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## Restoring the Balance Between Secrecy and Transparency: The Prosecution of National Security Leaks Under the Espionage Act

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The game of leaks is an important one in the United States. Most people acknowledge that the government has compelling reasons to keep some information secret, especially information related to national security. Yet it is widely known that government officials routinely leak secrets to the press and that such leaks “have played an important role in the governance of the United States since its founding.”<sup>1</sup> Leaks maintain the transparency necessary to keep government officials accountable to their constituents.

Unwanted leaks to the press have always irritated presidents, but criminal prosecution of such leaks was relatively rare.<sup>2</sup> That situation changed dramatically with the Obama Administration, which “prosecuted more leakers of classified information than all previous administrations combined.”<sup>3</sup> The Trump Administration has also signaled that it will aggressively pursue leaks to the press, arguing that the “staggering number of leaks undermin[es] the ability of our government to protect this country.”<sup>4</sup> Prosecution of leakers has occurred largely under the Espionage Act of 1917 (“Espionage Act”), the primary law government officials use to pursue unauthorized disclosures of national security information.

This increase in Espionage Act prosecutions is quite worrisome. Transparency and accountability sit

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<sup>1</sup> Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 249 (2008).

<sup>2</sup> David Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone[s] Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 534-36 (2013).

<sup>3</sup> 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, 1225 (2015).

<sup>4</sup> Julia Edwards Ainsley, *Trump Administration Goes on Attack Against Leakers, Journalists*, REUTERS (Aug. 4, 2017, 11:24 AM), <https://www.reuters.com/article/us-usa-trump-sessions-leaks-idUSKBN1AK1UR>.

in delicate balance with the need for secrecy. Leaks of national security information to the press are a critical aspect on the accountability side of the equation. Until recently the situation involving unauthorized leaks to the press was understood to involve a “détente” where the law “ceded to the government broad powers to keep secrets but afforded news organizations broad freedom to publish secrets once those secrets were in the hands of journalists, largely irrespective of how those secrets got there.”<sup>5</sup> Prosecutions of leaks to the press threaten to undermine government accountability by tipping the previous balance decidedly in favor of secrecy. Unfortunately, the lack of clarity associated with the language and history of the Espionage Act allows prosecutions of those who leak to the press to occur and suggests that the tilt toward secrecy will continue unless Congress and the courts intervene.

This Issue Brief reviews the relationship between secrecy, transparency and accountability in the United States, including the role of anonymous leaks. It also examines the threat that increased Espionage Act prosecutions pose to government accountability and discusses why changes to the Espionage Act are necessary to preserve an appropriate balance between government secrecy and transparency.

## I. A Brief History of Secrecy, Transparency and Leaks in the United States

### A. The Balance Between Secrecy and Transparency/Accountability

Secrecy and transparency both play important roles in effective governance. Although the U.S. Constitution does not explicitly speak to broad governmental powers regarding secrecy, the Supreme Court has recognized a constitutional basis for executive branch secrecy in two areas – assertions of executive privilege and classification of national security information.<sup>6</sup> Such secrecy is necessary for effective conduct of military action, diplomatic relations, and implementation of foreign policy.<sup>7</sup> However, the Supreme Court has recognized that the government’s secrecy rights are not absolute. For example, with executive privilege, i.e., the qualified privilege to withhold confidential communications between the president and his advisors in litigation, the Court will not accept generalized assertions of harm but instead requires identification of specific military secrets or other harm before the executive branch may withhold such communications during the course of a lawsuit.<sup>8</sup>

The Court’s reluctance to grant the president an absolute right to secrecy reflects the view that

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<sup>5</sup> 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, 473 (2013); see also ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 80 (1975).

<sup>6</sup> *United States v. Nixon*, 418 U.S. 683, 705-08 (1974); *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

<sup>7</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (“Secrecy in respect of information gathered ... may be highly necessary, and the premature disclosure of it productive of harmful results.”); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (“The [g]overnment has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence.”).

<sup>8</sup> *Nixon*, 418 U.S. at 710-13.

democratic forms of government must be transparent and accountable in order to claim legitimacy.<sup>9</sup> As courts recognize, much of the information officials want to keep secret also often touches on important policy issues even if the information pertains to national security: “No decisions are more serious than those touching on peace and war; none are more certain to affect every member of society. Elections turn on the conduct of foreign affairs and strategies of national defense, and the dangers of secretive government have been well documented.”<sup>10</sup> Yet national security is one of the hardest areas in which to find a suitable balance between secrecy and transparency.

The president’s classification authority illustrates this problem. Executive Order No. 13,526, issued by President Obama in December 2009, authorizes the president to restrict access to several categories of information, including information related to military plans, foreign government information, intelligence activities, and weapons of mass destruction.<sup>11</sup> Under the order, the president may restrict access only if “unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security.”<sup>12</sup> The order also identifies levels of classification, such as “top secret,” “secret,” and “confidential.”<sup>13</sup> These designations define the danger to national security that each level of classification poses if information is disclosed and provide important guidance to agency officials regarding who has access to the material.<sup>14</sup> Finally, the order prohibits classification of information to conceal illegal behavior, malfeasance, inefficiency, or other embarrassing information.<sup>15</sup>

At first glance, Executive Order 13,526 attempts to balance secrecy and accountability. It allows classification of only certain kinds of information, sets standards of harm that disclosure of information should cause in order to be classified, and admonishes officials not to classify information simply to avoid embarrassment or wrongdoing. Nevertheless, the classification system has been subject to abuse practically from the beginning of its existence. Executive officials’ tendency to wrongly classify (or overclassify) information is well-documented.<sup>16</sup> An enormous amount of information remains secret that should not under the terms of the order itself.

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<sup>9</sup> 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910) (“A popular Government, without popular information, or means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”).

<sup>10</sup> *United States v. Morison*, 844 F.2d 1057, 1081 (4<sup>th</sup> Cir. 1988) (Wilkinson, J., concurring).

<sup>11</sup> Exec. Order No. 13,526 § 1.4 (2009). Each president can issue an order or update a previous order.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at § 1.2.

<sup>14</sup> For example, the term “‘top secret’ shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.” *Id.* at § 1.2(a)(1). In contrast, information classified as “secret” need only “cause serious damage to the national security.” *Id.* at § 1.2(a)(2).

<sup>15</sup> *Id.* at § 1.7(a).

<sup>16</sup> *Examining the Costs of Overclassification on Transparency and Security: Hearing Before the Committee on Oversight and Government Reform*, 114<sup>th</sup> Cong. \_\_ (2016) (Statement of J. William Leonard, Former Director Information Security Oversight Office), <https://oversight.house.gov/wp-content/uploads/2016/12/Leonard-ISOO-Statement-Overclassification-12-7.pdf>; Christina E. Wells, “National Security” *Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1198-1205 (2004).

Furthermore, Executive Order 13,526 considers only the danger to national security and ignores any benefit that disclosure might pose to the public interest. Thus, it allows for one-sided balancing in favor of secrecy.

Although Congress can enact legislation to require greater access to information,<sup>17</sup> its efforts in this arena have fallen far short. Congress passed the Freedom of Information Act (“FOIA”) in 1967, which gives access to “any person” seeking documents held by executive agencies.<sup>18</sup> In passing FOIA, Congress recognized that “[a] democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies.”<sup>19</sup> Unfortunately, FOIA’s numerous exemptions undercut Congress’s attempt to inform its constituents. More specifically, FOIA allows agency officials to withhold properly classified national security information.<sup>20</sup> Because agency officials have enormous discretion to make withholding decisions under the exemption, over-withholding is a serious problem. Legal challenges to withholding decisions are expensive. Furthermore, in disputes over agency withholding decisions under the national security exemption, judges are often quite deferential to the government even though Congress amended FOIA in 1974 to allow judges to engage in independent review of the propriety of classification decisions.<sup>21</sup> Once the government has met its burden of establishing the applicability of an exemption, courts often defer to government affidavits outlining the classification level of the information, describing the documents withheld, and the procedures used to arrive at the decision to classify and withhold.<sup>22</sup>

### **B. Leaks and Leakers – The Symbiosis Between Government Officials and the Press**

With formal routes to obtaining government information cumbersome and marginally effective, an informal system of leaks to journalists arose, at least in part, to fill the gap. In fact, observers note that “leaking classified information occurs so regularly in Washington that it is often described as a routine method of communication about government.”<sup>23</sup> Many of those leaks contain valuable policy information that informs public decision-making. Most famously, Daniel Ellsberg leaked the Pentagon Papers to *The New York Times* and *Washington Post* during the Vietnam War. More recently, highly publicized news stories include leaked information about the National Security

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<sup>17</sup> *Egan*, 484 U.S. at 530.

<sup>18</sup> 5 U.S.C. § 552(a)(3) (2016).

<sup>19</sup> H.R. REP. NO. 89-1497, at 2429 (1966).

<sup>20</sup> FOIA’s national security exemption includes information “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” and which is “in fact properly classified.” 5 U.S.C. § 552(b)(1). FOIA contains an additional eight exemptions for material on other topics. See 5 U.S.C. § 552(b)(2)-(9).

<sup>21</sup> Congress amended FOIA in response to a Supreme Court decision, *EPA v. Mink*, 410 U.S. 73 (1973), which held that judges could review only the procedures used in classification decisions and not the substantive propriety of a particular classification decision. The amendments added the current language requiring that the exemption apply only to information “properly classified pursuant to . . . Executive Order.” 5 U.S.C. § 553(b)(1)(B).

<sup>22</sup> Wells, *supra* note 16, at 1206-07; see also Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 713 (2002).

<sup>23</sup> William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1467 (2008).

Administration's (NSA) conclusions regarding Russia's attempts to hack election software during the 2016 U.S. elections,<sup>24</sup> the CIA's ability to bypass encryption on smartphones,<sup>25</sup> the NSA's data collection regarding U.S. citizens and allies,<sup>26</sup> the U.S. government's failed attempt to disrupt Iran's nuclear program,<sup>27</sup> a foiled suicide bomber attack on a U.S.-bound airline,<sup>28</sup> and the treatment of prisoners at Abu Ghraib and Guantanamo Bay.<sup>29</sup> Many of these leaks have had a profound effect on public opinion and, consequently, on U.S. policy.

The classic conception of those who leak involves an image of a mid- to low-level government insider who views themselves as a whistleblower, attempting to shed light on government wrongdoing, or who simply wants to bring something to the public's attention during an important policy debate or other initiative. Certainly, people leak for such reasons. Chelsea Manning, for example, asked of others: "If you saw incredible things, horrible things, things that belonged in the public domain and not in some server stored in a dark room in Washington, D.C. – what would you do?"<sup>30</sup>

But this conception of those who leak to the press is incomplete. Many leaks actually originate at higher levels of government, such as with presidents and high-level administrative officials.<sup>31</sup> Their motives for leaking to the press vary considerably. They may range from a desire to gain public support for policy agendas or to float a trial balloon to determine the public's response to a proposed initiative.<sup>32</sup> Some officials leak information to the press as a means of communicating with other officials or legislators, or to gain the upper hand in a debate.<sup>33</sup> Some leak as a form of retribution – i.e., to retaliate against critics or political enemies.<sup>34</sup>

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<sup>24</sup> Matthew Cole et al., *Top-Secret NSA Report Details Russian Hacking Effort Days Before 2016 Election*, THE INTERCEPT, (June 5, 2017, 3:44 PM), <https://theintercept.com/2017/06/05/top-secret-nsa-report-details-russian-hacking-effort-days-before-2016-election/>.

<sup>25</sup> *Vault 7: CIA Hacking Tools Revealed*, WIKILEAKS (Mar. 7, 2017), <https://wikileaks.org/ciav7p1/>.

<sup>26</sup> Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN (June 5, 2013, 6:05 PM), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

<sup>27</sup> Michael Isikoff, *Ex-CIA Officer Charged With Leak to Reporter*, NBC NEWS (Jan. 6, 2011, 4:10 PM), [http://www.nbcnews.com/id/40951509/ns/us\\_news-security/t/ex-cia-officer-charged-leak-times-reporter/#.Wbb-d9VSzcs](http://www.nbcnews.com/id/40951509/ns/us_news-security/t/ex-cia-officer-charged-leak-times-reporter/#.Wbb-d9VSzcs).

<sup>28</sup> Scott Shane & Eric Schmitt, *Qaeda Plot to Attack Plane Foiled, U.S. Officials Say*, N.Y. TIMES (May 7, 2012), <http://www.nytimes.com/2012/05/08/world/middleeast/us-says-terrorist-plot-to-attack-plane-foiled.html>.

<sup>29</sup> James Risen, *G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15; Dana Priest & Joe Stephens, *Pentagon Approved Tougher Interrogations*, WASH. POST, May 9, 2004, at A1.

<sup>30</sup> Anna Mulrine, *Bradley Manning Trial: Leakers Julian Assange and Daniel Ellsberg Weigh In*, THE CHRISTIAN SCIENCE MONITOR (July 26, 2013), <https://www.csmonitor.com/USA/Justice/2013/0726/Bradley-Manning-trial-Leakers-Julian-Assange-and-Daniel-Ellsberg-weigh-in>. Other leakers may be less focused on wrongdoing and more focused on simply revealing perceived important information buried so deeply that FOIA requests would not discover it. David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 259 (2010).

<sup>31</sup> Lee, *supra* note 23, at 1468-70; Pozen, *supra* note 2, at 529-30.

<sup>32</sup> Papandrea, *supra* note 1, at 251-53; Pozen, *supra* note 2, at 532.

<sup>33</sup> Lee, *supra* note 23, at 1468-69; Papandrea, *supra* note 1, at 252-54.

<sup>34</sup> Lee, *supra* note 23, at 1468-69.

These motives shed light on why historically the executive branch rarely attempted to prosecute leaks to media outlets. Many leakers attempt to further policy agendas rather than expose government wrongdoing. Thus, the game of leaks is integral to governance in the United States. It makes no practical sense to engage in full-throated, even-handed pursuit of leaks that could put everyone in an administration at risk.<sup>35</sup> However, pursuing only those leaks an administration dislikes – usually from low- to mid-level leakers – leaves an administration open to claims of retaliatory prosecution or that it is manipulating the information it wants the public to receive.<sup>36</sup> Finally, aggressively pursuing leakers puts government officials' relationships with the press at risk by increasing distrust between administrative officials and the very media actors upon whom they rely to disseminate their policy agendas.<sup>37</sup> A government that openly prosecutes press publications is unlikely to find receptive journalists when it needs or wants to leak information for its own purposes.

In the last decade, however, the Obama and Trump Administrations have increased prosecutions of leakers and taken increasingly worrying actions against the press. Most of these prosecutions involved leaks by low- to mid-level employees or officials who sought to shed light on government programs, rather than by high-level administrative officials.

### C. Recent Prosecution Trends in the Obama and Trump Administrations

Prior to the Obama Administration, there were three prosecutions of individuals who leaked national security information to the press under the Espionage Act.<sup>38</sup> The Obama and Trump Administrations, however, have pursued at least nine such prosecutions. For example, federal law enforcement officials prosecuted (1) Thomas Drake, a senior NSA official, for providing classified information regarding alleged NSA mismanagement to the *Baltimore Sun*, (2) former CIA officer Jeffrey Sterling for disclosing classified information about the U.S. government's attempt to sabotage Iran's nuclear program to *New York Times* reporter James Risen, (3) Stephen Kim for disclosing classified information about North Korea's nuclear program to *Fox News* reporter James Rosen, and (4) former CIA officer John Kiriakou for disclosing information about the CIA's detention and interrogation program to a reporter.<sup>39</sup> In addition, the military instituted court martial proceedings against Private Chelsea Manning for downloading and delivering to Wikileaks a

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<sup>35</sup> *Id.* at 1467-68.

<sup>36</sup> Papandrea, *supra* note 1 at 254; McCraw & Gikow, *supra* note 5, at 492-94.

<sup>37</sup> Pozen, *supra* note 2, at 530-31 (describing symbiotic relationship between government officials and press).

<sup>38</sup> Samuel Morison was convicted of violating the Espionage Act for leaking photographs to a defense publication. *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988). Anthony Russo and Daniel Ellsberg were prosecuted under the Espionage Act for leaking the Pentagon Papers to the *Washington Post* and *New York Times* but the charges were dismissed. Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 314 (1974). In 2005, State Department analyst Lawrence Franklin pled guilty under the Espionage Act to leaking classified information about Iran to lobbyists. David Johnston, *Former Military Analyst Gets Prison Term for Passing Information*, N.Y. TIMES, Jan. 21, 2006, at A14.

<sup>39</sup> See Stephen P. Mulligan & Jennifer K. Elsea, *Criminal Prohibitions of Leaks and Other Disclosures of Classified Defense Information*, CRS Report (March 7, 2017) at 20-23, <https://fas.org/sgp/crs/secretcy/R41404.pdf>. For a discussion of other prosecutions, see *id.* at 23-25.

multitude of classified diplomatic cables and other military information.<sup>40</sup> Federal officials also indicted Edward Snowden, a former NSA contract employee for downloading and leaking classified information related to NSA data collection programs to *The Guardian (UK)* and *Washington Post*.<sup>41</sup> Recently, Trump Administration officials indicted Reality Winner, a former contract employee, for leaking a classified NSA document about Russian attempts to interfere in the 2016 elections.<sup>42</sup>

In contrast to their pursuit of leakers, Presidents Obama and Trump have paid lip service to the need for a free press. President Obama stated that his administration would not criminally pursue journalists because a free press is “essential for our democracy. . . . Journalists should not be at legal risk for their jobs.”<sup>43</sup> Yet, Obama Administration officials engaged in actions that put a free press at risk, including subpoenaing journalists’ phone records and emails, and naming journalists as unindicted co-conspirators in Espionage Act prosecutions of leakers.<sup>44</sup> Trump’s Attorney General, Jeff Sessions, also acknowledged “the important role that the press has,” but stated he was not inclined to read that freedom broadly, noting that the media’s rights were “not unlimited” and that “[t]hey cannot place lives at risk with impunity.”<sup>45</sup> He implied that the Trump Administration would curtail an Obama policy against subpoenaing journalists for the identities of their sources in leak cases.<sup>46</sup> The Trump Administration has also labeled some publishers of national security information, like Wikileaks, as “hostile intelligence services” for publishing information that other countries could use to the disadvantage of the United States.<sup>47</sup> This characterization seems to differ from the Obama Administration’s official statement that Wikileaks stood on the same footing as mainstream news organizations and journalists.<sup>48</sup>

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<sup>40</sup> *Id.* at 21-22.

<sup>41</sup> *Id.* at 24.

<sup>42</sup> Cole, *supra* note 24.

<sup>43</sup> Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

<sup>44</sup> Leonard Downie, Jr., *The Obama Administration and the Press: Leak Investigations and Surveillance in Post-9/11 America*, COMMITTEE TO PROTECT JOURNALISTS (Oct. 10, 2013), <https://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php>.

<sup>45</sup> Kevin Johnson, *Attorney General Jeff Sessions Announces Broad Crackdowns on Leaks, Issues Warnings to the Press*, USA TODAY (Aug. 4, 2017, 11:22 AM), <https://www.usatoday.com/story/news/politics/2017/08/04/jeff-sessions-justice-department-triples-number-leak-investigations/539476001/>.

<sup>46</sup> Callum Borchers, *Jeff Sessions Might Subpoena Journalists to Reveal Leakers. Mike Pence Once Fought Against That.*, WASH. POST. (Aug. 4, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/08/04/jeff-sessions-might-subpoena-journalists-to-reveal-leakers-mike-pence-once-fought-against-that/?utm\\_term=.ef11ece47cf0](https://www.washingtonpost.com/news/the-fix/wp/2017/08/04/jeff-sessions-might-subpoena-journalists-to-reveal-leakers-mike-pence-once-fought-against-that/?utm_term=.ef11ece47cf0).

<sup>47</sup> Morgan Chalfant, *ClA Head: Wikileaks a 'Non-state Hostile Intelligence Service.'*, THE HILL, (Apr. 13, 2017, 3:44 PM), <http://thehill.com/policy/cybersecurity/328730-cia-director-wikileaks-a-non-state-hostile-intelligence-service>.

<sup>48</sup> 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?utm\\_term=.6cee804d1443](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?utm_term=.6cee804d1443).

## II. The Espionage Act and Its Interpretation

### A. The Act

Several discrete laws exist for punishing unauthorized disclosure of national security information.<sup>49</sup> Because of its relative breadth, the Espionage Act is the primary law on which government officials rely. Although much of the Act targets classic espionage activities, such as spying,<sup>50</sup> it does contain provisions that arguably allow punishment of leakers and publishers of national security information.

Sections 793(d) prohibits persons with lawful possession of information from “willfully” communicating, distributing, or attempting to communicate or distribute to “any person not entitled to receive it:”

any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.<sup>51</sup>

Section 793(e) uses essentially the same language but punishes those who have “unauthorized possession” of the specified government information or documents and who disclose it to persons unauthorized to receive it.<sup>52</sup> Sections 793(d) and (e) also contain clauses prohibiting the willful retention of material listed in each statute. Section 798 prohibits any knowing and willful disclosure of classified information concerning communications intelligence activities to an unauthorized person or any use of it in any manner prejudicial to the interests of the U.S. or for the benefit of a foreign nation.<sup>53</sup> Section 793(g) punishes any two or more people who conspire to violate any section of the Espionage Act.<sup>54</sup>

With the exception of Section 798, which specifically punishes the disclosure of “classified information,” the provisions of the Espionage Act apply to the disclosure of information “relating to national defense.” Courts interpret this term in light of the presidential classification system.<sup>55</sup> Thus, whether disclosure of information is to a person “unauthorized to receive it” or is by a person with lawful or unlawful possession depends on whether the information is classified. The courts also require that the information that is the subject of the prosecution be “closely held.” This

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<sup>49</sup> Relevant laws include 18 U.S.C. § 641, which criminalizes knowing theft of government property, 50 U.S.C. §§ 3121-26, which punishes disclosing the identity of covert intelligence agents, 18 U.S.C. § 952, which punishes employees who willfully publish diplomatic code, and 42 U.S.C. § 2274, which prohibits disclosing information related to nuclear energy or weapons. For more discussion, see Mulligan & Elsea, *supra* note 39, at 7-12.

<sup>50</sup> Section 794, for example, penalizes transmission of certain information related to national defense to a foreign government or foreign political or military party. 18 U.S.C. § 794. Courts have referred to this section as punishing “classic spying” incidents. *Morison*, 844 F.2d at 1065.

<sup>51</sup> 18 U.S.C. § 793(d).

<sup>52</sup> *Id.* at § 793(e).

<sup>53</sup> *Id.* at § 798(a)(3).

<sup>54</sup> *Id.* at § 793(g).

<sup>55</sup> *See, e.g.,* *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).



requirement is not synonymous with classified information, but rather requires that the government have secured the information in addition to its being classified – e.g., by not leaking the information via other avenues.<sup>56</sup>

Reading the Espionage Act in light of this gloss, it is apparent that a “government insider ... could, theoretically, face Espionage Act prosecution for passing virtually any classified information to a third party, including a journalist.”<sup>57</sup> Most government insiders who leak classified information to the press do so intentionally and with knowledge that they may be violating the law, a state of mind which meets the definition of “willful” in the statute.<sup>58</sup> Since the leaks involve classified information, the insider arguably knew disclosure had the potential to cause harm. Finally, members of the public, including the press, are “not entitled to receive” information under the classification system and thus are prohibited from receiving it under Sections 793(d) and (e). They would also be an “unauthorized person” under Section 798.

Journalists are similarly at risk under the law. Third parties, such as media actors who disclose classified information, could qualify as persons with “unauthorized possession” of information under Section 793(e). Publication could qualify as “communication” of that information to members of the public, who are not authorized to receive it under the Act. Since publication was likely intentional, the only question would be whether the media “had reason to believe” the information could be used to injure the U.S. or aid a foreign nation. Media publication of information concerning specified communications intelligence activities, such as the NSA's surveillance programs of U.S. citizens, could also fall under Section 798, which makes “communication” of such information to an “unauthorized” person illegal.

Application of these provisions to leaks to third parties is not, however, as straightforward as it appears. Substantial questions arise regarding the requirement that a leaker or third-party discloser have “reason to believe” that their disclosure potentially causes harm to the U.S. or aids a foreign nation. Must the government prove malicious intent or bad faith on the part of leakers or third-party disclosers of information, or is it enough that they knew their disclosure violated the law and could potentially harm national security? To what extent must the harm the government fears from disclosure be concrete or simply possible? The law’s language does not clearly answer these questions.

Additionally, Harold Edgar and Benno Schmidt’s exhaustive review of the Espionage Act’s legislative history found that it “may fairly be read as excluding criminal sanctions for well-meaning publication of information no matter what damage to the national security might ensue and regardless of whether the publisher knew its publication would be damaging.”<sup>59</sup> Thus, the Act

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<sup>56</sup> *Morison*, 844 F.2d at 1071; *United States v. Rosen*, 445 F. Supp. 2d 602, 621 (E.D. Va. 2006); *id.* at 639-40.

<sup>57</sup> Kitrosser, *supra* note 3, at 1232.

<sup>58</sup> *Morison*, 844 F.2d at 1071.

<sup>59</sup> Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV.

arguably does not apply to third-party publishers of information at all – at least to the extent they are “well-meaning.” And as discussed below, the Supreme Court’s First Amendment jurisprudence, which largely developed after adoption of the Act, also supports this conclusion. Unfortunately, lower courts recently have tended to side with the government in Espionage Act prosecutions.

## B. The Espionage Act in the Courts

The Supreme Court has not decided a case involving Espionage Act charges against leakers or publishers. The closest the Court ever came to such a decision involved Daniel Ellsberg’s leak of the Pentagon Papers, a classified history of the U.S. military’s strategy in Vietnam, to the *Washington Post* and *New York Times*.<sup>60</sup> The Court’s decision centered on its concern that a court order barring publication amounted to an unconstitutional “prior restraint.”<sup>61</sup> However, some Justices intimated that *post*-publication criminal sanctions might be appropriate, specifically referencing the Espionage Act.<sup>62</sup> The government did not pursue the newspapers, but it did pursue criminal sanctions against Daniel Ellsberg until a court dismissed the charges due to government misconduct.<sup>63</sup>

### I. Leakers

The government’s decision to pursue Daniel Ellsberg in the Pentagon Papers case reflects a common theme in the Supreme Court’s jurisprudence – the free speech rights of government employees are limited compared to the rights of other citizens. The Court recognizes that the government as employer has different interests in regulating the speech of employees than when regulating the speech of citizens at large.<sup>64</sup> This is especially true when employees undertake a position of confidence and trust, such as when their job gives them access to classified information.<sup>65</sup> However, even in these cases, the Court acknowledges the public’s interest “in receiving the well-informed views of government employees.”<sup>66</sup> Thus, the government’s interests do not necessarily give it carte blanche to regulate speech; rather, the free speech rights of public employees to comment on issues of public concern must be balanced against government interests.<sup>67</sup>

Lower federal courts applying the Espionage Act, however, have refused to find the First Amendment implicated at all. *United States v. Morison* involved the prosecution of an employee who leaked top secret photographs of a Soviet aircraft carrier to the editor of *Jane’s Defense Weekly*, a

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929, 937 (1973).

<sup>60</sup> *New York Times v. United States*, 403 U.S. 713, 714 (1971).

<sup>61</sup> The Supreme Court defines a prior restraint as an “administrative or judicial order[] forbidding certain communications... in advance of the time the communications are to occur.” *Alexander v. United States*, 509 U.S. 544, 550 (1993).

<sup>62</sup> *Id.* at 730 (White, J., concurring) (noting the availability of “specific and appropriate criminal laws ... [that] are of colorable relevance to the circumstances of this case”); *see also id.* at 743 (Marshall, J., concurring); *id.* at 753 (Burger C.J., dissenting); *id.* at 759 (Blackmun J., dissenting).

<sup>63</sup> *See Nimmer, supra* note 38, at 314.

<sup>64</sup> *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

<sup>65</sup> *Snepp v. United States*, 444 U.S. 507, 507-08 (1980).

<sup>66</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

<sup>67</sup> *Pickering*, 391 U.S. at 568.

defense periodical that published information about international naval operations.<sup>68</sup> Although the court admitted that the defendant had not engaged in espionage, it found that the defendant's actions fell within Sections 793(d) and (e) of the Act. The court characterized Morison's decision to take and leak photographs as "theft" that did not implicate any First Amendment rights.<sup>69</sup> More recently, in Stephen Kim's prosecution for leaking information about North Korea's nuclear program to *Fox News*, the court similarly refused to find the First Amendment applicable.<sup>70</sup> According to the court, "those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information."<sup>71</sup>

First Amendment issues aside, courts also generally interpret the terms within the Espionage Act against leakers. For example, courts have rejected a defendant's argument that the statute requires the government to show defendant's bad faith to harm the U.S. or aid another country.<sup>72</sup> They do so despite the explicit requirements in Sections 793(d) and (e) that the government show leakers had reason to believe disclosure could be used to injure the U.S. or aid a foreign nation. These courts have occasionally disregarded the "reason to believe" requirement when the defendant has leaked documents as opposed to orally communicated the information,<sup>73</sup> but some seem to dispense with the requirement for any communication.<sup>74</sup> Since most cases involve leaking documents to journalists, this reading of the Espionage Act effectively means that the government need only show that the defendant willfully leaked the material and knew that the disclosure potentially could cause harm.

## 2. Publishers

The First Amendment rights of publishers are more firmly established than the rights of leakers, but even here the law is somewhat murky. Although some Justices in the Pentagon Papers case intimated post-publication criminal sanctions might be appropriate, they did not elaborate further. Later Supreme Court cases suggest that prosecutions of the press for publication of national security information may be constitutionally problematic. These decisions impose a high burden on government officials who attempt to impose criminal sanctions on the press for publication of truthful and lawfully acquired confidential information. In *Landmark Communications, Inc. v. Virginia*, for example, the Court overturned the conviction of a newspaper publisher for violating a state law prohibiting the publication of confidential judicial disciplinary pleadings. According to the Court, the

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<sup>68</sup> United States v. Morison, 844 F.2d 1057, 1060-61 (4<sup>th</sup> Cir. 1988).

<sup>69</sup> *Id.*

<sup>70</sup> United States v. Kim, 808 F. Supp. 2d 44, 57 (D.D.C. 2011) (finding that the "Defendant's First Amendment challenge lacks merit").

<sup>71</sup> *Kim*, 808 F. Supp. 2d at 57 (citing *Boehner v. McDermott*, 484 F.3d 573, 579 (D.C. Cir. 2007). *See also* United States v. Drake, 818 F. Supp. 2d 909, 920-22 (D. Md. 2011) (finding First Amendment inapplicable to Drake's prosecution for taking and retaining classified information he leaked to a reporter).

<sup>72</sup> *Morison*, 844 F.2d at 1068.

<sup>73</sup> *Drake*, 818 F. Supp. 2d at 916-18.

<sup>74</sup> *Kiriakou*, 898 F. Supp. 2d. at 926.

state's legitimate interest in confidentiality could not justify criminal sanctions for publication.<sup>75</sup> *Bartnicki v. Vopper*, similarly involved a media defendant convicted for broadcasting an audio tape containing a private conversation.<sup>76</sup> The tape had been obtained by the media in violation of wiretapping laws. The Court found that the state could not punish a publisher of information of value to public discourse who had otherwise lawfully acquired the information even though someone else had broken the law to gain access to the information.<sup>77</sup>

Unfortunately, these later decisions still leave unanswered questions. Importantly, they did not involve publication of national security information. Because the Justices tried to limit the decisions to their facts,<sup>78</sup> it is unclear whether courts will apply similarly high standards in Espionage Act prosecutions. After all, the Court has previously twisted its otherwise protective free speech rules in cases involving national security concerns.<sup>79</sup> Thus, whether a journalist “lawfully acquired” information that she knows has likely been leaked in violation of the Espionage Act or a government official’s confidentiality obligations could be an open question and could become the centerpiece of future arguments.<sup>80</sup> Furthermore, it is unclear whether the courts will apply the Supreme Court’s usually very high intent requirements should the government pursue Espionage Act prosecutions of publishers.<sup>81</sup>

Only one lower court decision, *United States v. Rosen*, has discussed whether the Espionage Act can be applied to non-government insiders who disclose national defense information.<sup>82</sup> *Rosen* involved two political lobbyists for AIPAC, an organization that lobbies Congress and the executive branch on “issues of interest to” Israel.<sup>83</sup> The government accused defendants, in their positions as lobbyists, of conspiring to violate Section 793(e) of the Espionage Act by cultivating relationships with federal officials, gaining access to sensitive information, and disseminating it to persons not entitled to receive it, such as the media, foreign policy analysts, and officials of other governments.<sup>84</sup>

Since the case did not involve disclosure by government insiders, the court did not immediately reject the defendant’s First Amendment argument. Instead, the court found that the lobbyists’ interests implicated core First Amendment values since gathering information and discussing it “is

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<sup>75</sup> *Id.* at 838.

<sup>76</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 518-21 (2001).

<sup>77</sup> *Id.* at 528.

<sup>78</sup> *Landmark Comm.*, 435 U.S. at 840; *Bartnicki*, 532 U.S. at 529.

<sup>79</sup> Christina Wells, *Contextualizing Disclosure’s Effects: WikiLeaks, Balancing and the First Amendment*, 97 IOWA L. REV. BULL. 51, 57-58 (2012).

<sup>80</sup> See Papandrea, *supra* note 1, at 295.

<sup>81</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1941) (noting that government can punish incitement of unlawful action only if it is “directed to inciting or producing imminent lawless action and likely to incite or produce such action”); see also *Schneiderman v. United States*, 320 U.S. 118, 125 (1943); *Taylor v. Mississippi*, 319 U.S. 583, 589–90 (1943); *Thornhill v. Alabama*, 310 U.S. 88, 104–05 (1940).

<sup>82</sup> *United States v. Rosen*, 445 F. Supp. 2d 602, 611-14 (E.D. Va. 2006).

<sup>83</sup> *Id.* at 607-08.

<sup>84</sup> *Id.* at 608.

indispensable to the healthy functioning of a representative government.”<sup>85</sup> This was true even for information the government attempted to keep secret because the government tends “to withhold reports of disquieting developments and to manage news in a fashion most favorable to itself.”<sup>86</sup> Ultimately, however, the court noted that defendants’ disclosure of government secrets “must yield to the government’s legitimate efforts to ensure the ‘environment of physical security which a functioning democracy requires.’”<sup>87</sup>

Applying the Espionage Act to defendants, the court construed Section 793(e) as punishing only intentional disclosure of “closely held” information that a defendant knew was “‘potentially damaging to the United States or . . . useful to an *enemy* of the United States.’”<sup>88</sup> The court allowed the defendants to show they did not know their disclosures could potentially damage the United States or aid its enemies by arguing that government officials regularly leaked information to them as a form of “back channel diplomacy.”<sup>89</sup> However, an appeals court later implied that the lower court’s interpretation “impose[d] an additional burden on the prosecution not mandated” by Section 793(e).<sup>90</sup> As a result, there is some question as to whether other courts will follow the lower court in *Rosen* and require a heightened intent standard.

### III. Troubling Developments and Suggestions for Change

#### A. Government Reaction to the Rise of Nontraditional Media

The current situation involving interpretations of the Espionage Act is worrisome. Government insiders who leak to media actors have virtually no defense against prosecution when their leaks contribute to public debate, cause no harm, and when their motives are unrelated to espionage. Recent government prosecutions seem unrelated to any potential harm caused and, instead, seem designed to chill all disclosure. For example, the former Director of the Information Security Oversight Office, J. William Leonard, stated in hearings before Congress that in the *Rosen*, *Drake* and *Manning* prosecutions “the government abused the classification system and used it not for its intended purpose of denying sensitive information to our nation’s enemies but rather to carry out an entirely different agenda.”<sup>91</sup> Furthermore, courts rarely allow defendants charged with Espionage Act crimes to raise over-classification or wrongful classification as a defense. Indeed, wrongly classified documents have been used as the basis for indictments.<sup>92</sup> Finally, by finding the First

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<sup>85</sup> *Id.* at 633.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (quoting *Morison*, 844 F.2d at 1082).

<sup>88</sup> *Id.* at 639-40 (quoting *Morison*, 844 F.2d at 1084).

<sup>89</sup> *United States v. Rosen*, Memorandum Opinion, Nov. 2, 2007, at 7-8,

<http://www.fas.org/sgp/jud/aipac/memop110207.pdf>. Prosecutors later dismissed the case against defendants, complaining that the court’s “knowledge” requirement established an impossibly “high” evidentiary burden. Eli Lake, *Case Against AIPAC Lobbyists Dropped*, WASH. TIMES (May 2, 2009), <http://www.washingtontimes.com/news/2009/may/02/fed-drop-charges-against-aipac-staffers/>.

<sup>90</sup> *United States v. Rosen*, 557 F.3d 192, 199 n.8 (4th Cir. 2009).

<sup>91</sup> *See supra* note 16 (statement of J. William Leonard), at 3-4.

<sup>92</sup> *Id.*

Amendment inapplicable to leakers, lower courts ignore the public's interest in receiving information that the Supreme Court recognizes is part of the balancing involved in other public employee speech cases. Thus, the government's attempt to chill all unwanted leaks will hurt the public in addition to stopping leakers. It will also lead to a one-sided and manipulative version of events, since high level government officials will still leak information they want the public to receive.

Although court decisions suggest that media publishers enjoy greater immunity from publication, the rights of publishers are also somewhat in doubt. *Rosen* allowed prosecution of non-government disclosers of classified information. Furthermore, the courts involved apparently disagreed as to the appropriate mental state required to prosecute third-party disclosers. Both developments are concerning in light of the evolving relationship between leakers and media actors, and the government's increasing hostility toward the press.

The classic leak scenario generally involves a symbiotic relationship between mid- to high-level officials leaking confidential material to a member of the institutional press. Websites such as Wikileaks independently and anonymously submit documents about government and corporate activity. Such websites feel far less pressure to refrain from publishing information that high level officials want to remain secret because there is no symbiotic relationship. Thus, their disclosures often include releases of information that are unsanctioned, generalized, made out of a sense of grievance, or by people who see themselves as whistleblowers. They are also the type of disclosures the government most wants to control.

Not surprisingly, government officials have tried to portray these third-party actors as akin to terrorists who can be prosecuted under the Espionage Act, rather than as journalists with good intentions.<sup>93</sup> Senator Dianne Feinstein claimed that the founder of Wikileaks was an "agitator intent on damaging our government."<sup>94</sup> CIA Director Mike Pompeo called Wikileaks "a non-state hostile intelligence service often abetted by state actors like Russia."<sup>95</sup> The Senate Intelligence Committee recently reached the same conclusion in a provision in its annual Intelligence Authorization bill.<sup>96</sup> *Rosen* unquestionably opened the door to prosecution of third-party disclosers of information who, unlike mainstream journalists, are not in symbiotic relationships with the government.

It is, however, foolish to think that prosecutions would end with such actors. Successful

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<sup>93</sup> Ewan McAskill, *Julian Assange Like a Hi-Tech Terrorist, Says Joe Biden*, THE GUARDIAN (Dec. 19, 2010, 1:20 PM), <https://www.theguardian.com/media/2010/dec/19/assange-high-tech-terrorist-biden>.

<sup>94</sup> Dianne Feinstein, Op-Ed., *Prosecute Assange Under the Espionage Act*, WALL ST. J., Dec. 7, 2010, at A19.

<sup>95</sup> Warren Strobel & Mark Hosenball, *CIA Chief Calls Wikileaks a 'Hostile Intelligence Service'* REUTERS (Apr. 13, 2017, 4:11 PM), <https://www.reuters.com/article/us-cia-wikileaks/cia-chief-calls-wikileaks-a-hostile-intelligence-service-idUSKBN17F2L8>.

<sup>96</sup> S. 1761, 115th Cong. (1st Sess. 2017). Section 623 of the bill states "[i]t is the sense of Congress that WikiLeaks and the senior leadership of WikiLeaks resemble a non-state hostile intelligence service often abetted by state actors and should be treated as such a service by the United States." *Id.* at § 623.

characterization of non-traditional media actors as national security threats could destabilize our understanding about publication of confidential information by *any* source. Officials and legislators have intimated that traditional media violates the Espionage Act for publishing documents leaked to Wikileaks.<sup>97</sup> Furthermore, once we decide that some media actors are less trustworthy than others, nothing stops us from applying such distinctions to undermine all forms of journalism. In an era where the current administration labels as “fake news” any leaks that it cannot control,<sup>98</sup> such an approach would be especially troubling. The executive branch’s ability to use conspiracy charges against journalists or to subpoena journalists for their sources or other information, as it has done in the past, is an especially potent weapon with which to harass those media actors that the administration holds in special disfavor.

## B. A Way Forward

Clearly, the détente that once existed regarding secrecy and transparency has broken down. If we are to preserve an appropriate balance that prevents us falling into pernicious patterns of secrecy, more specific action must be taken. With respect to government insiders who leak information, Congress (and courts) should act to clarify the Espionage Act and provide some protection for leakers. This does not mean that government insiders should be able to leak with impunity, but numerous scholars and experts have noted that statutory protections can prevent abusive prosecutions. Amending the Espionage Act to impose a clear and high intent requirement would protect leakers who have no malicious intent.<sup>99</sup> Congress could also provide affirmative defenses or other possible defense tools to government insiders. For example, Congress could allow a defendant to show that the information leaked was wrongfully classified or that they had a reasonable belief that by disclosing classified information they would expose government malfeasance to public scrutiny.<sup>100</sup>

Courts can similarly protect leakers and preserve security by requiring a showing of more concrete harm from disclosure. The current requirements defer to the government, essentially taking at face value officials’ claims that disclosure is “potentially” damaging to the United States or useful to another nation.<sup>101</sup> A requirement that government officials justify their claims of harm prevents excessive secrecy and focuses officials on their real concerns, which actually improves decision-

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<sup>97</sup> McCraw & Gikow, *supra* note 5, at 491.

<sup>98</sup> Daniella Silva, *Trump Claims ‘Fake News’ on Twitter Rant After Return from Abroad*, NBC NEWS, (May 28, 2017, 8:27 PM), <https://www.nbcnews.com/politics/donald-trump/back-home-trump-goes-twitter-offensive-against-leaks-fake-news-n765641>.

<sup>99</sup> Mary-Rose Papandrea, *National Security Information Disclosures and the Role of Intent*, 56 WM. & MARY L. REV. 1381, 1426-41 (2015); Derigan A. Silver, *National Security and the Press: The Government’s Ability to Prosecute Journalists for the Possession or Publication of National Security Information*, 13 COMM. L. & POL’Y 447, 483 (2008); *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. On the Judiciary*, 111th Cong. 66-69 (2010) (comments of Stephen I. Vladeck, Professor of Law), [https://fas.org/irp/congress/2010\\_hr/esp-wl.html](https://fas.org/irp/congress/2010_hr/esp-wl.html).

<sup>100</sup> See Espionage Act Hearings, *supra* note 99 (Vladeck comments suggesting affirmative defense); Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL’Y REV. 281, 305 (2014) (suggesting public accountability defense).

<sup>101</sup> *Morison*, 844 F.2d at 1071.

making.<sup>102</sup> Finally, courts must recognize the very real First Amendment rights of government insiders even as they leak information.<sup>103</sup> Although such rights do not give leakers free rein to release information, they can inform the extent to which leakers should be afforded some protections in prosecutions, as opposed to being characterized simply as thieves.

Steps similarly should be taken to protect third-party publishers of information. Congress should move back toward the Espionage Act's original intent – i.e., that the Espionage Act was not meant to apply to “well-meaning” publication of information regardless of the harm it causes. Congress should adopt standards that allow punishment only for intentional publication of classified material that the publisher knows is likely to cause imminent and grave harm to national security and which does not contribute to public debate.<sup>104</sup> Defenses regarding wrongful classification of information should be available. If prosecutions of third-party actors occur without such amendments to the Espionage Act, courts should play an active role in ensuring that First Amendment principles requiring intent to cause imminent harm are superimposed on the current Act.

As importantly, Congress should amend the Espionage Act to make clear that its inchoate liability provisions, especially provisions providing for conspiracy liability such as Section 793(g), do not apply to any third-party publishers who publish or disclose information in accordance with the above standards.<sup>105</sup> These actors should not be at risk simply because they have received information (even if knowingly) from another person who may have violated the law. Receipt of this type of confidential information is the core of a journalist's work. Bringing conspiracy charges for publishing classified information will choke the flow of information altogether. It will force third-party disclosers to take significant steps to avoid receiving classified information. In addition, failure to do so could subject them to subpoenas and other investigations as law enforcement officials attempt to determine their sources. The institution of journalism as an independent investigative check on government would be completely undermined as a result.

#### IV. Conclusion

For decades, there existed a shared understanding about the role of leaks in the balance between secrecy and transparency. Conventional wisdom held that the government had broad power to keep national security information secret, but the press also had broad authority to publish that information once received. Furthermore, those who leaked were rarely pursued under criminal laws. This understanding, however, did not result from clearly stated rules of law. Rather, it resulted from

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<sup>102</sup> Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 629 (2010).

<sup>103</sup> Mary-Rose Papandrea, *Leaker, Traitor, Whistleblower, Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 450-51 (2014); Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SEC. L. & POL'Y 409, 409-10 (2013).

<sup>104</sup> See, e.g., Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185, 213 (2006); Papandrea, *supra* note 1, at 297-303.

<sup>105</sup> Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219, 229-30 (2006); Papandrea, *supra* note 1, at 303-04.



pragmatic concerns that constrained the government's actions, combined with assumptions about the meaning of complex and ambiguous laws governing the release of national security information. Our shared understanding has now broken down. As the government increasingly pursues prosecutions of those who leak national security information to the press, it is time to clarify the law so that the pre-existing balance between secrecy and transparency does not tip too far toward secrecy.

### About the Author

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