice Department, to Francis Biddle, U.S. Attorney General (Sept. 2, 1942) (on file with Naval Historical Center)).
[273] *See* SCHOENFELD, *supra* note 40, at 137–40.
[274] *See* Frank, *supra* note 261, at 299.
[275] Famed First Amendment litigator Floyd Abrams believes the *Tribune* could have been prosecuted under the Espionage Act. *See* Bill Keller, *Secrecy in Shreds*, N.Y. TIMES (Apr. 1, 2011), https://www.nytimes.com/2011/04/03/magazine/mag-03lede-t.html. But James C. Goodale, former general counsel for the *New York Times*, strongly disagrees. *See* James C. Goodale, Letter to the Editor, *What Code-Breaking Scoop?*, N.Y. TIMES, Apr. 3, 2011, at 8, http://www.jamesgoodale.net/images/191.pdf.
[276] Oscar S. Cox, *Criminal Liability for Newspaper Publication of Naval Secrets*, 1 Op. O.L.C. Supp. 93, 96 (June 16, 1942)), https://fas.org/irp/agency/doj/olc/newspub.pdf.
[277] Whittaker Chambers, *The Strange Case of Amerasia*, TIME (June 12, 1950), http://content.time.com/time/subscriber/article/0,33009,812633-1,00.html.
[278] *Id.*; *see Foreword: The Office of Strategic Services: America's First Intelligence Agency*, CIA, https://www.cia.gov/library/publications/intelligence-history/oss/foreword.htm (last visited Feb. 10, 2020).
[279] Chambers, *supra* note 277.
[280] *Id.* at 2.

to indict the first two staffers, and after a thorough look at the evidence, the prosecutors dropped the espionage charges against the rest in favor of the lesser offense of theft of government property.[281] Jaffe's lawyer struck a deal with the prosecution that Jaffe would plead guilty to theft and pay a $2,500 fine to repent for his "excess of journalistic zeal."[282] Another staffer paid a $500 fine; the remaining defendant was let go without charges.[283]

However, that was only the beginning of the *Amerasia* Affair. Jaffe's guilty plea spawned three more investigations: a House Judiciary subcommittee investigation, a second grand jury investigation in New York, and a Senate Foreign Relations subcommittee investigation described by the *New York Times* as an "offshoot" of Senator Joseph McCarthy's investigation into communism in the State Department.[284] In sum, Senator McCarthy and his supporters questioned why none of the defendants were charged with espionage, arguing that their light punishment was evidence the Justice Department had been too "soft" on *Amerasia*—perhaps due to communist influence within the government itself.[285] The House Judiciary subcommittee investigation concluded there was "no evidence" the *Amerasia* staffers' actions satisfied the elements of the Espionage Act.[286] The second grand jury further absolved the Justice Department in its handling of the matter.[287] But these reports did not assuage anti-Communists in the Senate, who carried on one last six-week investigation into the *Amerasia* Affair.[288]

Ultimately, Jaffe avoided prison, but his magazine folded. Worse, his congressional foes amended the Espionage Act to allow more airtight prosecutions of his successors.[289]

3. Attempted Prosecution of the *New York Times*

The Nixon Administration never did successfully prosecute the journalists who published the Pentagon Papers—

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[281] *Id.* at 3.
[282] *Id.*
[283] *Id.*
[284] Editorial, *Amerasia Issues*, N.Y. TIMES, June 18, 1950, at E1.
[285] *Id.* Conservatives also pointed to evidence that the Truman Administration had delayed prosecution of Jaffe and his associates; officials said they were looking for more evidence of actual espionage. *See, e.g.*, Philip Potter, *2 Departments Delayed Jaffe Case, FBI Says*, BALT. SUN, June 17, 1950, at 1.
[286] Alfred Friendly, *Light Finally Shed on Some of the 5-Year-Old Amerasia 'Mysteries,'* WASH. POST, May 28, 1950, at B2.
[287] Edward Ranzal, *Jurors Clear U.S. in Amerasia Case; Ask Further Study*, N.Y. TIMES, June 16, 1950, at 1.
[288] *See* William L. O'Neill, *The Cover-Up*, N.Y. TIMES, Mar. 31, 1996, at BR24.
[289] *See supra* Section I.C.

although it did try. Crucially, in the Pentagon Papers litigation, the Supreme Court appeared to give the government the go-ahead for future prosecutions. In a 235-word per curiam opinion, the majority could only agree that an injunction on publishing the Pentagon Papers was unconstitutional.[290] Each of the nine justices wrote his own opinion explaining his legal reasoning. Of the six justices who opposed the injunction, three—Justices Potter Stewart, Byron White, and Thurgood Marshall—clearly suggested that the journalists could still be prosecuted for espionage after publication.[291] A fourth, Justice William Douglas, argued § 793(e) should not apply to journalists based on its statutory language and legislative history; however, he distinguished § 793 from § 798, which *does* apply to whoever "publishes" proscribed information.[292] Justice William J. Brennan, Jr.'s concurrence did not address post-publication punishment at all.[293] Certainly the dissents can be read to support prosecution under the Espionage Act, in addition to prior restraint.[294] Only Justice Hugo Black's concurrence can be read, broadly, to reject such a prosecution on its face.[295]

Following the Supreme Court's decision, the Nixon Justice Department convened a grand jury to attempt to indict the *Times* and its reporter Neil Sheehan on espionage charges.[296] When the Manhattan U.S. Attorney's Office refused to prosecute, Boston assumed the mantle.[297] For over fifteen months, the proceedings transfixed Cambridge, as prosecutors tried to force prominent anti-war activists, journalists, and

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[290] N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

[291] *See id*. at 730 (Stewart, J., concurring) ("Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases."); *id.* at 737 (White, J., concurring) ("I would have no difficulty in sustaining convictions under [§§ 797, 798 or 793(e)] . . . ."); *id.* at 745 (Marshall, J., concurring) ("At least one of the many statutes in this area seems relevant to these cases . . . 18 U.S.C. § 793(e).").

[292] *See N.Y. Times Co.*, 403 U.S. at 721 (Douglas, J., concurring) ("[I]t is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act."); *see also supra* Section I.C.

[293] *See N.Y. Times Co.*, 403 U.S. at 724–27 (Brennan, J., concurring).

[294] *See id.* at 752 (Burger, C.J., dissenting); *id.* at 757 (Harlan, J., dissenting); *id.* at 761 (Blackmun, J., dissenting).

[295] *See id.* at 719 (Black, J., concurring) ("The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."). In *Rosen*, Judge Ellis read the Pentagon Papers dictum to support his finding that the Espionage Act could apply to private citizens. *See* United States v. Rosen, 445 F. Supp. 2d 602, 638–39 (E.D. Va. 2006).

[296] *See* Goodale, *supra* note 42.

[297] *Id.* Another grand jury in Los Angeles also appeared to be investigating the *Times*. *See, e.g.*, Robert Reinhold, *Legal Obstacles Blocking Boston Grand Jury in Its Investigation of the Release of Pentagon Papers*, N.Y. TIMES, Nov. 1, 1971, at 29.

academics to testify, including Noam Chomsky, Howard Zinn, *Times* reporter David Halberstam, and Sheehan's wife, *New Yorker* reporter Susan Sheehan.[298] Many fought the subpoenas on First Amendment grounds.[299] When aides to Senator Mike Gravel were called to testify, they moved to quash the subpoenas and took the fight all the way to the Supreme Court.[300] Harvard professor Samuel Popkin was ultimately jailed for contempt for refusing to answer questions.[301]

But one week after jailing Popkin, the prosecution abruptly disbanded the grand jury. Both the *Times* and the *Boston Globe* called the dismissal a "surprise"—the U.S. Attorney's office had previously announced the investigation would continue into 1973.[302] The *Times* reported that the decision came from Washington, in part due to pressure from the Harvard administration to secure Popkin's release.[303] While U.S. Attorney James M. Gabriel told the *Globe* that he could empanel another grand jury after Ellsberg's trial, his plans never came to fruition.[304] Former *Times* general counsel James Goodale—once so sure an indictment was forthcoming, he had the press release ready to go—now says with the benefit of hindsight, "The government was eventually forced to dissolve the grand jury once it became clear it would be impossible to indict."[305] Maybe so, but the Supreme Court suggested otherwise—so the Nixon administration spent sixteen months trying.

4. Prosecution of WikiLeaks

WikiLeaks has made the Espionage Act's applicability to journalists a particularly urgent open question. WikiLeaks founder Julian Assange started the site in 2006 as a collaboratively-edited Wikipedia for leaked documents but

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[298] *Id.*

[299] *See, e.g.*, *2 Seek to Avoid Grand Jury in Pentagon Papers Inquiry*, N.Y. TIMES, Jan. 15, 1972, at 15; John B. Wood & Walter D. O'Leary, *Falk Refuses to Testify on Pentagon Papers Leak*, BOS. GLOBE, Oct. 29, 1971, at 11.

[300] Gravel v. United States, 408 U.S. 606, 626–27 (1972).

[301] Bill Kovach, *Harvard Professor Jailed In Pentagon Papers Case*, N.Y. TIMES (Nov. 22, 1972), https://www.nytimes.com/1972/11/22/archives/new-jersey-pages-harvard-professor-jailed-in-pentagon-papers-case.html; United States v. Doe, 460 F.2d 328, 334 (1st Cir. 1972) (rejecting Popkin's assertion of a scholar's First Amendment privilege), *cert. denied*, 411 U.S. 909 (1973).

[302] Bill Kovach, *Popkin Freed in a Surprise As U.S. Jury Is Dismissed*, N.Y. TIMES, Nov. 29, 1972, at 1; John Wood, *Move Comes as Surprise: Grand Jury Discharged, Popkin Freed*, BOS. GLOBE, Nov. 29, 1972, at 1.

[303] *See* Kovach, *supra* note 302.

[304] *See* Wood, *supra* note 302.

[305] Goodale, *supra* note 42.

rebranded it as an "open government group" staffed by "investigative journalists" in 2010.[306] After WikiLeaks's makeover, it published the Baghdad airstrike video, the Afghan and Iraq War Logs, and the State Department diplomatic cables provided by Chelsea Manning.[307]

In November 2010, Sweden issued an international arrest warrant for Assange on suspicion of rape,[308] so Assange sought diplomatic asylum in the Ecuadorean Embassy in London.[309] Nevertheless, WikiLeaks continued to publish, most notably two sets of email dumps ahead of the 2016 election, from Democratic National Committee staff[310] and Hillary Clinton campaign manager John Podesta.[311] The hacks were later revealed to be the work of Russian government operatives, personally ordered by Russian president Vladimir Putin in an attempt to harm Clinton's electability and "undermine public faith in the US democratic process."[312]

The U.S. government first began investigating WikiLeaks for violation of the Espionage Act in 2010.[313] However, the

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[306] Dave Gilson, *WikiLeaks Gets a Facelift*, MOTHER JONES (May 19, 2010), https://www.motherjones.com/politics/2010/05/WikiLeaks-assange-returns/.

[307] *See supra* notes 196–204 and accompanying text.

[308] *WikiLeaks' Assange Faces International Arrest Warrant*, BBC (Nov. 20, 2010), https://www.bbc.com/news/world-europe-11803703.

[309] William Neuman & Maggy Ayala, *Ecuador Grants Asylum to Assange, Defying Britain*, N.Y. TIMES (Aug. 16, 2012), https://www.nytimes.com/2012/08/17/world/americas/ecuador-to-let-assange-stay-in-its-embassy.html.

[310] *DNC Email Database*, WIKILEAKS (July 22, 2016), https://WikiLeaks.org/dnc-emails/.

[311] *The Podesta Emails*, WIKILEAKS (Oct. 7, 2016), https://WikiLeaks.org/podesta-emails/.

[312] OFFICE OF THE DIR.OF NAT'L INTELLIGENCE, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS ii (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf*; see also* Ellen Nakashima & Shane Harris, *How the Russians Hacked the DNC and Passed Its Emails to WikiLeaks*, WASH. POST (July 13, 2018, 7:26 PM), https://www.washingtonpost.com/world/national-security/how-the-russians-hacked-the-dnc-and-passed-its-emails-to-WikiLeaks/2018/07/13/af19a828-86c3-11e8-8553-a3ce89036c78_story.html.

[313] *E.g.*, Charlie Savage, *U.S. Weighs Prosecution of WikiLeaks* Founder, N.Y. TIMES (Dec. 1, 2010), https://www.nytimes.com/2010/12/02/world/02legal.html. The applicability of the Espionage Act to WikiLeaks in particular is beyond the scope of this Article but has been well-studied. *See, e.g.*, Christopher J. Markham, *Punishing the Publishing of Classified Materials: The Espionage Act and WikiLeaks*, 23 B.U. PUB. INT. L.J. 1, 26 (2014) (finding that while Assange would be entitled to some First Amendment protections, he could still be liable under the Espionage Act); Jamie L. Hester, *The Espionage Act and Today's "High-Tech Terrorist"*, 12 N.C. J.L. & TECH. 177, 193 (2011) (analyzing Assange's liability under the Espionage Act and the proposed SHIELD Act); Heather M. Lacey, *Government Secrets, National Security and Freedom of the Press: The Ability of the United States to Prosecute Julian Assange*, 1 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 202, 225–26 (2011) (finding "significant substantive and procedural barriers" to an Espionage Act prosecution of Assange).

Obama Justice Department quickly ran into a problem it dubbed the "*New York Times* problem": Any legal theory for holding WikiLeaks liable under the Espionage Act could also apply to the *New York Times*, the *Washington Post*, and other news organizations that published the same materials.[314] Since then, scholars have sought a way to distinguish WikiLeaks from the institutional press. For example, perhaps WikiLeaks's actions can be treated as "knowing collaboration with a foreign intelligence agency,"[315] outside the "legitimate press function."[316] Nevertheless, the sense remains that the prosecution of Assange would "cross a constitutional Rubicon."[317]

These legal theories will now be tested. Obama administration officials told the *Washington Post* in 2013 that they had decided not to bring a case against Assange,[318] but Trump's Justice Department has made a different choice. After initially charging Assange with other crimes,[319] in May 2019 the Justice Department filed a superseding indictment charging Assange with seventeen counts of violating the Espionage Act[320]—for

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[314] Sari Horwitz, *Julian Assange Unlikely to Face U.S. Charges Over Publishing Classified Documents*, WASH. POST (Nov. 25, 2013), https://www.washingtonpost.com/world/national-security/julian-assange-unlikely-to-face-us-charges-over-publishing-classified-documents/2013/11/25/dd27decc-55f1-11e3-8304-caf30787c0a9_story.html; *see also supra* note 193 and accompanying text (citing *Times* stories based on WikiLeaks materials).

[315] Yochai Benkler, *Prosecuting WikiLeaks, Protecting Press Freedoms*, JUST SECURITY (Nov. 19, 2018), https://www.justsecurity.org/61519/prosecuting-WikiLeaks-protecting-press-freedoms-drawing-line-knowing-collaboration-foreign-intelligence-agency/; *cf.* Floyd Abrams, *What Facts Would Deny the Trump Campaign First Amendment Protections in Colluding with Russia*, JUST SECURITY (Oct. 10, 2018), https://www.justsecurity.org/60995/facts-deny-trump-campaign-amendment-protections-colluding-russia/ (suggesting this possibility vis-à-vis a civil suit against the Trump campaign).

[316] *Cf.* Bob Bauer & Ryan Goodman, *Why the First Amendment Does Not Protect Trump Campaign Collusion with WikiLeaks and Russia*, JUST SECURITY (Nov. 2, 2018), https://www.justsecurity.org/61327/amendment-protect-trump-campaign-collusion-WikiLeaks-russia/ (discussing a civil suit brought against the Trump campaign).

[317] Elizabeth Goitein, *The Constitutional Rubicon of an Assange Prosecution*, JUST SECURITY (May 9, 2017), https://www.justsecurity.org/40672/constitutional-rubicon-assange-prosecution.

[318] Horwitz, *supra* note 314.

[319] *See* Indictment, United States v. Assange, No. 1:18-cr-00111-CMH (E.D. Va. Mar. 6, 2018), https://int.nyt.com/data/documenthelper/754-assange-indictment/d093e7dc7982f7fe4c24/optimized/full.pdf; Charlie Savage, Adam Goldman & Eileen Sullivan, *Julian Assange Arrested in London as U.S. Unseals Hacking Conspiracy Indictment*, N.Y. TIMES (Apr. 11, 2019), https://www.nytimes.com/2019/04/11/world/europe/julian-assange-wikileaks-ecuador-embassy.html.

[320] *See* Superseding Indictment, United States v. Assange, No. 1:18-cr-00111-CMH (E.D. Va. May 23, 2019), https://www.documentcloud.org/documents/6024850-Gov-Uscourts-Vaed-384245-31-0-1.html; Charlie Savage, *Assange Indicted Under*

publishing the very documents the *Times* also published.[321] The first Espionage Act prosecution of a publisher has begun.

III. POTENTIAL DEFENSES AND THEIR WEAKNESSES

It is easy to find high-minded dictum supporting a First Amendment defense against an espionage prosecution of a journalist.[322] On the most general level, stories that inform the public about government affairs and hold public officials accountable for their actions are the heart of what the First Amendment was designed to protect.[323] But a closer look at existing doctrine suggests a gloomier prognosis for a journalist charged with espionage.

A. The Bartnicki Defense

A journalist's first defense against an Espionage Act charge would be a well-established principle: A media outlet that publishes information that is truthful, lawfully-obtained, and about a matter of public significance has no liability, "absent a need to further a state interest of the highest order."[324] This principle was first articulated by the Supreme Court in *Smith v. Daily Mail*, when prosecutors indicted a newspaper for publishing a juvenile defendant's name despite a criminal law barring disclosure.[325] The Court struck down the law as an unconstitutional infringement of First Amendment rights.[326]

A decade later, the Court extended the principle again to *Florida Star*, a case where a sexual assault victim sued a

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Espionage Act, Raising First Amendment Issues, N.Y. TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/us/politics/assange-indictment.html.

[321] *See supra* notes 196 – 199 and accompanying text; *see also* Savage, *supra* note 319 ("Notably, *The New York Times*, among many other news organizations, obtained precisely the same archives of documents from WikiLeaks, without authorization from the government—the act that most of the charges addressed.").

[322] *See, e.g.*, Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104 (1979) ("A free press cannot be made to rely solely upon the sufferance of government to supply it with information."); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("It has yet to be demonstrated how governmental regulation of [the editorial process] can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open.").

[323] *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

[324] *Smith*, 443 U.S. at 103.

[325] *Id.* at 100.

[326] *Id.* at 103–04.

newspaper for publishing her name in violation of a civil statute.[327] The Court found that the published information was truthful, lawfully-obtained, and broadly about a matter of public significance, namely, "the commission, and investigation, of a violent crime which had been reported to authorities."[328] The victim's privacy interest, on the other hand, did not constitute a countervailing "state interest of the highest order."[329]

The last in this line of cases, *Bartnicki v. Vopper*, is the most on-point.[330] In *Bartnicki*, a radio host played a recording of a phone call about local union negotiations that had been illegally recorded.[331] The host had obtained the tape of the call from the head of a local taxpayers' group, who said he had found the tape in his mailbox.[332] The government articulated two main interests in holding the radio host liable: first, "removing an incentive for parties to intercept private conversations," and second, "minimizing the harm to persons whose conversations have been illegally intercepted."[333] The plurality found that the way to serve those interests compatibly with the First Amendment is to punish the interception itself, more harshly if necessary.[334] But the radio host could not be held liable for playing the tape—which was true and about a matter of public significance—even if he knew or should have known that the information was obtained illegally.[335] All that mattered was that the journalist himself had not obtained the material illegally.[336]

But the concurrence and dissent in *Bartnicki* suggest the case might represent an outer limit of the *Daily Mail* principle. Justice Stephen Breyer, joined by Justice Sandra Day O'Connor, agreed with the outcome but advocated a balancing test to consider the chilling effect of dissemination of private material.[337]

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[327] Fla. Star v. B. J. F., 491 U.S. 524, 536 (1989).
[328] *Id.* at 536–37.
[329] *Id.* at 537.
[330] Bartnicki v. Vopper, 532 U.S. 514, 527–28 (2001).
[331] *Id.* at 519.
[332] *Id.*
[333] *Id.* at 529.
[334] *Id.* at 529–30.
[335] *See id.* at 535 ("[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.").
[336] *Id.*
[337] *See id.* at 536 (Breyer, J., concurring) ("The statutes directly interfere with free expression in that they prevent the media from publishing information. At the same time, they help to protect personal privacy—an interest here that includes not only the 'right to be let alone,' but also 'the interest . . . in fostering private speech.' Given these competing interests 'on both sides of the equation, the key question becomes one of proper fit.' I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences." (internal citations omitted)).

Justice William Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas, instead treated the wiretapping statute at issue as a content-neutral law of general applicability that did not merit strict scrutiny.[338] The Supreme Court has not revisited the *Daily Mail* principle since *Bartnicki*, and there is reason to worry it would not survive an Espionage Act prosecution intact.[339]

1. Pitting Journalists Against Their Sources

The first problem with the *Bartnicki* defense to an espionage charge is that it pits journalists against their sources in a way that should be both ethically and strategically suspect. The *Bartnicki* defense requires the press to concede that a crime has been committed but argue that the crime should not be imputed to the journalists who relied on it in their truthful reporting.[340] This legal framework is on shaky ground, and it is a particularly poor fit for the Espionage Act, which criminalizes the very conversation between a journalist and her source.[341]

Thus far, the Justice Department has practiced what Professor Heidi Kitrosser calls the "mixed approach," punishing leakers but not the beneficiaries of their leaks.[342] On one hand, there are sound reasons for journalists to seek to maintain that distinction.[343] However, WikiLeaks demonstrates that the line

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[338] *See id.* at 548–49 (Rehnquist, C.J., dissenting) ("These laws therefore should be upheld if they further a substantial governmental interest unrelated to the suppression of free speech, and they do.").

[339] *Cf.* Brief for the Knight First Amendment Inst. at Columbia Univ. et al. as Amici Curiae Supporting Wikileaks' Motion to Dismiss, Democratic Nat'l Comm. v. Russian Federation, No. 1 :18-cv-03501-JGK (S.D.N.Y. Mar. 13, 2019) (No. 238-1), https://knightcolumbia.org/sites/default/files/content/Cases/WikiLeaks/DNCvWikiLeaks_Brief.pdf (describing the import of *Bartnicki* to investigative reporting and the dangers of narrowing its holding).

[340] *See, e.g.*, Nathaniel A. G. Zelinsky, *Foreign Cyber Attacks and the American Press: Why the Media Must Stop Reprinting Hacked Material*, 127 YALE L.J. F. 286, 299 (2017) ("[Press advocates] should have little to fear if the Court faithfully follows *Bartnicki*'s calculus: because the ability to deter leakers obviates the need to pursue publishers, the First Amendment should prevent holding a reporter liable under the Espionage Act in most situations.").

[341] *See* Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1494 (2012) (distinguishing the Espionage Act from the statute at issue in *Bartnicki* because the Espionage Act criminalizes receipt of national defense information).

[342] Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 WM. & MARY L. REV. 1221, 1226 (2015); *see also* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 606–09 (2013) (describing this phenomenon as the "source/distributor divide").

[343] *See generally* Geoffrey R. Stone, *WikiLeaks and the First Amendment*, 64 FED. COMM. L.J. 477 (2012) (explaining the legal basis for distinguishing between the rights of public employees and the rights of journalists).

between journalist and source is thinner than it first appears and thinner than it used to be, a line that becomes harder to justify in an era when anyone with a Twitter account can become a publisher. At this moment, journalists should not foreclose the possibility that their sources also have First Amendment rights worth protecting.[344] If the Court decides *Bartnicki* is the high-water mark of the *Daily Mail* principle, journalists will need to seek refuge in a different First Amendment framework.

The "mixed approach" is not even a surefire way to keep reporters out of jail. In *Sterling*, when reporter James Risen's source was prosecuted for espionage, the Justice Department got a Fourth Circuit order forcing Risen to testify or face contempt of court.[345] While the Justice Department ultimately declined to call Risen as a witness, *Sterling* demonstrates it is possible for a reporter to be jailed in conjunction with an espionage prosecution, even if the reporter is not prosecuted for espionage himself. Moreover, that Risen was prepared to go to jail to protect his source demonstrates the kind of cognitive dissonance the "mixed approach" requires.

Most importantly, in modern journalistic practice, the actions of journalists are not so easily disentangled from the actions of their sources. A smoking-gun document rarely appears unbidden in a journalist's mailbox.[346] More often, journalists cultivate sources by intentionally seeking them out and eliciting

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[344] *See generally* Kitrosser, *supra* note 342, at 1262–77 (theorizing how the First Amendment rights of leakers might be expanded); Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 513 (2014) ("[T]he Court's jurisprudence does not entirely foreclose the First Amendment claims of national security insiders."); Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281, 285–86 (2014) (proposing legislation protecting both leakers who seek to "expose to public scrutiny substantial violations of law or substantial systemic error, incompetence, or malfeasance," and the journalists who report on those leaks); *cf.* RonNell A. Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1226 (2013) (arguing that reporter's privilege cases be reconceived to protect the *source's* right to anonymous speech, rather than the *reporter's* rights under the press clause).

[345] Adam Liptak, *Supreme Court Rejects Appeal From Times Reporter Over Refusal to Identify Source*, N.Y. TIMES (June 2, 2014), https://www.nytimes.com/2014/06/03/us/james-risen-faces-jail-time-for-refusing-to-identify-a-confidential-source.html; *see also supra* notes 189 – 195 and accompanying text.

[346] Barton Gellman, Reporter, Wash. Post, Secrecy, Security and Self-Government: How I Learn Secrets and Why I Print Them, Address at Woodrow Wilson School, Princeton University (Oct. 9, 2003) ("In 15 years at The Washington Post, I can count on maybe two hands the number of good stories I've learned from someone who made contact out of the blue."). *But see* Susanne Craig, *The Time I Found Donald Trump's Tax Records in My Mailbox*, N.Y. TIMES (Oct. 2, 2016), https://www.nytimes.com/2016/10/03/insider/the-time-i-found-donald-trumps-tax-records-in-my-mailbox.html.

information.[347] As Professor William Lee has argued, "In between the polar extremes of theft or passive receipt lie fascinating and novel cases possibly involving inchoate crimes such as solicitation and conspiracy."[348] Recall that in *Rosen*, the AIPAC lobbyists were charged with conspiracy to violate the Espionage Act for accepting "classified" information from a source,[349] whereas in *Bartnicki*, no one even knew the original source of the illegally intercepted tape.[350] Recall also that conspiracy to violate the Espionage Act is punishable by up to 10 years in prison.[351]

2. An Interest of the Highest Order?

The other landmine in the *Bartnicki* defense is that the *Daily Mail* principle only applies "absent a need to further a state interest of the highest order."[352] Although the Supreme Court has never identified such an interest, national security is an obvious contender. Notably, while the Court rejected a prior restraint of the Pentagon Papers, the concurrences considered post-publication liability.[353] More recently, in *Humanitarian Law Project*, the Court found a statute that prohibited a "form of speech" nonetheless survived strict scrutiny because of the overriding interest in national security.[354] Most worryingly, the Court added that in cases involving national security, executive decision-making is "entitled to deference."[355] Simply, if the press intends to argue that the Espionage Act does not implicate any

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[347] *See, e.g.*, BRANT HOUSTON, INVESTIGATIVE REPORTERS AND EDITORS, INC., *People Trails, in* THE INVESTIGATIVE REPORTER'S HANDBOOK 68, 68–88 (5th ed. 2009) (advising investigative reporters on how to cultivate human sources); Katherine L. Johansen, *A Legion of Worries: National Security Reporting in the Age of the War on Terror*, 34 WM. MITCHELL L. REV. 5107, 5108 (2008) (interviewing national security reporters about their processes and corresponding legal concerns).

[348] Lee *supra* note 14, at 134; *see also* Rodney Smolla, *Liability for Massive Online Leaks of National Defense Information*, 48 GA. L. REV. 874, 904 (2014).

[349] *See* Superseding Indictment, *supra* note 243.

[350] Bartnicki v. Vopper, 532 U.S. 514, 519 (2001).

[351] 18 U.S.C. § 793(f) (2018).

[352] Smith v. Daily Mail Pub. Co., 443 U.S. 97, 103 (1979).

[353] *See supra* notes 290 – 295 and accompanying text.

[354] Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010) (upholding a statute that allows the Secretary of State to designate terrorist organizations); *see also* Heidi Kitrosser, *Free Speech and National Security Bootstraps*, 86 FORDHAM L. REV. 509, 511 (2017) (comparing how courts treat administrative designations in material-support statutes and in prosecutions for leaking classified information).

[355] *Humanitarian Law Project,* 561 U.S. at 33–34; *see also* Mary Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 50–52 (2005) (describing how courts defer to the executive's classification decisions, even when empowered to exercise *de novo* review by the Freedom of Information Act).

"state interest of the highest order," it should be prepared to lose.[356]

B. Scienter Requirements

The next defense is to read a stronger scienter requirement into the Espionage Act to require some element of bad faith, thus creating a good-faith defense to prosecution. Such a reading could be supported by the Act's legislative history.[357] Furthermore, Papandrea has argued intent should matter in espionage prosecutions, consistent with other Supreme Court jurisprudence.[358] For example, the Court has found a related crime—treason—requires "the mental element of disloyalty or adherence to the enemy," and innocent intentions are an absolute defense.[359] More generally, Papandrea argues, "In First Amendment law, the speaker's intent frequently plays a major role in determining the availability and scope of constitutional protection, even though a speaker's intent does not usually have any impact on the harm that the speech might cause, or its inherent value."[360] In particular, Papandrea notes the scienter requirements for defamation, obscenity, and incitement.[361]

But even the most stringent intent standard for the Espionage Act thus far established by the courts—articulated by Judge Ellis in *Rosen*—has come under scrutiny.[362] Though the Fourth Circuit did not have the jurisdiction to review Judge Ellis's order, the court suggested in dicta that Ellis had "impose[d] an additional burden on the prosecution not mandated by the governing statute."[363] In a subsequent Espionage Act prosecution, another district court flatly rejected Judge Ellis's interpretation, writing, "[T]he Court finds that the text of the statute means what it says."[364] Papandrea concludes that it remains "unclear whether [the Espionage Act] requires the government to prove that the defendant acted with the purpose of harming the United States—a standard that would protect

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[356] *See* Croner, *supra* note 115, at 778–79.
[357] *See supra* Section I; *see also* Shapiro, *supra* note 236, at 262 (arguing *Rosen*'s judicial interpretation of Espionage Act's scienter requirement gave insufficient weight to the legislative history).
[358] Papandrea, *supra* note 254, at 1406.
[359] *Id.* at 1390 (quoting Morrisette v. United States, 342 U.S. 246, 265, 262 n.21 (1952)).
[360] *Id.* at 1426.
[361] *See id.* at 1426–33.
[362] *See id.* at 1406–08 (citing United States v. Rosen *(Rosen III)*, 557 F.3d 192, 199 n.8 (4th Cir. 2009)); *see also supra* notes 244 – 257 and accompanying text.
[363] United States v. Rosen, 557 F.3d 192, 199 n.8 (4th Cir. 2009).
[364] United States v. Kiriakou, 898 F. Supp. 2d 921, 923–27 (E.D. Va. 2012).

those with benign motives—or whether the 'reason to believe' standard permits prosecutions based on recklessness or even negligence."[365]

Moreover, it is not clear even the *Rosen* standard would protect journalists from an espionage conviction.[366] Notably, *Rosen* only requires a "bad faith purpose to either harm the United States or to aid a foreign government" for disclosures of intangible information; if any classified *documents* are involved, the government need only prove "a bad purpose either to disobey or to disregard the law."[367] Journalists often rely on classified documents to verify intangible information.[368] Meanwhile, § 798 contains no "reason to believe" clause at all, and its legislative history suggests intent to criminalize publication regardless of motive.[369] Besides, the imposition of any scienter requirement could have other negative ramifications for the press.

1. Implications for Negotiations

A heightened scienter requirement could create a perverse incentive: Journalists may be better off not asking government officials how disclosure could harm national security—because if they publish anyway, these actions will not be evidence of due diligence, but of scienter.

It is now common practice for professional journalists to contact government officials before publishing classified information.[370] As *Washington Post* reporter Barton Gellman has explained, "When *The Washington Post* turns up something sensitive, we consult with authorities before publishing. Often we agree to hold something back."[371] The *New York Times* and *Los Angeles Times* do the same.[372] Investigative reporters at

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[365] Papandrea, *supra* note 254, at 1395.
[366] *See* Ellis, *supra* note 259, at 1626.
[367] *Rosen*, 445 F. Supp. 2d at 625–26.
[368] *E.g.*, BRANT HOUSTON, INVESTIGATIVE REPORTERS AND EDITORS, INC., *supra* note 347, at 4, 5 (advising investigative reporters to have a "documents state of mind" because "[s]econdary sources are most useful when they lead to primary documents").
[369] Papandrea, *supra* note 254, at 1412; *see supra* Section I.C.
[370] *See generally* Jonathan G. Odom, *A Modern-Day Pentagon Paper in a Post*-Pentagon Papers *World: A Case Study of Negotiations Between* The Washington Post *and the U.S. Government Regarding Publication of the 2009 Afghanistan* Assessment, 23 HARV. NEGOT. L. REV. 215 (2018) (chronicling the *Washington Post*'s negotiation with the government over publication of a classified assessment of ongoing military operations in Afghanistan in 2009).
[371] Gellman, *supra* note 346.
[372] Dean Banquet & Bill Keller, Opinion, *When Do We Publish a Secret?*, N.Y. TIMES, July 1, 2006, at A15, https://www.nytimes.com/2006/07/01/opinion/01keller.html.

ProPublica and *Buzzfeed* call the practice the "no-surprises school of journalism," meaning subjects of a story "should never be surprised by what you publish."[373] The Society for Professional Journalist's Code of Ethics says journalists should "[v]erify information before releasing it," "[d]iligently seek subjects of news coverage to allow them to respond to criticism or allegations of wrongdoing," and "[b]alance the public's need for information against potential harm."[374] Professional journalists consider these practices so fundamental, some cite them as the reason Julian Assange is not a journalist at all.[375]

Even *Intercept* founder Glenn Greenwald—who argues journalists should maintain an "adversarial" relationship with the government[376]—redacts information in response to national security concerns he considers legitimate.[377]

This practice was not always a given. In 1971, the *New York Times* did not notify the government before publishing the Pentagon Papers.[378] Relative prosecutorial discretion since then has allowed a process of give-and-take to develop. Investigative reporter Bob Woodward believes this practice reduces his risk of prosecution under the Espionage Act.[379] He explained, "If this became a test case in court, you'd be able to make a very strong argument of good faith that 'We went to [the government], we asked, and this is where we accommodated them.'"[380]

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[373] Nicole Collins Bronzan, *Podcast: When Those We Report On Complain*, PROPUBLICA (Feb. 23, 2015), https://www.propublica.org/podcast/podcast-when-sources-complain.

[374] SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (rev. 2014), https://www.spj.org/ethicscode.asp.

[375] *See, e.g.*, Susan Mulligan, Opinion, *Why WikiLeaks's Julian Assange Isn't a Journalist*, U.S. NEWS & WORLD REPORT: CIVIC (Jan. 31, 2011), https://www.usnews.com/opinion/blogs/susan-milligan/2011/01/31/why-wikileakss-julian-assange-is-no-journalist. In 2010, the *Guardian*, *New York Times*, *El Pais*, *Der Spiegel* and *Le Monde* condemned WikiLeaks for publishing "unredacted state department cables, which may put sources at risk." James Ball, *WikiLeaks Publishes Full Cache of Unredacted Cables*, GUARDIAN (Sept. 2, 2011), https://www.theguardian.com/media/2011/sep/02/wikileaks-publishes-cache-unredacted-cables.

[376] *See, e.g.*, Bill Keller & Glenn Greenwald, *Is Glenn Greenwald the Future of News?*, N.Y. TIMES: OPINION (Oct. 27, 2013), https://www.nytimes.com/2013/10/28/opinion/a-conversation-in-lieu-of-a-column.html.

[377] *See* Kia Makarechi, *Julian Assange Goes Where Glenn Greenwald Wouldn't*, VANITY FAIR (May 23, 2014), https://www.vanityfair.com/news/politics/2014/05/julian-assange-glenn-greenwald-nsa-afghanistan.

[378] *See* JAMES L. GREENFIELD, *Foreword*, in THE PENTAGON PAPERS: THE SECRET HISTORY OF THE VIETNAM WAR ii (Neil Sheehan et al. eds., 2017).

[379] Odom, *supra* note 370, at 241 n.165.

[380] *Id.*

But there is no good-faith exception to the Espionage Act.[381] Rather, the opposite argument could be made on the basis of that same evidence. In cases where a publisher had gone to the government, asked if publication of certain classified information posed any threat to national security, evaluated the government's arguments, then published the information anyway, the prosecution would have strong evidence the publisher had "reason to believe" the information "could be used to the injury of the United States"—because the government had explicitly told the publisher that disclosure would harm the United States.[382] Under *Rosen*'s heightened scienter requirements, the prosecution could likewise show (1) "the information was closely held," (2) "disclosure of this information might potentially harm the United States," and (3) "the persons to whom the defendants communicated the information"—namely, readers—"were not entitled under the classification regulations to receive the information."[383] If the dispute involved a classified document, an ignored threat of prosecution would quickly establish that the journalists had "a bad purpose either to disobey or to disregard the law."[384] Even under the *Rosen* standard, then, the prosecution would turn not on the journalist's intent, but whether national security was "genuinely at risk."[385]

Woodward's good-faith argument is strong insofar as the Justice Department respects it. But it has little basis in law. The imposition of an intent standard to protect journalists would threaten to disturb the delicate status quo. In interpreting the Espionage Act, courts could inadvertently create a rule that disincentivizes journalists from working with the government to manage the risks of sensitive disclosures.[386]

2. Incentives for Surveillance

Moreover, using intent to determine liability under the Espionage Act would further encourage government surveillance of reporters. If an espionage conviction only turned

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[381] *See, e.g.*, Benkler, *supra* note 344, at 285–86 (proposing legislation to create such an exception).
[382] 18 U.S.C. § 793(e) (2018).
[383] United States v. Rosen, 445 F. Supp. 2d 602, 625 (E.D. Va. 2006).
[384] *Id.* (quoting United States v. Morison, 844 F.2d 1057, 1071 (4th Cir. 1988)).
[385] *Id.* at 639.
[386] *Cf.* Roy Greenslade, *The D-Notice System: A Typically British Fudge That Has Survived a Century*, GUARDIAN (Jul. 31, 2015, 10:02 AM), https://www.theguardian.com/media/2015/jul/31/d-notice-system-state-media-press-freedom (describing how British journalists can seek government review of national security stories, but often do not for fear of legal action).

on the reporter's knowledge and intentions, prosecutors would have even more reason to monitor national security reporters, especially those most critical of the government.[387] Even if government monitoring never results in criminal charges, surveillance and the perception of surveillance has a chilling effect that can impede freedom of speech.[388]

The *Sachtleben* case demonstrated that prosecutors have already been willing to engage in dragnet surveillance to investigate espionage charges.[389] While the Obama Justice Department amended its internal guidelines governing surveillance of journalists following the outcry over its seizure of AP phone records,[390] the Trump Justice Department has since seized years' worth of phone and email records from a *New York Times* reporter pursuant to a leak investigation.[391] As electronic surveillance gets easier, it stands to reason it will only become more common. Lucy Dalglish, former executive director of the Reporters Committee, tells the story of a national security official who predicted subpoenas of reporters would become increasingly rare. The official explained to her, "We don't need to ask who you're talking to. We know."[392]

History suggests that the self-proclaimed "adversarial" journalists would be most endangered by an intent-based standard. In the *Amerasia* Affair, suspicions about the journalists' Communist sympathies drove the prosecution; when the investigation turned up no evidence of espionage, anti-Communists investigated the investigators.[393] In the modern era, what the FBI calls "intent to harm the United States" may be what Glenn Greenwald calls "adversarial journalism." As Elizabeth Goitein of NYU's Brennan Center for Justice writes, "To state the obvious, allowing the government to decide

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[387] Brown & MacLaren, *supra* note 43, at 106.

[388] *E.g.*, Ali Watins & Josh Dawsey, *Trump's Leaks Crackdown Sends Chills Through National Security World*, POLITICO (July 7, 2017, 5:11 AM), https://www.politico.com/story/2017/07/07/trumps-leak-vendetta-sends-chills-240274.

[389] *See supra* notes 221–223 and accompanying text.

[390] DEPARTMENT OF JUSTICE, REPORT ON REVIEW OF NEWS MEDIA POLICES (2013), https://www.justice.gov/iso/opa/resources/2202013712162851796893.pdf.

[391] Adam Goldman, Nicholas Fandos & Katie Benner, *Ex-Senate Aide Charged in Leak Case Where Times Reporter's Records Were Seized*, N.Y. TIMES (June 7, 2018), https://www.nytimes.com/2018/06/07/us/politics/times-reporter-phone-records-seized.html; *see also* Ramya Krishnan & Trevor Timm, *Report Reveals New Details About DOJ's Seizing of AP Phone Records*, COLUM. J. REV. (May 23, 2019), https://www.cjr.org/watchdog/doj-ap-phone-records.php (explaining how the Justice Department has interpreted its media guidelines narrowly).

[392] Liptak, *supra* note 170.

[393] *See supra* Section III.D.2.

whether the intent behind a media disclosure is to 'harm the United States' would throw open the door to viewpoint based discrimination."[394] But unlike *Amerasia*'s investigators, modern prosecutors seeking to prove a reporter's "bad faith purpose" could rely on almost everything a reporter has ever said—publicly on social media and privately in unencrypted electronic communications.

C. Vagueness

The third line of defense is to challenge the Espionage Act as unconstitutionally vague. This argument has intuitive appeal. As the Supreme Court recently reiterated, "The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes."[395] Arguably, the press does not have "fair notice" of what the Espionage Act proscribes, both because the law is so opaque, and because lawmakers have given conflicting signals about whether the law applies to newsgathering or not.[396] As Senator Cummins complained in 1917, even the law's drafters could not define "national defense."[397] Particularly confusing is the 1950 provision declaring, "Nothing in this Act shall be construed . . . in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States.[398] After a century of (at times, narrowly) avoiding prosecution under the Espionage Act, national security reporters arguably have little notice that their work runs afoul of the law.

However, the Espionage Act has already survived repeated vagueness challenges. In 1941, the Supreme Court found the phrase "national defense" is "sufficiently definite to apprise the public of prohibited activities and is consonant with due process."[399] In *Morison*, the Fourth Circuit rejected other vagueness challenges to the statute,[400] and district courts have cited *Morison* to reject void-for-vagueness claims in subsequent

[394] Goitein, *supra* note 317.
[395] Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018).
[396] *See* Brown & MacLaren, *supra* note 43, at 117.
[397] *See* Edgar & Schmidt, *supra* note 15, at 971 n.107 (quoting 54 Cong. Rec. 3495 (1917)).
[398] Internal Security Act of 1950, 64 Stat. 987(b) (1950) (repealed 1993).
[399] Gorin v. United States, 312 U.S. 19, 28 (1941).
[400] United States v. Morison, 844 F.2d 1057, 1070–75 (4th Cir. 1988).

espionage prosecutions.[401] Also in *Morison*, the court said the fact that the prosecution was the first of its kind was irrelevant.[402]

But the main problem with a vagueness challenge is that it is a Fifth Amendment claim, not a First Amendment claim.[403] If a statute is not vague enough to be void, its deficiency can be cured with a narrower interpretation.[404] Government censorship, when "sufficiently definite," may satisfy the Fifth Amendment, if not the First.[405] The alternative to the vagueness of § 793 is the specificity of § 798, a law that makes its threat to the press crystal clear.[406]

1. The Problem of Overclassification

Challenging the Act as unconstitutionally vague risks further cementing the current classification regime's place in espionage jurisprudence. While § 793 of the Espionage Act predates the classification system, courts have largely treated classification as shorthand for proscribed material under the statute.[407] For example, in *Kim*, the district court found the defendant's vagueness challenge "particularly unpersuasive" because the report he was accused of leaking was clearly marked "TOP SECRET/SENSITIVE COMPARTMENTED INFORMATION."[408] As a result, the court said, "There can be no reasonable doubt that such information qualifies as 'relating to the national defense.'"[409]

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[401] United States v. Drake, 818 F. Supp. 2d 909, 916 (D. Md. 2011); United States v. Kim, 808 F. Supp. 2d 44, 53 (D.D.C. 2011); United States v. Rosen, 445 F. Supp. 2d 602, 618 (E.D. Va. 2006).
[402] *Morison*, 844 F.2d at 1067.
[403] *See* Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982) ("Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment.").
[404] *See, e.g.*, *Morrison*, 844 F.2d at 1071 ("[A]ll vagueness may be corrected by judicial construction which narrows the sweep of the statute within the range of reasonable certainty.").
[405] *See* Am. Jur. 2d Constitutional Law § 428 ("The distinction between the doctrine of overbreadth and the doctrine of vagueness is that the overbreadth doctrine is applicable primarily in the First Amendment area and may render void legislation which is lacking neither in clarity nor precision, whereas the vagueness doctrine is based on the due process clauses of the Fifth and 14th Amendments and is applicable solely to legislation which is lacking in clarity and precision.").
[406] *See supra* Section I.C. *But see* Croner, *supra* note 115, at 785–87 (arguing § 798 could be found unconstitutionally vague).
[407] Kitrosser, *supra* note 354, at 529–33. *But see Morison*, 844 F.2d at 1086 (Phillips, J., concurring) ("[T]he government must still be required to prove that it was in fact 'potentially damaging . . . or useful,' i.e., that the fact of classification is merely probative, not conclusive, on that issue. . . .") (emphasis omitted).
[408] United States v. Kim, 808 F. Supp. 2d 44, 53 (D.D.C. 2011).
[409] *Id.*

Classification is a particularly poor shorthand when so much is overclassified.[410] Justice Stewart warned in the Pentagon Papers litigation, "[W]hen everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion."[411] His warning has not been heeded. National Security Archive Director Thomas Blanton now estimates that between 50% and 90% of documents are unnecessarily classified.[412] He argues, "The system is so overwhelmed with the secrets that we can no longer really protect the real ones and we can't let out the ones that would actually keep us all safer."[413] Even President Obama recognized the problem of overclassification and convened a Public Interest Declassification Board to recommend ways to increase public transparency.[414]

But even if overclassification were reduced, the modern classification system would still be dangerously reminiscent of Wilson's proposed censorship regime rejected by Congress in 1917.[415] To paraphrase Senator Borah, does classification not clearly provide that unless the executive consents, publication about certain topics is forbidden?[416] Professor Heidi Kitrosser has argued, "An executive power to determine via classification and prosecutorial choices which government information may and may not be shared legally is deeply antithetical to [First Amendment] precepts."[417] This is not to say that there are no necessary secrets.[418] Rather, as Judge J. Skelly Wright wrote

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[410] *See generally* Alexander M. Taber, *Information Control: Making Secrets and Keeping Them Safe*, 57 ARIZ. L. REV. 581, 582 (2015) (describing the current classification system and suggesting improvements).

[411] N.Y. Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

[412] *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 74 (2010) (statement of Thomas S. Blanton, Director, National Security Archive), https://fas.org/irp/congress/2010_hr/esp-wl.html.

[413] *Id.*

[414] *See* Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009); PUBLIC INTEREST DECLASSIFICATION BOARD, TRANSFORMING THE SECURITY CLASSIFICATION SYSTEM (2012), https://www.archives.gov/files/declassification/pidb/recommendations/transforming-classification.pdf.

[415] *See supra* Section I.A.

[416] Edgar & Schmidt, *supra* note 15, at 951 n.50 (citing 55 Cong. Rec. 779 (1917)).

[417] Kitrosser, *supra* note 354, at 531; *see also* Tim Bakken, *The Prosecution of Newspapers, Reporters, and Sources for Disclosing Classified Information: The Government's Softening of the First Amendment*, 45 U. TOL. L. REV. 1, 3 (2013).

[418] *See infra* notes 432–34 and accompanying text; *see also, e.g.*, Near v. Minnesota, 283 U.S. 697, 716 (1931) ("No one would question but that a government might

during the Pentagon Papers litigation, "To allow a government to suppress free speech simply through a system of bureaucratic classification would sell our heritage, far, far too cheaply."[419] Deference to executive classification decisions to correct statutory vagueness could prove to be a cure worse than the disease.

2. Vagueness' Cousin: Selective Prosecution

The real problem with the Espionage Act's vagueness is not its lack of notice, but that the law's vagueness allows for arbitrary and capricious use against political adversaries.[420] Given the tenor of the relationship between the press and the government in the Trump era,[421] it is not inconceivable that prosecutors would bring an Espionage Act charge in an attempt to silence and harass critics of the administration.[422]

Of course, selective prosecution claims are narrow and hard to prove. Generally, "prosecutorial discretion is broad" but "not 'unfettered.'"[423] Defendants bringing a selective prosecution claim must prove (1) "others similarly situated generally had not been prosecuted" for similar conduct, and (2) the prosecution is "based on impermissible grounds such as race, religion, or exercise of First Amendment rights."[424] Since it is clear that reporters generally have not been prosecuted under the Espionage Act, the first reporter charged could argue they were impermissibly targeted for their speech.[425] The success of this claim would turn on a very fact-specific inquiry into the alleged prosecutorial animus.[426] But ultimately, a selective prosecution claim may address the Espionage Act's dangerous vagueness better than a void-for-vagueness claim would.

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prevent . . . the publication of the sailing dates of transports or the number and location of troops.").

[419] United States v. Wash. Post Co., 446 F.2d 1322, 1326 (1971) (Wright, J., dissenting).

[420] *See, e.g.*, Epstein, *supra* note 117, at 507–08.

[421] *See supra* notes 21–28 and accompanying text.

[422] *See, e.g.*, *supra* notes 21–28 and accompanying text.

[423] Wayte v. United States, 470 U.S. 598, 608 (1985) (rejecting a defendant's selective prosecution claim) (citations omitted).

[424] *Id.* at 605.

[425] *See Prosecuting the Press: Criminal Liability for the Act of Publishing*, 120 HARV. L. REV. 1007, 1017–18 (2007).

[426] *Id.*

IV. AFFIRMATIVE OVERBREADTH CHALLENGE

The last defense to an Espionage Act prosecution—overbreadth—doubles as an offense. An overbreadth challenge says that a law "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep."[427] Overbreadth doctrine is an exception to the normal rules of facial challenges because a successful overbreadth challenge "invalidate[s] *all* enforcement of that law."[428] In First Amendment overbreadth challenges, formal standing requirements are also relaxed to allow a litigant to challenge the theoretical application of the law to third parties.[429] The Supreme Court has explained, "We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."[430] What's more, a speaker need not wait to be prosecuted to bring a facial overbreadth challenge; overbreadth claims are permitted both "in defense of a criminal prosecution" and in "actions seeking a declaratory judgment."[431]

The Espionage Act is "famously overbroad."[432] More than forty years ago, Edgar and Schmidt predicted that its overbreadth might one day force courts to declare it unconstitutional.[433] First Amendment luminary Melville Nimmer agreed.[434] An overbreadth challenge perfectly describes the root problem with the legislation: In attempting to safeguard some plainly legitimate government secrets, it "punishes a substantial amount of protected free speech," namely the vast majority of national security reporting published since 1917. Unlike void-for-vagueness, overbreadth can attack not only § 793 but also § 798.[435]

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[427] Virginia v. Hicks, 539 U.S. 113, 118–19 (2003) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)); *see also* United States v. Stevens, 559 U.S. 460, 473 (2010).
[428] *Virginia*, 539 U.S. at 119.
[429] *Id.*; *see also* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U.L. REV. 359, 369–70 (1998).
[430] *Virginia*, 539 U.S. at 119.
[431] New York v. Ferber, 458 U.S. 747, 772–73 (1982).
[432] Jack Goldsmith, *Why the U.S. Shouldn't Try Julian Assange*, WASH. POST (Feb. 11, 2011), https://www.washingtonpost.com/opinions/just-ignore-him/2011/02/10/ABWkpiF_story.html.
[433] Edgar & Schmidt, *supra* note 15, at 1000.
[434] Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 324–27 (1974) (arguing §§ 793(d) and (e) are "facially overbroad").
[435] *See* Croner, *supra* note 115, at 790–93.

But an overbreadth challenge would require the press to take a position on what constitutes the Espionage Act's "plainly legitimate sweep." Here, journalists can borrow from the First Amendment doctrine Justice Holmes created in his own struggle with the Espionage Act a century ago.[436] Specifically, journalists should argue for an adaption of the incitement standard to revelation of national defense secrets.[437] As Kitrosser proposes, "[t]he revelation of official secrets cannot constitutionally result in criminal conviction unless such revelation is directed toward causing, and is likely to cause, grave damage to national security that is specific, identifiable, and imminent."[438] Such a standard would finally bring the Espionage Act in line with the rest of First Amendment jurisprudence.[439] Drafting a statute that meets the incitement standard would of course be a legislative challenge, one largely beyond the scope of this Article. Suffice it to say, this Article assumes that proper balancing of interests would require the government to prove both (1) publication of national defense information was *directed toward* causing "grave damage to national security that is specific, identifiable, and imminent," and (2) publication of national defense information was actually *likely to cause* such damage.[440] Such a rule would allow the executive to punish those who intentionally endanger Americans, while protecting both bona fide journalists who do not intend harm and saboteurs who may intend harm but do not actually cause any.[441]

Admittedly, lower courts have repeatedly rejected overbreadth challenges to the Espionage Act, preferring limiting instructions to facial invalidation of the statute.[442] But those

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[436] *See supra* Section II.A.

[437] This is a popular idea in First Amendment scholarship. *E.g.*, Stone, *supra* note 338, at 491. *See* Shapiro, *supra* note 236, at 267. *But cf.* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1097–1103 (2005) (arguing that publication of sensitive information is not incitement).

[438] Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 928 (2008).

[439] *See id.* at 930.

[440] *Id.* at 928.

[441] Legal scholarship has proposed other ways of amending the Espionage Act to balance First Amendment and national security interests, some of which may also satisfy the "incitement" standard. *See supra* note 117 and accompanying text. One solution of note is Yochai Benkler's safe-harbor approach of writing a "public accountability defense" into the Espionage Act. *See* Benkler, *supra* note 344.

[442] United States v. Morison, 844 F.2d 1057, 1075–76 (4th Cir. 1988) (finding the term "national defense" had been reasonably narrowed by a limiting instruction and the term "to one not entitled to received" had been reasonably narrowed by the Classification Act); United States v. Drake, 818 F. Supp. 2d 909, 920–22 (D. Md. 2011) (rejecting Drake's overbreadth challenge under *Morison*); United States v.

decisions were predicated on the assumption that espionage prosecutions of journalists were a remote possibility. Concurring in *Morison*, Judge Wilkinson wrote,

> [I]nvestigative reporting is a critical component of the First Amendment's goal of accountability in government. To stifle it might leave the public interest prey to the manifold abuses of unexamined power. It is far from clear, however, that an affirmance here would ever lead to that result. The Supreme Court has cautioned that to reverse a conviction on the basis of other purely hypothetical applications of a statute, the overbreadth must 'not only be real, but substantial as well.' I question whether the spectre presented by the [amici, the *Washington Post*, et al.,] is in any sense real or whether they have much in common with Morison's conduct.[443]

Today, the spectre of espionage prosecutions of journalists seems more real than it did when the Fourth Circuit upheld the first espionage conviction of a leaker in 1988. Affirmative litigation seeking declaratory judgment that the Espionage Act is facially overbroad may now be the press's best defense.

A. Mechanics of a Pre-Enforcement Challenge

Rather than wait to be prosecuted, journalists could bring suit seeking a judgment declaring that the Espionage Act is unconstitutional and enjoining the Attorney General from enforcing it.[444] The Supreme Court has said a plaintiff has standing to bring such a pre-enforcement challenge when the plaintiff alleges (1) she has "an intention to engage in a course of conduct arguably affected with a constitutional interest," (2) the conduct is "proscribed by a statute," and (3) "there exists a credible threat of prosecution thereunder."[445]

Rosen, 445 F. Supp. 2d 602, 642–43 (E.D. Va. 2006) (finding the overbreadth was not "substantial" under the Espionage Act as narrowly construed).

[443] *Morison*, 844 F. 2d at 1084 (Wilkinson, J., concurring) (citations omitted).

[444] *E.g.* Sandvig v. Sessions, 315 F. Supp. 3d 1 (D.D.C. 2018) (bringing a First Amendment challenge to the Computer Fraud and Abuse Act facially and as applied to journalists and researchers).

[445] Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014) (quoting Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979)).

As the D.C. Circuit has recognized, courts have "shown special solicitude to pre-enforcement challenges brought under the First Amendment" out of concern for the chilling effects of overbroad statutes.[446] As a result, pre-enforcement challenges have become an important way for First Amendment advocates to attack speech-suppressive statutes that legislators are politically unwilling to repeal or revise. For example, in response to pre-enforcement overbreadth challenges, the Supreme Court has struck down laws criminalizing sexually explicit online speech,[447] depictions of minors engaging in sexual conduct,[448] and the teaching of evolution in schools.[449] Advocates have recently brought First Amendment pre-enforcement challenges to laws combatting computer hacking and online sex trafficking.[450] In a challenge to a statute criminalizing display of obscene material in view of children, the Supreme Court said, "We are not troubled by the pre-enforcement nature of this suit. . . . [T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."[451] Likewise, the Court found plaintiffs had standing to challenge a statute criminalizing material support to designated "terrorist" groups because the government never argued the plaintiffs would not be prosecuted, and plaintiffs "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."[452]

The prosecution of Julian Assange—long feared by the media bar—provides the perfect opportunity for a broader pre-enforcement challenge. Now that Assange is being prosecuted for publishing the same documents published by the *New York Times* and other institutional media outlets, the "threat of prosecution" to journalists is suddenly much more "credible." Journalists could use the Assange prosecution as a springboard for affirmative litigation challenging the Espionage Act as unconstitutional.

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[446] N.Y. Republican State Comm. & Tenn. Republican Party v. SEC, 799 F.3d 1126, 1135–36 (2015) (citing Reno v. ACLU, 521 U.S. 844, 870–74 (1997); Broadrick v. Oklahoma, 413 U.S. 601, 611–15 (1973)).
[447] *Reno*, 521 U.S. at 882.
[448] Ashcroft v. Free Speech Coal., 535 U.S. 234, 243 (2002).
[449] Epperson v. Arkansas, 393 U.S. 97, 109 (1968).
[450] Sandvig v. Sessions, 315 F. Supp. 3d 1 (D.D.C. 2018) (finding plaintiffs had standing to challenge the Computer Fraud and Abuse Act); Woodhull Freedom Found. v. United States, 948 F.3d 363, 369–71 (D.C. Cir. 2020) (finding plaintiffs had standing to challenge SESTA/FOSTA).
[451] Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988).
[452] Holder v. Humanitarian Law Project, 561 U.S. 1, 15–16 (2010) (quoting Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979) (internal quotation marks omitted).

B. Danger of a Pre-Enforcement Challenge

The danger of a pre-enforcement challenge is largely obvious but must be acknowledged: The press could take on the constitutionality of the Espionage Act and lose. In fact, many assume that would be the most likely outcome.[453] A loss could have catastrophic effects for the individual plaintiffs and the journalistic profession as a whole. The salt in the wound is that the loss would be seen as an unforced error, the result of an unnecessary and fruitless attempt to vindicate a right that has not yet been explicitly challenged.

The first problem is that bringing suit could require drawing attention to news organizations' practices, potentially exposing individual journalists to heightened risk of liability. This risk would be exacerbated if journalists brought a pre-enforcement challenge untethered from the prosecution of Assange.

The larger danger is that a pre-enforcement suit would be an invitation to the Supreme Court to draw bright lines that could change the way journalists do their work. Since so much of journalistic practice is based on ethical norms, the imposition of new legal rules could easily upend them. For that reason, in the modern era, the media bar has largely tried to stay out of the Supreme Court, making any predictions especially speculative.[454] On one hand, some commentators argue persuasively that the Roberts Court has been one of the most First Amendment-friendly courts in American history;[455] if anything, one leftist

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[453] *See, e.g.*, Ryan Goodman & Steve Vladeck, *Q&A: Does an Assange Prosecution Pose a Threat to Freedom of the Press*, JUST SECURITY (Apr. 26, 2017), https://www.justsecurity.org/40281/qa-assange-prosecution-pose-threat-press/ ("I'm just not that sanguine about the prospect of the Supreme Court recognizing a First Amendment right to publish national security secrets in anything but such a compelling case.").

[454] *See, e.g.*, Lee Levine, *What Does the "New" Supreme Court Portend for Media Lawyers?*, BALLARD SPAHR LLP: LEGAL ALERTS (Oct. 10, 2018), https://www.ballardspahr.com/alertspublications/legalalerts/2018-10-10-what-does-the-new-supreme-court-portend-for-media-lawyers.aspx.

[455] *See, e.g.*, Adam Liptak, *A Significant Term, With Bigger Cases Ahead*, N.Y. TIMES (June 28, 2011), https://www.nytimes.com/2011/06/29/us/29scotus.html (calling "defending free speech" one of Chief Justice John Roberts' "signature projects"); *see also* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (finding, in a 9-0 decision, that a state statute barring sex offenders from social media for life violated the First Amendment); Snyder v. Phelps, 562 U.S. 443 (2011) (finding, in an 8-1 decision, that Westboro Baptist Church protests were protected speech "on matters of public concern"); United States v. Stevens, 559 U.S. 460 (2010) (finding, in an 8-1 decision, that a federal statute banning kitten crush videos was unconstitutionally overbroad). *But see* Erwin Chemerinsky, Lecture, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723 (2011) (arguing that the Roberts Court has not, on the whole, been supportive of First Amendment rights).

critique of the Roberts Court is that its view of the First Amendment is *too* expansive.[456] On the other hand, the Court has been solicitous of executive power.[457] Compounding the uncertainty, the high court has not heard a case on freedom of the press in eighteen years.[458]

Finally, as Alexander Bickel observed after defending the *Times* in the Pentagon Papers litigation, "Those freedoms which are neither challenged nor defined are the most secure. . . . We extend the legal reality of freedom at some cost in its limitless appearance. And the cost is real."[459] Does asking whether the First Amendment protects journalists from espionage prosecutions only endanger the free press right that does exist? Or is the right already sufficiently endangered? In their comprehensive study of the Espionage Act, Edgar and Schmidt asked whether questions about the statute's validity were best left unanswered, and decided, "that delicate approach mandates reliance upon the presence of ambiguities, both constitutional and statutory, that do not survive many trips to the courthouse."[460] Ultimately, a pre-enforcement overbreadth challenge would be, to borrow the Court's phrase, "strong medicine . . . employed . . . sparingly and only as a last resort."[461] Prosecutorial forbearance is preferable but no longer a given. If prosecution seems imminent, a tougher response may be required.

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[456] *See, e.g.*, Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 3, 2013), https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation.

[457] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (upholding the Muslim ban); Holder v. Humanitarian Law Project, 561 U.S. 1, 33–34 (2010) (finding executive decision-making about national security is "entitled to deference" even in First Amendment cases). *But see, e.g.*, Boumediene v. Bush, 553 U.S. 723, 771 (2008) (holding noncitizens have a constitutional right to challenge their detention via writ of habeas corpus).

[458] *See* Bartnicki v. Vopper, 532 U.S. 514 (2001). Only three of the justices who decided this case—Ginsburg (affirming), Breyer (concurring), and Thomas (dissenting)—are still on the Court.

[459] Alexander Bickel, *The "Uninhibited, Robust and Wide-Open" First Amendment*, COMMENTARY, Nov. 1, 1972, at 61.

[460] Edgar & Schmidt, *supra* note 15, at 936. Admittedly, Edgar and Schmidt began their study in search of "the extent to which constitutional principles" would "limit official power to prevent or punish public disclosure of national defense secrets"—like the constitutional principles this Article identifies—but instead concluded "the central issues are legislative." *Id.* at 930.

[461] Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (referring to the Court's application of the overbreadth doctrine).

C. Advantages of a Pre-Enforcement Challenge

The old legal maxim is that bad facts make bad law.[462] Few tears are shed for Julian Assange.[463] But the espionage conviction of Samuel Moring Morison, by all accounts a careless and career-minded leaker,[464] paved the way for the espionage prosecution of Edward Snowden, whose leaks have been called a "public service" by the nation's former top law enforcement official.[465] Likewise, the espionage conviction of Julian Assange could pave the way for the espionage prosecution of James Risen. In contrast, affirmative litigation allows the press to set the terms of the debate. Furthermore, a pre-enforcement challenge could be filed outside the Fourth Circuit, where *Morison* will not be binding.

Another benefit of affirmative litigation is that the press could add co-plaintiffs. On its face, the Espionage Act criminalizes not just the communication of national defense information, but the receipt of it.[466] Does that mean the Espionage Act applies to *New York Times* subscribers, who "receive" potentially prohibited information in their newspapers every day? What if a *Times* subscriber forwards a news article containing classified information to a friend?[467] What about readers of WikiLeaks.org? Do WikiLeaks readers have "reason to believe that the information is to be used to the injury of the United States"?[468] What does "receive" even mean in the era of emails and instant messages? Criminalization of news consumption would make a mockery of the First Amendment.[469] Yet that is what the Espionage Act seems to do. Consequentially, the statute may have a chilling effect on not just reporting, but

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[462] N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases. like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.").

[463] *See, e.g.*, Christopher Hitchens, *Turn Yourself In, Julian Assange*, SLATE (Dec. 6, 2010), https://slate.com/news-and-politics/2010/12/the-WikiLeaks-founder-is-an-unscrupulous-megalomaniac-with-a-political-agenda.html ("The WikiLeaks founder is an unscrupulous megalomaniac with a political agenda.").

[464] *See, e.g.*, SCHOENFELD, *supra* note 40, at 223–28.

[465] Jaffe, *supra* note 218.

[466] 18 U.S.C. § 793(c) (2017).

[467] *See id.* § 793(e).

[468] *Id.* § 793(a).

[469] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

also on receipt of information.[470] After the first major Wikileaks disclosures in 2010, federal agencies told employees and contractors not to access Wikileaks on their work or personal computers,[471] and university career services departments warned students that viewing or discussing leaked information could jeopardize their ability to get security clearances for federal jobs.[472] In 2016, CNN anchor Chris Cuomo caused a stir by announcing on television that it was "illegal" for private citizens to read WikiLeaks.[473] Understandably, the general public remains unsure if reading unauthorized leaks of national defense information online is a criminal act.[474] Given the Supreme Court's hesitance to extend special rights to the press,[475] courts may be more sympathetic to a First Amendment overbreadth suit brought by both publishers and their readers.[476]

Ultimately, an overbreadth challenge is the best way to solve the underlying problem: The Espionage Act is a badly written statute. No one understands the Espionage Act because not even Congress understood the Espionage Act. For years,

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[470] *Cf.* Karen Gullo, *Surveillance Chills Speech—As New Studies Show—And Free Association Suffers*, EFF (May 19, 2016), https://www.eff.org/deeplinks/2016/05/when-surveillance-chills-speech-new-studies-show-our-rights-free-association (citing studies that people were more hesitant to read about controversial topics online after reports of NSA surveillance).

[471] Rachel Slajda, *White House Tells All Federal Agencies To Prohibit Unauthorized Employees From Wikileaks Site*, TALKING POINTS MEMO (Dec. 3, 2010), https://talkingpointsmemo.com/muckraker/white-house-tells-all-federal-agencies-to-prohibit-unauthorized-employees-from-wikileaks-site.

[472] *E.g.*, Elie Mystal, *Could Just Reading WikiLeaks Get You Nixed From Working as a Federal Attorney?*, ABOVE THE LAW (Dec. 1, 2010), https://abovethelaw.com/2010/12/could-just-reading-wikileaks-get-you-nixed-from-working-as-a-federal-attorney/.

[473] *See* Eugene Volokh, *'Remember, it's illegal to possess' WikiLeaks Clinton emails, but 'it's different for the media,' says CNN's Chris Cuomo*, WASH. POST (Oct. 17, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/17/remember-its-illegal-to-possess-wikileaks-clinton-emails-but-its-different-for-the-media-says-cnns-chris-cuomo/.

[474] *E.g.*, *Wait... So is it or is it not illegal to read Wikileaks?*, REDDIT, https://www.reddit.com/r/AskReddit/comments/g11ns/waitso_is_it_or_is_it_not_illegal_to_read/ (last accessed Mar. 2, 2019) ("seriously, Im confused [sic].").

[475] *See, e.g.* Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (quoting Lovell v. Griffin, 303 U.S. 444, 450, 452 (1938)) ("Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals.'"); Citizens United v. FEC, 558 U.S. 310, 352 (2010) (quoting Austin v. Mich. State Chamber of Com., 494 U.S. 652, 691 (1990)) (Scalia, J., dissenting) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."). *But see* STEPHEN GILLERS, JOURNALISM UNDER FIRE 23–26 (2018) (criticizing the *Citizens United* dicta); Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633–34 (1975) (articulating a view of the press clause that protects the press as an institution).

[476] *Cf.* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) ("A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.").

legal scholars have called for a statutory overhaul, to no avail.[477] Tellingly, while Judge Ellis rejected an overbreadth challenge in *Rosen*, in the same breath, he called for Congress to revise the statute.[478] Rather than engaging in judicial contortions to make sense of a nonsensical law, perhaps Judge Ellis should have forced Congress to do its job.[479] The Supreme Court has since said, "We will not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain, and sharply diminish Congress's incentive to draft a narrowly tailored law in the first place."[480] Judicial construction cannot solve the fundamental problems with the Act, so the press should move to strike it down, thus putting the onus on Congress to rewrite it consistent with the First Amendment.

V. CONCLUSION

When I began this project, I set out to imagine the best defense a journalist would have against an Espionage Act prosecution. I found the situation to be much more dire than I anticipated: The statute is vaguer, the case law is weaker, and throughout American history, the press has had more near misses with prosecution than I initially thought. As a result, this Article proposes an equally dire solution, affirmative litigation to strike down the Espionage Act as unconstitutionally overbroad. While the wisdom of this proposal is debatable, it is a debate that civil libertarians should have.

Simply put, what has protected journalists for the last hundred years is not the law, but the Justice Department's lack of will to use it. A president with the desire to do so could easily go after journalists who hold him accountable, and under current precedents, he could even succeed. Such a prosecution would cause an irreparable shift in the relationship between the government and the media that could cripple our civil society and gut the meaning of the First Amendment's press clause. Perhaps the danger will never come to pass. But if we wait to see if the Justice Department summons the will, it could be too

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[477] *See supra* note 116 and accompanying text.
[478] United States v. Rosen, 445 F. Supp. 2d 602, 643, 646 (E.D. Va. 2006) ("[T]he time is ripe for Congress to engage in a thorough review and revision of these provisions."); *see also* Ellis, *supra* note 259, at 1624–26 (recommending revisions to the Espionage Act).
[479] Bant, *supra* note 117, at 1040.
[480] United States v. Stevens, 559 U.S. 460, 481 (2010) (citations omitted).

late—and by then, the security of our First Amendment rights will be at stake.