FIRST AMENDMENT LAW REVIEW

VOLUME 19 **SYMPOSIUM 2021**

THE UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW

THE UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW

Administration

PETER HANS, B.A., M.A., *UNC System President*
MARTIN H. BRINKLEY, A.B., J.D., *Dean and Arch T. Allen Distinguished Professor of Law*
MARY-ROSE PAPANDREA, B.A., J.D., *Associate Dean for Academic Affairs and Samuel Ashe Distinguished Professor of Constitutional Law*
ANDREW HESSICK, B.A., J.D., *Associate Dean for Strategy and Judge John J. Parker Distinguished Professor of Law*
LEIGH Z. OSOFSKY, A.B., J.D., *Associate Dean for Faculty Development and William D. Spry III Distinguished Professor of Law*
CRAIG T. SMITH, B.A., J.D., LL.M., *Assistant Dean for the Writing and Learning Resources Center and Clinical Professor of Law*
KELLY PODGER SMITH, B.A., J.D., *Associate Dean for Student Affairs*
DEIRDRE GORDON, B.S., *Associate Dean for Advancement*
NICK P. GOETTSCH, B.A., B.A., M.P.A, *Associate Dean for Administration*
AMY BAREFOOT GRAEDON, B.A., *Assistant Dean for Communications*
JENNIFER L. GOTSHALL CLARK, B.S., *Assistant Dean for Finance*
JOHN B. KASPRZAK, B.A., M.A., J.D., *Assistant Dean for Student Development and Adjunct Professor of Law*
ROBERT MICHAEL BIRRENKOTT, B.A., M.A., J.D., *Assistant Dean for Career Development*
BIANCA MACK, B.A., M.B.A., J.D., *Assistant Dean for Admissions*

Faculty

DAVID S. ARDIA, B.S., M.S., J.D., LL.M., *Associate Professor Law, Reef C. Ivey II Excellence Fund Term Professor of Law, and Co-Director of the Center for Media Law and Policy*
KEVIN BENNARDO, B.A., J.D., *Clinical Associate Professor of Law*
KIMBERLY C. BISHOP, B.A., J.D., *Clinical Professor of Law*
MARTIN H. BRINKLEY, A.B., J.D., *Dean and Arch T. Allen Distinguished Professor of Law*
JOHN WESLEY BROOKER, B.A., J.D., LL.M., M.M.A.S., *Clinical Associate Professor of Law*
LISSA LAMKIN BROOME, B.S., J.D., *Burton Craige Distinguished Professor of Law and Director of the Center for Banking and Finance*
PATRICIA L. BRYAN, B.A., J.D., LL.M., *Henry P. Brandis Distinguished Professor of Law*
ELLIE CAMPBELL, B.A., M.A., M.A., J.D., M.L.I.S, *Reference Librarian and Clinical Assistant Professor of Law*
ALEXA Z. CHEW, A.B., J.D., *Clinical Professor of Law*
ANDREW CHIN, B.S., PH.D., J.D., *Paul B. Eaton Distinguished Professor of Law*
JOHN MARTIN CONLEY, B.A., J.D., PH.D., *William Rand Kenan Jr. Professor of Law*
JOHN F. COYLE, B.A., M.PHIL., J.D., *Reef C. Ivey II Distinguished Professor of Law*
NICOLE M. DOWNING, B.S., J.D., M.S.L.S., *Head of Reference Services and Clinical Assistant Professor of Law*
MAXINE N. EICHNER, B.A., J.D., M.A., PH.D., *Graham Kenan Distinguished Professor of Law*
KATE SABLOSKY ELENGOLD, B.A., J.D., *Assistant Professor of Law*
LEWIS MOORE EVERETT, B.A., M.A., J.D., *Clinical Professor of Law*
BARBARA A. FEDDERS, B.A., J.D., *Assistant Professor of Law*
DEBORAH R. GERHARDT, A.B., J.D., *Reef C. Ivey II Excellence Term Professor of Law*
MICHAEL J. GERHARDT, B.A., M.S., J.D., *Burton Craige Distinguished Professor of Jurisprudence*
RACHEL I. GURVICH, B.A., J.D., *Clinical Associate Professor of Law*
THOMAS LEE HAZEN, B.A., J.D., *Cary C. Boshamer Distinguished Professor of Law*
ANDREW HESSICK, B.A., J.D., *Associate Dean for Strategy and Judge John J. Parker Distinguished Professor of Law*
CARISSA BYRNE HESSICK, B.A., J.D., *Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr., Distinguished Professor of Law*
JEFFREY MICHAEL HIRSCH, B.A., M.P.P., J.D., *Geneva Yeargan Rand Distinguished Professor of Law*
DONALD THOMAS HORNSTEIN, B.A., J.D., *Aubrey L. Brooks Professor of Law*
MELISSA HYLAND, B.A., J.D., M.S.L.S., *Reference and Faculty Research Services Librarian and Clinical Assistant Professor of Law*
MELISSA B. JACOBY, B.A., J.D., *Graham Kenan Professor of Law*
EISHA JAIN, B.A., J.D., *Assistant Professor of Law*
THOMAS A. KELLEY, A.B., J.D., *James Dickson Phillips, Jr. Distinguished Professor of Law and Director of the UNC School of Law Institute for Innovation*
JOSEPH E. KENNEDY, B.A., J.D., *Martha Brandis Term Professor of Law*
JULIE L. KIMBROUGH, B.A., J.D., M.S.L.S., *Deputy Director of the Law Library and Clinical Assistant Professor of Law*
AARON S. KIRSCHENFELD, A.B., M.S.I.S., J.D., *Digital Initiatives Law Librarian and Clinical Assistant Professor of Law*
P. ANNE KLINEFELTER, B.A., M.S.L.S., J.D., *Director of Law Library and Henry P. Brandis Distinguished Professor of Law*
JOAN H. KRAUSE, B.A., J.D., *Dan K. Moore Distinguished Professor of Law; Professor of Social Medicine in the School of Medicine; Adjunct Professor in the Gillings School of Global Public Health*
HOLNING S. LAU, B.A., J.D., *Willie Person Mangum Distinguished Professor of Law*
WILLIAM P. MARSHALL, B.A., J.D., *William Rand Kenan Jr Distinguished Professor of Law*
JONAS J. MONAST, B.A., J.D., *C. Boyden Gray Distinguished Fellow, Assistant Professor of Law and Director of the Center on Climate, Energy, Environment & Economics (CE^3)*
ERIC L. MULLER, A.B., J.D., *Dan K. Moore Distinguished Professor of Law in Jurisprudence and Ethics*
WALTER KERREL MURRAY, B.A., J.D., *Post Doc Fellow*
PETER NEMEROVSKI, A.B., J.D., *Clinical Associate Professor of Law*
GENE R. NICHOL, B.A., J.D., *Boyd Tinsley Distinguished Professor of Law*
DONNA L. NIXON, B.S., J.D., M.S.L.S., *Electronic Resources Librarian, and Clinical Assistant Professor of Law*

JOHN V. ORTH, A.B., J.D., M.A., PH.D., *William Rand Kenan Jr. Professor of Law*
LEIGH Z. OSOFSKY, A.B., J.D., *Associate Dean for Faculty Development and William D. Spry III Distinguished Professor of Law*
MARY-ROSE PAPANDREA, B.A., J.D., *Associate Dean for Academic Affairs and Samuel Ashe Distinguished Professor of Constitutional Law*
BETH S. POSNER, A.B., M.A., J.D., *Clinical Associate Professor of Law*
ZANETA M. ROBINSON, B.S., J.D., *Director of Intellectual Property Initiatives and Clinical Associate Professor of Law*
STACEY L. ROWLAND, B.A., M.I.S., M.S., J.D., *Assistant Director for Collection and Technology Services and Clinical Assistant Professor of Law*
KATHRYN A. SABBETH, B.A., J.D., LL.M., *Associate Professor of Law*
OSCAR J. SALINAS, B.A., J.D., M.A., *Director of Academic Excellence Program and Clinical Professor of Law*
MARIA SAVASTA-KENNEDY, B.A., J.D., *Director of the Externship Program and Clinical Professor of Law*
RICHARD S. SAVER, B.A., J.D., *Arch T. Allen Distinguished Professor of Law; Professor of Social Medicine in the School of Medicine; Adjunct Professor in the Gillings School of Global Public Health*
ANNIE SCARDULLA, B.A., J.D., *Clinical Assistant Professor of Law*
THEODORE M. SHAW, B.A., J.D., *Julius L. Chambers Distinguished Professor of Law and Director of the Center for Civil Rights*
CRAIG T. SMITH, B.A., J.D., LL.M., *Assistant Dean for the Writing and Learning Resources Center and Clinical Professor of Law*
RICK SU, B.A., J.D., *Professor of Law*
KATHLEEN DELANEY THOMAS, B.S., J.D., LL.M., *Associate Professor of Law, George R. Ward Term Professor of Law, and Director of the UNC School of Law Tax Institute*
SARA B. WARF, B.A., J.D., *Clinical Associate Professor of Law*
W. MARK C. WEIDEMAIER, B.A., J.D., *Ralph M. Stockton, Jr. Distinguished Professor of Law*
DEBORAH M. WEISSMAN, B.A., J.D., *Reef C. Ivey II Distinguished Professor of Law*
MARJORIE S. WHITE, A.B., J.D., *Director of the Startup NC Law Clinic and Clinical Professor of Law*
ERIKA K. WILSON, B.S., J.D., *Associate Professor of Law, Wade Edwards Distinguished Scholar, Thomas Willis Lambeth Distinguished Chair in Public Policy, and Director of Clinical Programs*
JANINE M. ZANIN, B.A., J.D., *Faculty Supervisor of Externship Programs and Clinical Associate Professor of Law*

Adjunct Faculty

TERESA ARTIS, B.A., J.D., M.B.A., *Adjunct Professor of Law*
E. KENT AUBERRY, A.B., J.D., *Adjunct Professor of Law*
SHERROD BANKS, A.B., J.D., *Adjunct Professor of Law*
CARMEN BANNON, B.S., J.D., *Adjunct Professor of Law*
E. WILLIAM BATES II, B.A., J.D., *Adjunct Professor of Law*
JENNIFER LEAH BILLS, B.A., J.D., *Adjunct Professor of Law*
SETH A. BLUM, B.A., M.A., J.D., *Adjunct Professor of Law*
M. CHRISTOPHER BOLEN, B.S., M.B.A., J.D., *Adjunct Professor of Law*
ELIZABETH BRASWELL, B.A., J.D., *Adjunct Professor of Law*
ERIC J. BRIGNAC, B.A., J.D., *Adjunct Professor of Law*
JONATHAN E. BROUN, B.PH., J.D., *Adjunct Professor of Law*
KENNETH S. BROUN, B.S., J.D., *Henry Brandis Professor of Law Emeritus and Adjunct Professor of Law*
R. JEAN CADIGAN, B.A., M.A., PH.D., *Adjunct Associate Professor of Law*
TRACY E. CALDER, B.A., J.D., LL.M., *Adjunct Professor of Law*
LAURA COYLE, B.S., M.A., PH.D., *Adjunct Associate Professor of Mental Health and the Law*
FELICE M. CORPENING, B.A., J.D., *Adjunct Professor of Law*
BENJAMIN A. DAVIDSON, B.S., J.D., *Adjunct Associate Professor of Law*
KAREN DAVIDSON, B.A., M.A., J.D., *Adjunct Professor of Law*
JOLYNN DELLINGER, B.A., M.A., J.D., *Adjunct Professor of Law*
THE HONORABLE M. PATRICIA DEVINE, B.A., J.D., *Adjunct Professor of Law*
JINA DHILLON, B.A., M.P.H., J.D., *Adjunct Associate Professor of Law*
THE HONORABLE CHRIS DILLON, B.A., J.D., *Adjunct Professor of Law*
MARK E. DOROSIN, B.A., M.A., J.D., *Adjunct Professor of Law*
DENNIS M. DUFFY, B.A., J.D., *Adjunct Professor of Law*
CATHERINE ROSS DUNHAM, B.A., J.D., LL.M., *Adjunct Professor of Law*
J. FORD EUBANKS, B.A., M.A., J.D., *Adjunct Assistant Professor of Law*
GLENN GERDING, B.A., J.D., LL.M., *Adjunct Professor of Law*
BETH YOUNT GRIMES, B.A., J.D., *Adjunct Professor of Law*
MIKAEL R. GROSS, B.S., M.S., J.D., *Adjunct Professor of Law*
KEN HAMMER, B.S., J.D., *Adjunct Professor of Law*
CHRISTOPHER J. HEANEY, B.A., J.D., *Adjunct Assistant Professor of Law*
R. HARPER HECKMAN, B.A., J.D., *Adjunct Professor of Law*
MALCOLM HUNTER, B.A., J.D., *Adjunct Professor of Law*
SAMUEL S. JACKSON, A.B., J.D., *Adjunct Professor of Law*
ROBERT O. JENKINS, B.A., M.P.A., J.D., *Adjunct Professor of Law*
ELIZABETH H. JOHNSON, B.A., J.D., M.E.M., *Adjunct Professor of Law*
VALERIE A. JOHNSON, B.A., J.D., *Adjunct Professor of Law*
JOHN B. KASPRZAK, B.A., M.A., J.D., *Assistant Dean for Student Development and Adjunct Professor of Law*
JILLIAN C. KATZ, B.A., J.D., *Adjunct Associate Professor of Law*
DAVID B. KEIM, B.A., J.D., LL.M., *Adjunct Professor of Law*
TOD M. LEAVEN, B.S., J.D., *Adjunct Associate Professor of Law*
J. CHRISTOPHER LYNCH, B.A., J.D., *Adjunct Professor of Law*
MARIA M. LYNCH, B.A., J.D., *Adjunct Professor of Law*
RINA LYUBKIN, B.S., B.S., J.D., *Adjunct Clinical Professor of Law*
RICHARD L. MAGEE, A.B., J.D., *Adjunct Professor of Law*
C. STEVEN MASON, B.A., J.D., *Adjunct Professor of Law*
AMILY K. MCCOOL, B.A., M.S.W., J.D., *Adjunct Associate Professor of Law*

WILLIAM S. MILLS, A.B., J.D., *Adjunct Professor of Law*
MARCIA H. MOREY, B.S., M.A., J.D., *Adjunct Professor of Law*
ORLA MARIE O'HANNAIDH, B.A., M.A., J.D., *Adjunct Assistant Professor of law*
MARK OLIVE, B.S., J.D., *Adjunct Professor of Law*
BARBARA OSBORNE, B.A., M.A., M.ED., J.D., *Adjunct Professor of Law*
JOHN R. OWEN, B.S.E., J.D., *Adjunct Professor of Law*
RYAN PARK, B.A., J.D., *Adjunct Associate Professor of Law*
M. SCOTT PEELER, B.A., J.D., *Adjunct Professor of Law*
KATIE ROSE GUEST PRYAL, B.A., M.A., J.D., PH.D., *Adjunct Professor of Law*
AMANDA REID, B.A., M.A., J.D., PH.D., *Adjunct Assistant Professor of Law*
TODD S. ROESSLER, B.S., M.S., J.D., *Adjunct Professor of Law*
THOMAS C. SHANAHAN, B.S., J.D., *Adjunct Professor of Law*
ELLIOT M. SILVERSTEIN, B.S., J.D., PH.D., *Adjunct Professor of Law*
ERIC J. SPITLER, B.A., J.D., *Adjunct Professor of Law*
THOMAS M. STERN, B.A., J.D., *Adjunct Professor of Law*
KIMBERLY TRAN, B.S., M.A., PH.D., *Adjunct Associate Professor of Mental Health and the Law*
DEVON WHITE, B.A., M.A., J.D., *Adjunct Professor of Law*
THE HONORABLE FRANK D. WHITNEY, B.A., J.D., M.B.A., *Adjunct Professor of Law*

Faculty Emeriti

JOHN CHARLES BOGER, A.B., M.DIV., J.D., *Wade Edwards Distinguished Professor of Law Emeritus*
CAROLINE NICHOLSON BROWN, B.A., M.A., J.D., *Professor of Law Emerita*
MICHAEL L. CORRADO, B.A., B.S., A.M., PH.D., J.D., *Arch T. Allen Distinguished Professor of Law Emeritus*
CHARLES EDWARD DAYE, B.A., J.D., *Henry Brandis Professor of Law Emeritus*
LAURA N. GASAWAY, B.A., M.S., J.D., *Paul B. Eaton Distinguished Professor of Law Emerita*
S. ELIZABETH GIBSON, B.A., J.D., *Burton Craige Professor of Law Emerita*
JOSEPH JOHN KALO, B.A., J.D., *Graham Kenan Professor of Law Emeritus*
RONALD CHARLES LINK, A.B., M.A., J.D., *Dan K. Moore Distinguished Professor of Law Emeritus*
ARNOLD H. LOEWY, B.S., J.D., LL.M., *Graham Kenan Professor of Law Emeritus*
RUTH ANN MCKINNEY, B.A., M.Ed., J.D., *Clinical Professor of Law Emerita*
ROBERT P. MOSTELLER, B.A., M.A., J.D., *J. Dickson Phillips Distinguished Professor of Law Emeritus*
RICHARD E. MYERS, B.A., M.A., J.D., *Henry Brandis Professor of Law Emeritus*
ALICE A. RATLIFF, B.A., M.A., J.D., *Clinical Professor of Law Emerita*
RICHARD A. ROSEN, B.A., J.D., *Professor of Law Emeritus*
WILLIAM J. TURNIER, B.S., M.A., J.D., *Willie Person Mangum Professor of Law Emeritus*
JUDITH WELCH WEGNER, B.A., J.D., *Burton Craige Professor of Law Emerita*
ARTHUR MARK WEISBURD, A.B., J.D., *Reef C. Ivey II Distinguished Professor of Law Emeritus*

The *First Amendment Law Review* is published three times a year by the First Amendment Law Review.

Subscriptions: We have stopped printing issues and therefore stopped accepting subscriptions. The contact information for the *Review* is listed below:

First Amendment Law Review
The University of North Carolina School of Law
100 Ridge Road, CB# 3380
3002 Van Hecke-Wettach Hall
Chapel Hill, North Carolina 27599-3380
(919) 843-6683
falr@unc.edu

Manuscripts: The *Review* invites the submission of unsolicited manuscripts. Manuscripts cannot be returned unless accompanied by a self-addressed, postage-paid envelope. Correspondence and manuscripts should be directed to the Editor-in-Chief.

Publication Information: The *Review* is exclusively online and available through Hein Online, LexisNexis, Westlaw, and on the *First Amendment Law Review's* website. The text and citations in Volume 17 conform generally to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds, 20th ed. 2015).

Cite as: FIRST AMEND. L. REV.

www.falrunc.wordpress.com

The Board of Editors would like to thank the following individuals and organizations for their support of the *First Amendment Law Review*:

Dean Martin H. Brinkley

Professor David S. Ardia

Dean Mary-Rose Papandrea

Professor William P. Marshall

Assistant Dean John B. Kasprzak

Director of Student Services Lakethia Jefferies

University of North Carolina Center for Media Law & Policy

Graduate and Professional Student Federation of the University of North Carolina at Chapel Hill

Student Bar Association

Student Congress of the University of North Carolina at Chapel Hill

North Carolina Law Review

North Carolina Banking Institute

North Carolina Journal of International Law and Commercial Regulation

North Carolina Journal of Law and Technology

and the many alumni of the First Amendment Law Review and UNC School of Law who helped to build and continue to support this publication.

FIRST AMENDMENT LAW REVIEW

VOLUME 19 **SYMPOSIUM 2021**

ARTICLE

TRANSCRIPTS

FIRST AMENDMENT LAW REVIEW

VOLUME 19 **SYMPOSIUM 2021**

KEYNOTE SPEAKER

Mary-Rose Papandrea

The University of North Carolina School of Law

PANELISTS

Heidi Kitrosser

University of Minnesota Law School

Margaret Kwoka

University of Denver Sturm College of Law

David McCraw

The New York Times

Mary-Rose Papandrea

The University of North Carolina School of Law

David Pozen

Columbia Law School

David Schulz

Yale Law School

Stephen I. Vladeck

The University of Texas School of Law

A HOUSE BUILT ON SAND: THE CONSTITUTIONAL INFIRMITY OF ESPIONAGE ACT PROSECUTIONS FOR LEAKING TO THE PRESS

Heidi Kitrosser & David Schulz*

INTRODUCTION

Since 9/11 our government has embarked on an unprecedented surge in leak investigations and Espionage Act prosecutions for the disclosure of classified information to the American press—punishing disclosures about mass surveillance of U.S. citizens, Russian interference in the U.S. election, FBI targeting of Muslim groups, and other issues of legitimate public concern. These prosecutions are designed to squelch the flow of classified information to the public, and they do.

Despite obvious First Amendment issues posed by this transformation of the 1917 Espionage Act into a twenty-first century official secrets act, prosecutors and courts slough off constitutional concerns. The Fourth Circuit's 1988 ruling in *United States v. Morison*[1] was the first judicial opinion addressing the constitutionality of a media leak prosecution under the Espionage Act;[2] it remains the only appellate court opinion on the matter to this day. District courts since *Morison* have routinely dismissed First Amendment objections to Espionage Act prosecutions of those who leak to the press, embracing a form of national security exceptionalism to free speech that extends deep deference to executive branch judgments about the needs of national security with virtually no consideration of the First Amendment rights of leakers, the public or the press.[3]

---

* Heidi Kitrosser is the Robins Kaplan Professor of Law at the University of Minnesota Law School. David Schulz is a Floyd Abrams Clinical Lecturer in Law and Senior Research Scholar in Law at Yale Law School. We both owe a debt of gratitude to Patrick Kabat, with whom we have spent a great deal of time brainstorming about the ideas in this paper. Patrick's insights greatly benefitted this project. We are also very grateful to the students, faculty, and staff of the *First Amendment Law Review* for inviting this contribution to their annual symposium, to the Floyd Abrams Institute for Freedom of Expression at Yale Law School for allowing us to preview a preliminary version of this paper at its 2020 Free Expression Scholars Conference, and to the University of Kentucky Law School for hosting a workshop on this paper in its Randall Park Speaker Series.

[1] 844 F.2d 1057 (4th Cir. 1988).

[2] Technically, of course, it was second insofar as it followed the district court opinion in the same case. *See* United States v. Morison, 604 F. Supp. 655 (D. Md. 1985).

[3] *See infra* Part III.B.

The reasoning in these cases is deeply antithetical to basic principles of free expression and First Amendment doctrine. It also turns a blind eye to the reality of a monstrously bloated classification system that too often conceals embarrassments, mismanagement, and illegality. As the use of the Espionage Act to prosecute leaks to the press rather than leaks to foreign adversaries exploded in recent years, a number of scholars have explored these concerns and suggested judicial and legislative fixes to the First Amendment problems presented by this transformation of the Espionage Act into an official secrets act.[4] Until now, however, none have taken a close look at the precedential edifice upon which rests today's misguided approach in media leaks cases. This edifice presents a puzzle, after all. On the one hand, the reasoning of the media leaks cases is deeply at odds with basic aspects of modern First Amendment doctrine; on the other, courts can cite to a growing body of precedent suggesting that constitutional challenges to Espionage Act leak prosecutions have long been resolved in the government's favor.[5]

The answer to this puzzle, it turns out, stems largely from the expansive nature and long history of the Espionage Act itself, and from the evolution of the government's use of the Act since 9/11. Hastily enacted during World War I, the Espionage Act has been around for more than 100 years, and its broad language can be read to cover everything from classic spying[6] to the type

---

[4] *See, e,g,* WHISTLEBLOWING NATION, THE HISTORY OF NATIONAL SECURITY DISCLOSURES AND THE CULT OF STATE SECRECY (Kaeten Mistry & Hannah Gurman eds., 2020); Mailyn Fidler, *First Amendment Sentence Mitigation: Beyond a Public Accountability Defense for Whistleblowers*, 11 HARV. NAT'L SEC. L. J. 214 (2020); 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 (2015) [hereinafter Kitrosser, *Leak Prosecutions and the First Amendment*]; Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281, 283–84, 303–04 (2014); Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment,* 94 B.U. L. REV. 449 (2014); Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SECURITY L. & POL'Y 409 (2013) [hereinafter Kitrosser, *Free Speech Aboard the Leaky Ship of State*]; Pamela Takefman, Note, *Curbing Overzealous Prosecution of the Espionage Act: Thomas Andrews Drake and the Case for Judicial Intervention at Sentencing*, 35 CARDOZO L. REV. 897 (2013); *see also* David Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information,* 127 HARV. L. REV. 512, 516, 626 (2013).

[5] *See infra* Part III.

[6] By "classic spying," we mean gathering information with the intent to secretly convey it to an enemy of the United States. The key here is not only the adversarial

of national security news reporting that appears regularly in publications like *the New York Times* and *the Wall Street Journal*. It was decades before the government thought to use the Act against someone who leaked to the press rather than to prosecute international spying.[7] As a result, constitutional challenges to the Espionage Act arose—and were rejected—over several decades in prosecutions for traditional spying brought in the context of an extremely limited national security classification system that did not substantially expand until after World War II.[8] The earliest cases also addressed since-amended statutory provisions featuring relatively high scienter requirements and were decided before the Supreme Court erected the foundations of modern, highly protective free speech doctrine.[9]

Once the government did begin to prosecute media leakers, courts resolved constitutional challenges by dressing their intuitions about national security exceptionalism in the vestments of anachronistic Espionage Act precedent. This approach has taken on a life of its own. Courts first confronting constitutional challenges in media leak cases applied the early, inapposite precedents; those decisions are cited in turn in subsequent leak prosecutions, and on it goes, as a lengthening line of authority appears to confirm the absence of any serious First Amendment problems.

This perception is fundamentally incorrect. The government's use of the Espionage Act to prosecute those who leak to reporters information of intense public interest rests on a shaky constitutional foundation with which courts have yet to grapple, and that cannot withstand First Amendment scrutiny. This article demonstrates how First Amendment concerns have thus far been side-stepped by the courts and why they urgently need to be addressed.

In Part I of this Article, we explain that the use of the Espionage Act to prosecute media leaks is antithetical to free speech values and to modern free speech doctrine. In failing meaningfully to restrain such uses, courts have sanctioned a type

---

intent but the plan for *secret* conveyance, rather than communication to the media for purposes of informing the public.

[7] *See* United States v. Morison, 844 F.2d 1057 (4th Cir. 1988).

[8] *See infra* Part III.

[9] *See infra* Part III.

of national security exceptionalism that damages the public's ability to check their governors.

In Part II, we trace the Espionage Act's evolution, from its early decades as a tool used exclusively to prosecute spies and traitors who leaked information to foreign governments, to its current incarnation as something approaching an official secrets act. This discussion underscores how very different the world was in the early and mid-twentieth century when the key precedents on which the *Morison* court and its progeny rely were decided. Part II also highlights the role that technology has played in smoothing the Act's path to becoming the government's key weapon against unauthorized leaks. Modern technology largely freed the government from its prior need to subpoena journalists to identify and prosecute leakers and, in so doing, removed a crucial element of "First Amendment friction" from prosecutorial decisions to pursue Espionage Act leak prosecutions.[10]

In Part III, we do a deep dive into the growing precedential edifice of cases in which courts ever more confidently assert that media leak prosecutions pose little if any problem under the First Amendment. This confidence is sorely misplaced. The foundational case—*United States v. Morison*—justified its dismissal of the serious First Amendment interests at stake by relying on an amalgam of anachronistic and inapposite precedents. In building on *Morison*, and on other cases that rely on *Morison*, courts continue to compound the error, placing more and more weight on this ramshackle edifice.

Part IV provides a brief overview of the types of steps that could address the First Amendment concerns presented by the use of the Espionage Act to prosecute leaks to the media. In recent years a number of these reforms have been addressed in depth elsewhere.[11] We review them here simply to provide a sense of the constitutional and statutory fixes that courts and legislatures should consider. To the extent that they have

[10] *See infra* Part II.B.2.
[11] *See infra* Part IV (discussing some of this work).

sidestepped such review, they have been enabled by the shaky precedential edifice that we examine in Part III.

I. THE SUBSTANTIAL FIRST AMENDMENT PROBLEMS CREATED BY USING THE ESPIONAGE ACT AS AN OFFICIAL SECRETS ACT

When viewed through the lens of basic free speech theory and doctrine, media leak prosecutions raise grave concerns that call for searching judicial review. At the base of this position is the understanding that classified information is, after all, information; to convey it is to speak. Insofar as such communications concern government, foreign affairs, or public policy, they are in a realm that scholars and jurists routinely place at the very core of the First Amendment.[12] Suppressing media leaks also raises a worry at the heart of much free speech theory and doctrine: government actors may single out that speech (i.e., those media leaks) that casts them in a bad light.[13]

Several aspects of free speech doctrine reflect a commitment to protecting the vigorous exchange of information and opinion on matters of public importance and a corresponding fear that government actors will punish or deter speech that criticizes them. For example, in the 1964 case of *New York Times v. Sullivan*,[14] the Supreme Court famously imposed a very high bar on defamation lawsuits brought by public officials, citing our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[15] The *Sullivan* Court also referenced the "obsolete doctrine that the governed must not criticize their governors," and stressed that "the protection of the public requires not merely discussion, but information."[16]

---

[12] *See, e.g.,* HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY 59, 63 (2015) (citing an "eclectic" sampling of works on free speech theory and noting that each work deems speech about government "either central to the First Amendment's purpose or encompassed in a broader free speech value or set of values").

[13] *See, e.g.,* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 33–4, 44–6, 86, 162–63 (1982) (demonstrating that all major theories of free speech share a core distrust of government).

[14] 376 U.S. 254 (1964).

[15] *Id.* at 270.

[16] *Id.* at 272 (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)).

The Supreme Court similarly erected a high hurdle for prosecutors to surmount when they attempt to punish speakers for inciting violence. In the 1969 case of *Brandenburg v. Ohio*,[17] the Court held that one cannot constitutionally be punished for such speech unless it is intended to incite, and likely to incite, imminent, lawless action.[18] *Brandenburg* marked an important shift from the Court's approach in a series of World War I and early Cold War cases involving prosecutions for antiwar, communist, and socialist speech.[19] In those earlier cases, the Court had approached the government's claims with a great deal of credulity. There is wide consensus in retrospect that the Court deferred unduly to the government in those cases, enabling it to chill public debate on matters of national importance.[20] In *Brandenburg*, the Court appeared to have internalized these critiques, shaping its doctrine to err on the side of public discourse and against reflexively giving credence to government claims of harm.

Courts also have evinced concerns over government abuse outside of the context of "unprotected" speech categories. Such fears are manifest, for example, in the general rule that content-based restrictions on speech receive the most rigorous level of judicial scrutiny.[21] This rule marks an effort to stave off any government attempts to "effectively drive certain ideas or viewpoints from the marketplace."[22]

Courts recognize as well the uniquely valuable role that government employees can play through their speech, including by exposing government misdeeds to which they alone have access. To be sure, the Supreme Court gives government employers considerable leeway to fire, demote, or otherwise retaliate against employees for their speech.[23] Nonetheless, the

---

[17] 394 U.S. 444 (1969).
[18] *Id.* at 447.
[19] *See, e.g.,* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 227–36 (Jamie Kalven ed., 1988) (discussing doctrinal evolution from a series of World War I era cases through *Brandenburg*).
[20] *See, e.g.,* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, 179–207, 403–11 (2004); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1166–73 (1982).
[21] *See, e.g.,* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 624–25 (1991).
[22] R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) (quoting Simon & Schuster v. Members of New York State Crime Victims Board, 502 U.S. 105, 116 (1991)).
[23] Lane v. Franks, 573 U.S. 228, 236–41 (2014).

Court has also made clear that government employees retain some constitutional protection from employment repercussions for their speech.[24] The Court credits this protection partly to the "special value" of public employees' speech—a value rooted in the fact that "those employees gain knowledge of matters of public concern through their employment."[25]

None of these doctrinal features nor their theoretical foundations tell us precisely how courts ought to approach the liability and sentencing questions that arise in media leak prosecutions. They do, however, give us some important baselines. Outside of the classified information context, we see that courts ordinarily apply very high levels of scrutiny to claims that the content of information is too dangerous to convey.[26] Courts also recognize the heightened importance of speech on matters of public concern, the special value of public employees' speech, and the dangers that the government will exaggerate national security threats and punish speech that casts it in a bad light.

It is important to ask, then, whether there is something about the national security classification system that justifies a dramatic departure from these baselines when classified information is at issue. From a theoretical perspective, the answer is surely no. The notion that the executive branch—or even the political branches acting in tandem—can erase or substantially diminish the robust First Amendment protections that would otherwise apply, simply by declaring swaths of information "classified," flies in the face of core free speech principles. Such a system is antithetical to the fears of government overreach and abuse that underlie much of modern free speech doctrine.

The realities of the classification system bear out these theoretical concerns. As we have elaborated elsewhere,[27] information is massively over-classified in the United States, and there is longstanding, bi-partisan consensus to this effect.[28]

---

[24] *Id.*
[25] *Id.* at 240.
[26] *See* Williams, *supra* note 21, at 624–26.
[27] *See, e.g.*, Kitrosser, *Free Speech Aboard the Leaky Ship of State*, *supra* note 4, at 426–29.
[28] *See, e.g.,* Brief of Amici Curiae Scholars of Constitutional Law, First Amendment Law, and Media Law in support of Defendant at 7–12, United States v. Albury, No. 18-cr-00067 (D. Minn. Oct. 4, 2018), https://fas.org/sgp/jud/albury-amicus.pdf.

Indeed, "every government study of the issue over the last six decades has found widespread classification of information that the government had no basis to conceal."[29] The problem was summed up succinctly by former solicitor general Erwin Griswold, who wrote that "It quickly becomes apparent to any person who has considerable experience with classified material" that "the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."[30]

Endemic overclassification, in short, is a real-life manifestation of the notion that the government will abuse its powers to stifle debate about itself. It illustrates the wisdom of the judiciary's strong presumptions against government efforts to curtail speech on matters of public importance and against content-based restrictions on speech more broadly. It also betrays the folly of classification exceptionalism—that is, of the notion that these doctrinal protections should shrink away at the wielding of a classification stamp.

The broad reach of the contemporary Espionage Act, combined with rampant overclassification, endangers the ability of the public to learn through the press information essential to self-government. Compelling anecdotal evidence shows that investigative reporters lost sources of classified and unclassified information after the Obama administration launched its unprecedented volley of media-leak prosecutions.[31] Scott Shane, a Pulitzer-winning journalist at *The New York Times*, observed in 2013 that "[m]ost people are deterred by those leak prosecutions. They're scared to death. There's a gray zone between classified and unclassified information, and most sources were in that gray zone. Sources are now afraid to enter that gray zone. It's having a deterrent effect."[32] *Washington Post* reporter Rajiv Chandrasekaran remarked that same year that "one of the most pernicious effects [of the leak crackdown] is the chilling effect

---

[29] *Id.* at 7 (citing multiple studies from 1956 through 2004, including reports commissioned by the Defense Department and by Congress).
[30] Erwin N. Griswold, Op-Ed., *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST (Feb. 15, 1989), https://www.washingtonpost.com/archive/opinions/1989/02/15/secrets-not-worth-keeping/a115a154-4c6f-41fd-816a-112dd9908115/ (cited in Brief of Amici Curiae Scholars of Constitutional Law, *supra* note 28, at 11).
[31] LEONARD DOWNIE JR., THE OBAMA ADMINISTRATION AND THE PRESS 2–3 (2013), https://cpj.org/wp-content/uploads/2013/10/us2013-english.pdf.
[32] *Id.* at 2.

created across government on matters that are less sensitive but certainly in the public interest as a check on government and elected officials."[33] Aggressive Espionage Act prosecutions send a pointed message to career insiders who contemplate exposing abuses or illegality, or sharing information that casts an administration in a bad light.

Addressing the Espionage Act's clear conflict with the First Amendment is essential given the importance of public access to the very information that is being cut off at the source. The First Amendment concerns are acute when it comes to protecting the flow of information relating to the national defense, where "the absence of the governmental checks and balances present in other areas of our national life" makes an informed citizenry "the only effective restraint upon executive policy and power."[34] As Justice Black famously observed in the Pentagon Papers case, "[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."[35]

II. THE FUNDAMENTAL TRANSFORMATION OF THE ESPIONAGE ACT IN THE POST 9/11 WORLD

Adopted hastily as the U.S. entered World War I, the Espionage Act sought to protect the country from spies and traitors.[36] Four decades passed between Congress's passage of the Act in 1917 and the first use of the Act to prosecute a leak to the press rather than to a foreign government.[37] Between that 1957 prosecution and the end of the George W. Bush administration in 2009, the federal government prosecuted only three more such "media leaks."[38] After that, things changed dramatically. The Obama Administration prosecuted eight

---

[33] *Id.* at 3.
[34] New York Times v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).
[35] *Id*. at 719 (Black, J., concurring).
[36] Sam Lebovic, *From Censorship to Classification, The Evolution of the Espionage Act*, *in* WHISTLEBLOWING NATION, *supra* note 4, at 47–55.
[37] *See* Ian MacDougall, *The Leak Prosecution That Lost the Space Race*, THE ATLANTIC (Aug. 15, 2016), https://www.theatlantic.com/politics/archive/2016/08/the-leak-prosecution-that-lost-the-space-race/495659/.
[38] *Federal cases involving unauthorized disclosures to the news media, 1778 to the present*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/resources/leak-investigations-chart (last visited Jan. 29, 2021).

leakers under the Espionage Act, twice as many as had all previous administrations combined, and the Trump Administration upped the pace still more.[39] During President Trump's first year in office, his Justice Department reportedly opened at least twenty-seven leak investigations,[40] and by the time he left office, the Trump administration in one term had filed as many indictments for leaks to the press as the Obama administration filed in two.[41]

There is no single, comprehensive explanation for the recent, dramatic, and ongoing rise in media leak prosecutions. One factor surely is technology, although the nature of technology's impact itself is debatable. Certainly, technology makes the prospect of massive, even indiscriminate leaks more plausible, and thus could partly explain the rise in prosecutions. We do not think, however, that this aspect of technology has much explanatory power. Indeed, most of the Obama and Trump administration prosecutions did not involve large-scale leaks.

Rather, we believe that technology has strengthened the government's hand and made leak prosecutions more likely for another reason: The increasing ubiquity of electronic surveillance tools—ranging from GPS devices to cell phone and e-mail records to security cameras to bar-coded entry and exit badges—eases the government's burden in identifying leakers in the first place. Matthew Miller, a spokesperson for Attorney General Eric Holder during the Obama Administration, explained that the administration found media leak cases "'easier to prosecute' with 'electronic evidence.' . . . 'Before, you needed to have the leaker admit it, which doesn't happen' . . . or the reporter to testify about it, which doesn't happen.'"[42] As Miller's statement suggests, technological developments do not simply make it easier to find leakers; they remove a potential judicial check by obviating the need, in many cases, for prosecutors to subpoena reporters and to defend those subpoenas against First Amendment objections in court.

---

[39] *See infra* sources cited in notes 40–41.

[40] *See* Jameel Jaffer, *The Espionage Act and a Growing Threat to Press Freedom*, THE NEW YORKER (June 25, 2019), https://www.newyorker.com/news/news-desk/the-espionage-act-and-a-growing-threat-to-press-freedom.

[41] *See All Incidents*, U.S. PRESS FREEDOM TRACKER, https://pressfreedomtracker.us/all-incidents/?categories=7 (last visited Mar. 4, 2021).

[42] DOWNIE JR., *supra* note 31, at 9, 14.

There is also a more fundamental set of reasons for the Espionage Act's dramatic evolution. The development of a large peacetime classification system after World War II made media leak prosecutions more logistically possible and more culturally fathomable, while each prosecution itself has helped to normalize subsequent ones. Today's vast secret-keeping infrastructure was unimaginable to the 1917 Congress, or even to the 1950 Congress that amended the Espionage Act. A non-military classification system did not exist in 1917, and by 1950 it had existed only in wartime.[43]

Indeed, we needn't speculate as to whether the 1917 Congress would have tolerated the prospect of the President declaring swaths of information unspeakable to the media or unprintable by it, subject to criminal penalties. That Congress rejected such a proposal, despite its being offered on the eve of the U.S.'s entry into World War I and limited explicitly to wartime.[44] And the 1950 Congress added express language to the Espionage Act indicating that it was not to be construed to restrain the press or diminish First Amendment rights.[45] It was only as the memories of 1917 and 1950 receded, and as a permanent classification infrastructure took shape and grew, that the notion of using the Espionage Act to prosecute media leaks became palatable. And the slow drip of early prosecutions themselves—from the first, shocking prosecution in 1957, to the ill-fated prosecutions of Daniel Ellsberg and Anthony Russo in 1973, to the successful prosecution of Samuel Morison more than a decade later—helped to clear the path for the steady stream of prosecutions that began in the aftermath of 9/11.

The normalizing effects have been not just logistical and cultural, but doctrinal as well. As we will see in Part III, the federal government struck gold in its third media leak prosecution. That action, against naval intelligence analyst Samuel Morison for leaking satellite photographs to a periodical, resulted in a 1988 opinion by the U.S. Court of Appeals for the Fourth Circuit.[46] The Fourth Circuit upheld Morison's prosecution, suggesting that there was meager First Amendment

---

[43] ARVIN S. QUIST, SECURITY CLASSIFICATION OF INFORMATION 9, 45, 50–51 (Vol. 1, 2002).
[44] Lebovic, *supra* note 36, at 51–52.
[45] *Id.* at 59.
[46] United States v. Morison, 844 F.2d 1057 (4th Cir. 1988), *cert. denied,* 488 U.S. 908 (1988).

interest at stake.[47] Although the Fourth Circuit's reasoning was deeply anachronistic—relying heavily on early and mid-century precedents that entailed classic spying and that themselves drew on the relatively lean First Amendment doctrine of the time—and despite two separate concurrences warning that future cases may raise more pressing First Amendment concerns,[48] *Morison* has become the doctrinal bedrock on which subsequent cases have repeatedly anchored themselves.

Below, in Part II(A), we elaborate on the Espionage Act's dramatic evolution from a law that went unused against media leakers throughout two World Wars and most of the Cold War, to one that today is wielded like an official secrets act. We also dig further into two of the key elements responsible for this trajectory—the creation of a vast and permanent national security secrecy system in the United States over the past century, and the ratchet effects of media leak prosecutions themselves. In Part II(B), we look more closely at how technology shortens the government's path to finding leakers. Perhaps most importantly, technological advances make it less likely that prosecutors will encounter, or even have to factor in the potential for litigation over subpoenaing journalists to testify about their sources.

A. From Unfathomable to the New Normal: The Espionage Act as a Tool to Prosecute Media Leakers

1. Congressional Intent and Understanding that the Espionage Act Only Punished Spies and Traitors Who Communicate with Foreign Agents

The authoritative 1973 study of the Espionage Act by Harold Edgar and Benno C. Schmidt Jr. traces the Act's history through both the 65th Congress that enacted it in 1917 and the 81st Congress that amended it through the 1950 Internal Security Act.[49] Edgar and Schmidt looked with particular care to the evolution of the principal restraints imposed by the Act on the unauthorized disclosure of information, codified today at 18

[47] *Id.* at 1060, 1068 ("[W]e do not perceive any First Amendment rights to be implicated here.").
[48] *Id.* at 1084–85 (Wilkinson, J., concurring); *id.* at 1086 (Phillips, J., concurring).
[49] Harold Edgar & Benno C. Schmidt Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 934 (1973).

U.S.C. §§ 793(d) & (e) (hereinafter "Section 793") and 798(b) (hereinafter "Section 798"):

As adopted in 1917, Section 793 drew on language from the Defense Secrets Act of 1911 that prohibited the willful communication of "anything connected with the national defense" to one "not entitled to receive it."[50] As amended in 1950, Section 793 today makes it a crime for anyone with either authorized possession (subsection (d)) or unauthorized possession (subsection (e)) of information "relating to the national defense" to "willfully" communicate that information to an unauthorized person or to fail to return it on demand, if the possessor "has reason to believe" the information "could be used to the injury of the United States or to the advantage of any foreign nation."[51] When the communicated items are tangible—such as documents or photographs, rather than orally conveyed information—the Act does not even require willfulness.[52] The Act also has never defined what constitutes "national defense" information.

Added to the Espionage Act in 1950, Section 798 more specifically makes it a crime to publish "classified" information that either (a) reveals the cryptographic and communications intelligence activities of the United States or any foreign country, or (b) discloses classified information obtained from a foreign

---

[50] *Id.* at 939. Under the Defense Secrets Act, the communicated information also must have been obtained from a military location or "other place connected with the national defense." *Id.* at 969. Foreshadowing the sloppiness of the soon-to-follow 1917 Act, the 1911 Act "was alternatively so broad in its first prohibition . . . and so vague in succeeding sections as to virtually defy analysis." *Id.* The 1911 Act's "sparse legislative history" suggested that Congress had been focused only on the problem of spying. *Id.* at 969–70. "Once in the statute books," however, "the formless terms of the 1911 Act were accorded a respect and a putative clarity in later legislative stages out of all keeping with the casual process that spawned them." *Id.* at 1005.

[51] 18 U.S.C. § 793(d), (e). The 1950 amendments split the restriction in Section 793 into to two provisions, (d) and (e), dealing separately with individuals having authorized possession of information and those with no authorization; restated the scope of the restriction to include "information relating to the national defense" (which remains undefined); and, added a scienter requirement ("the possessor has reason to believe [the information] could be used to the injury of the United States or the advantage of any foreign nation . . . .") *See* Edgar & Schmitt, *supra* note 49, at 998–1000.

[52] 18 U.S.C. § 793(d)-(e) prohibit disclosure of national defense information with "reason to believe" the information "could be used to the injury of the United States or to the advantage of any foreign nation[,]" but they do not impose the "reason to believe" requirement to the disclosure of documents or other tangible things. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 738 n. 9 (1971) (White, J. concurring).

government or military force through the "processes of communication intelligence."[53] Unlike Section 793, Section 798 is a strict liability provision that is violated if a disclosure is "prejudicial to the safety or interest of the United States," or benefits a foreign government, regardless of whether the person disclosing the information had reason to believe that the disclosure would cause harm.[54]

In reviewing the legislative history of these provisions, Edgar and Schmidt drew two conclusions of importance to their application today. First, the disclosure penalties in Section 793 were but one aspect of the complicated bills before Congress, and the legislators grappling with the bills simply "never understood" these sections or realized that their literal terms might be applied to criminalize speech essential to public debate or preliminary activities undertaken to promote that debate.[55] Second, "neither the Congresses that wrote the laws nor the Executives who enforced them behaved in a manner consistent with the belief that the general espionage statutes forbid acts of publication or conduct leading up to them, in the absence of additional and rarely present bad motives."[56]

a. The 1917 Act

The historic record makes clear that the 65th Congress did *not* believe it had created any type of "official secrets act" that would punish a disclosure regardless of to whom it was made and whether it caused any harm to U.S. interests. Both the House and the Senate in 1917 rejected a provision that the Wilson administration drafted and for which it lobbied actively, which would have authorized the President, in "a time of war," to promulgate regulations governing the collection, recording, publishing, communication, or "attempt to elicit any . . . information relating to the public defense or calculated to be, or which might be, useful to the enemy."[57] This provision received

[53] 18 U.S.C. § 798(a).
[54] *Id.*
[55] Edgar & Schmitt, *supra* note 49, at 1032.
[56] *Id.* at 1077.
[57] *Id.* at 947; *see also id.* at 950–65 (chronicling developments relating to, and ultimate rejection of the provision in the House and the Senate).

considerable attention in the House, the Senate, and the press.[58] From the congressional debates, one can discern a common understanding among the provision's opponents and proponents alike that it would have authorized prosecutions for publishing designated national defense information "without any sinister purpose at all," albeit "only in time of war."[59] Opponents, who carried the day, insisted that the costs of punishing communications made for innocent purposes, including those made to or by the press to inform the public, outweighed the countervailing interests.[60]

The 65th Congress also rejected a provision that would have given content to the words "not entitled to receive it" in the precursor to today's Sections 793(d) and (e), which prohibit the communication of certain "information relating to the national defense" to persons not entitled to receive it.[61] The provision rejected by Congress would have empowered the President "to designate any matter, thing, or information belonging to the Government, or contained in the records or files of any of the executive departments, or of other Government offices, as information relating to the national defense, to which no person [other than those duly authorized] shall be lawfully entitled."[62] Congress thus declined in 1917 to grant the President authority to classify information to which the criminal provisions of the Espionage Act would apply.[63]

---

[58] Indeed, the Senate in the 64th Congress initially passed a version of the provision before rejecting it in the 65th Congress. *Id.* at 950–65. The House in the 65th Congress first rejected the provision and then accepted a substitute for it before ultimately rejecting the substitute. *Id.* Furthermore, between the 64th and 65th Congresses, the press began to devote much more attention (and opposition) to the provision, which in turn prompted more deliberation in Congress. *Id.*

[59] *Id.* at 953 (citing bill proponent Sen. Walsh and characterizing his understanding as typical).

[60] *Id.* at 954–58. Before opponents prevailed in striking the provision, Senator Cummins had proposed to limit it. His remarks on that proposal reflect opponents' emphasis on the need to protect speech by and to the United States press: "I assume that the President can, in so far as his supervision goes, prevent the disclosure by the several departments of information relating to the Army and the Navy; but suppose it is disclosed to individuals or to the newspapers, then the President's power ceases and the individual who communicates or the individual who publishes cannot be punished." *Id.* at 957 n.63. *See also id.* at 959 (citing parallel points made in the House).

[61] *Id.* at 1006–09.

[62] *Id.* at 1008.

[63] *Id.* at 1001.

As Edgar & Schmitt note, this history calls into question whether "the term ['not entitled to receive it'] can be given meaning by reference to Executive Orders."[64] Nonetheless, as discussed below, courts more recently have given the term meaning in precisely this way.[65] The propriety of recent judicial constructions aside, the point remains that members of the 65th Congress expressly declined to grant such a designation power in the Espionage Act, and presumably believed that the president possessed no such power inherently.[66]

b. The 1950 Act

Congress amended the Espionage Act through the 1950 Internal Security Act.[67] This amendment came at the height of the McCarthy era, and much of the 81st Congress's attention was focused on higher profile parts of the Act, including provisions "that made it unlawful to conspire to establish a totalitarian dictatorship in the United States, the broad registration requirements, and the powers of the Subversive Activities Control Board."[68] With respect to the provisions that today are invoked against leaks to the press, the 1950 legislative changes were relatively small, although Congress did divide what was previously one Section (d) into today's Sections 793(d) and (e).[69]

Whether due to inattention, confusion, or some combination of both, the 81st Congress's approach to (d) and (e) largely paralleled that of its predecessors.[70] In passing the Internal Security Act, Congress left intact language that could be

---

[64] *Id.*

[65] *See infra* Part III.A.3.

[66] Edgar & Schmitt, *supra* note 49, at 1019. Indeed, Edgar & Schmitt observe that this history raises "serious issues of whether . . . 793(d) and (e) are[] enforceable criminal laws." *Id.*

[67] *Id.* at 1021–22.

[68] *Id.* at 1028. As Edgar & Schmitt put it, "[s]ubsections 793(d) and (e) were tucked away among the many provisions of the Internal Security Act of 1950, a massive effort to deal with what was then perceived to be the serious threat of domestic communism." *Id.* at 1022.

[69] *Id.* at 1021. Section (d) currently focuses on persons with authorized access to information, whereas section (e) targets those who obtain information without authorization. *Id.* "The purpose of the distinction was to oblige the ordinary citizen to return defense information" without official demand. *Id.* Congress also added "information" to the list of covered items, along with a new textual culpability requirement for conveying information as opposed to tangible items, such as documents. *Id.* Congress also added violations for "causing or attempting to cause" violations of (d) or (e). *Id.*

[70] *Id.* at 1031.

construed to empower the executive to criminalize the communication of designated information to the press or the public.[71] Yet, just as in 1917, the legislative history from 1950 indicates that Congress did not intend or expect any such result.[72] For example, when Senator Kilgore expressed worry that the bill could "theoretically . . . make practically every newspaper in the United States . . . into criminals without their doing any wrongful act," Senator McCarren, the bill's sponsor, replied that the suggestion "naturally concerns me greatly."[73] McCarren solicited letters on the matter from Attorney General Clark, from the Library of Congress, and from "eminent private lawyer" Elisha Hanson.[74] Both Clark and the Library of Congress responded with letters that McCarren entered into the congressional record.[75] The letters were reassuring in their tone, even as their literal language did not explicitly rule out the possibility raised by Kilgore.[76] Clark wrote, for instance, that the Act's "language [and] history," and "the integrity of the three branches of the Government . . . would indicate 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."[77]

Rather than offering an opinion on the existing language, Hanson suggested reinserting a provision that had been dropped in the drafting process that would make clear that the Act did not erode First Amendment rights.[78] His proposal was acted upon, and a section of the final bill provided that the Act shall not "be construed" to 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."[79] There was little further discussion of this press-protecting provision once it was added back into the bill, and most of the congressional debate about the First Amendment involved other

---

[71] *Id.*
[72] As Edgar & Schmitt put it, "The 1950 legislation thus follows the frustrating pattern of so many of the espionage statutes: Congress said it, but seems not to have meant it." *Id.*
[73] *Id.* at 1025.
[74] *Id.*
[75] *Id.* at 1025–27.
[76] *Id.* at 1025–26.
[77] *Id.* at 1026.
[78] *Id.*
[79] *Id.* at 1026–27.

parts of the Act.[80] Nonetheless, Senator McCarren "plainly viewed the anti-censorship proviso as a corrective for what he saw as erroneous readings of 793(d) and (e)."[81] More so, as Edgar & Schmitt suggest, "the very fact that nothing further was said about the threat that 793(d) and (e) might pose to a free press may reflect belief that the proviso eliminated such a danger."[82]

c. The Context in which the Act(s) were Written and Debated

We can better grasp the perspectives of the 65th and 81st Congresses if we understand how very foreign today's classification regime would have seemed to them. The first Executive Order on classification was not issued until 1940, shortly after World War II began in Europe.[83] Before 1940, national security secrecy was dealt with predominantly through regulations internal to the military.[84] And it was not until 1951 that a peacetime classification system was initiated, via President Harry Truman's Executive Order 10290.[85] Truman's order was decried by the press, members of Congress, and others who considered it "unwarranted peacetime censorship."[86] Truman's successor, President Eisenhower, responded to the outcry by vowing to scale the system back.[87]

In the long run, of course, the classification regime prevailed. Today's system towers over the one that struck Americans as frighteningly radical in the 1950s. According to the last reported figures, roughly 1,700 individuals have "Original Classification Authorities"[88] and more than 4 million people

---

[80] *Id.* at 1028.
[81] *Id.*
[82] *Id.*
[83] QUIST, *supra* note 43, at 9; Lebovic, *supra* note 36, at 54.
[84] *See* QUIST, *supra* note 43, at 9, 45.
[85] *Id.* at 50–51.
[86] Luther A. Huston, *Brownell Praises Information Plan*, N.Y. TIMES, Oct. 29, 1953, at 20; *see also, U.S. Adds Controls on Security Data*, N.Y. TIMES, Sept. 26, 1951, at 17; QUIST, *supra* note 43, at 50–51.
[87] Huston, *supra* note 86.
[88] *See* INFO. SEC. OVERSIGHT Office, 2018 REPORT TO THE PRESIDENT 4 (2018), https://www.archives.gov/files/isoo/images/2018-isoo-annual-report.pdf.

possess derivative classification authority.[89] In 2017 alone, roughly 49 million new classifications were made.[90]

The evolution of the classification system is symptomatic of, and perhaps a driver of, a fundamental shift in American views of secrecy and free speech. As historian Samuel Lebovic has chronicled in several recent publications, the paths of freedom of speech and national security secrecy have gone in largely opposite directions.[91] As the government, including the judiciary, has embraced the freedom to express one's opinion, it has also sanctioned an ever-growing system of national security secrecy.[92] During the Civil War, for example, "military information was kept secret by regulating the sphere of circulation, not controlling information at the source."[93] In some cases, "hostile editors were jailed, select periodicals were barred from the mail, and others were forcibly closed by the military."[94] Such methods became increasingly unacceptable in the twentieth century, as epitomized by the emergence of a modern free speech doctrine that is highly skeptical of official restrictions on the content of what can be spoken or published. At the same time, Americans have come to expect, and to accept, that government will go to great lengths to bottle up information at the source.[95] Today, this tension is epitomized by the growing body of

---

[89] FISCAL YEAR 2017 ANNUAL REPORT ON SECURITY CLEARANCE DETERMINATIONS 4 (2017), https://www.dni.gov/files/NCSC/documents/features/20180827-security-clearance-determinations.pdf.

[90] INFO. SEC. OVERSIGHT OFFICE, 2017 REPORT TO THE PRESIDENT 1, 42–43, 45 (2017) (reporting that 58,501 "original" classification decisions and 49 million "derivative" classification decisions were made in 2017), https://www.archives.gov/files/isoo/reports/2017-annual-report.pdf. In its annual reports during the Trump administration, ISOO broke with past practice and did not list the number of classification decisions made in those years. *See* INFO. SEC. OVERSIGHT OFFICE, 2018, *supra* note 88; INFO. SEC. OVERSIGHT OFFICE, 2019 REPORT TO THE PRESIDENT (2019), https://www.archives.gov/files/isoo/reports/2019-isoo-annual-report.pdf.

[91] *See, e.g.*, SAM LEBOVIC, FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA (2016); *see also* Lebovic, *supra* note 36, at 47.

[92] *See, e.g.,* Lebovic, FREE SPEECH AND UNFREE NEWS, *supra* note 91.

[93] Lebovic, *supra* note 36, at 47.

[94] *Id.* at 47; *see also, e.g.,* Timothy L. Ericson, *Building Our Own "Iron Curtain": The Emergence of Secrecy in American Government*, 68 THE AM. ARCHIVIST 18, 29 (2005) ("During the Civil War, the federal government still had not developed a formal system of protecting sensitive information. Significant controls occurred primarily in the war zones and these were directed primarily at the press.").

[95] *See, e.g.,* Lebovic, *supra* note 36, at 54 ("As this ever broadening distinction between freedom of press and freedom of information was hollowing out the First Amendment, it was simultaneously doing important work to legitimate the emerging regime of state secrecy.").

precedent that treats Espionage Act prosecutions based on press leaks as exceptions to a generally robust system of speech and press freedoms.

d. Further Evidence of Congressional Understanding of the Limited Scope of the Espionage Act

Congressional and executive actions and proposals in the wake of both the 1917 and 1950 acts provide further evidence that the Espionage Act was not understood to create a vehicle to broadly pursue press leakers. In the years between the two Acts, Congress passed three statutes "prohibiting publication of discrete categories of highly sensitive information, without regard to anti-American or pro-foreign intent," and "[n]o one ever suggested" that the Espionage Act already covered the matter.[96] Moreover, legislation repeatedly has been proposed since 1950 "that can only reflect the assumption that the espionage statutes do not prohibit non-culpable disclosure of properly classified information."[97] As late as 2000, Congress passed legislation that would have criminalized the unauthorized disclosure of classified information, incorporating a type of "official secrets act" as part of the Intelligence Authorization Act for Fiscal Year 2001.[98] President Clinton vetoed that Act, specifically out of concern with its impact on "the free flow of information [that] is essential to a democratic society."[99]

---

[96] Edgar & Schmitt, *supra* note 49, at 1020.
[97] *Id.* at 1055.
[98] Intelligence Authorization Act for Fiscal Year 2001, H.R. 4392, 106th Cong. § 303 (2000). The legislation imposed criminal penalties on anyone who "knowingly and willfully discloses, or attempts to disclose, any classified information acquired as a result of such person's authorized access to classified information to a person who is not authorized to access such classified information, knowing that the person is not authorized to access such classified information." *Id.* This legislation did what the Espionage Act does not—it removed the government's obligation to show either that a disclosure was actually "prejudicial to the safety or interest of the United States or for the benefit of any foreign government," 18 U.S.C. § 798(a) (2018), or was made with "reason to believe" it could be used to injure the United States or advantage a foreign government, *id.* § 793(d), (e) (2018). It criminalized the act of willfully leaking classified information to anyone not authorized to receive it, regardless of intent or impact. *See* Intelligence Authorization Act for Fiscal Year 2001 § 303.
[99] OFFICE OF THE PRESS SEC'Y, WHITE HOUSE, STATEMENT BY THE PRESIDENT ON THE VETO OF HR 4392 (2000), https://fas.org/irp/news/2000/11/irp-001104-leak.htm.

Over time, of course, the executive branch increasingly has proceeded as though the 1917 Espionage Act gives it all the authority that it needs to prosecute any media leaks of classified information. Just two years after President Clinton's veto message, George W. Bush's first Attorney General, John Ashcroft, told Congress that new legislation was not essential, as "current statutes provide a legal basis to prosecute those who engage in unauthorized disclosures, if they can be identified."[100] Ashcroft added that the Justice Department "would, of course, be prepared to work with Congress" if it was to pursue new legislation,[101] but his priority was to use existing authorities more aggressively. Ashcroft also took the position that the President already had the constitutional power to classify and withhold information "quite apart from any explicit congressional grant."[102] He committed to rigorously investigate "unauthorized disclosures of classified information[,] to identify the individuals who commit them," and to oversee vigorous "enforcement of the applicable administrative, civil, and criminal provisions already available."[103]

2. Opening a Path to Prosecuting Leaks to the Press Under the Espionage Act

Given this history, it is unsurprising that the executive did not deploy the Espionage Act against a press leak during the Act's first forty years.[104] To the contrary, it is jarring that the government *did* pursue such a prosecution in 1957, just a few years after Americans were introduced to the controversial peacetime classification system. The 1957 prosecution was a

---

[100] JOHN ASHCROFT, OFFICE OF THE ATTORNEY GEN., LETTER TO HOUSE SPEAKER J. DENNIS HASTERT 3 (2002), https://fas.org/sgp/othergov/dojleaks.pdf. In the aftermath of the Clinton veto, Congress had passed legislation calling for a "comprehensive review" of protections of classified information. *Id.* at 1. The Bush administration conducted that review, and Ashcroft's message followed. *Id.* at 2.

[101] *Id.* at 9.

[102] *Id.* at 2.

[103] *Id.* at 3.

[104] During World War II, government officials considered prosecuting the Chicago Tribune for publishing a story revealing that the United States had cracked Japanese codes before the Battle of Midway. Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 258 (2008). The Justice Department ultimately decided not to pursue the prosecution out of fear that it would draw Japanese attention to intelligence capabilities. *See id.*; Geoffrey R. Stone, *Roy R. Ray Lecture Freedom of the Press in Time of War*, 59 SMU L. REV. 1663, 1668 (2006).

court martial proceeding against Army Colonel Jack Nickerson, who had revealed the results of an Army missile program to the press in an effort to demonstrate that Defense Secretary Charlie Wilson had acted improperly in rejecting the Army missile in favor of an inferior Air Force missile manufactured by GM, Wilson's former employer.[105]

The Nickerson prosecution marked a crossroad in the Espionage Act's evolution. The decision to commence the court martial reflected both a growing concern in the executive branch that its nascent classification system was leaky and a traditional sensitivity to politically damaging or embarrassing leaks.[106] But the Nickerson experience gave prosecutors reason to hesitate before bringing another press leak case under the Espionage Act. The case garnered enormous public attention, and much of the press coverage portrayed Nickerson as a martyr.[107] The prosecution also brought home the reality that revelations in judicial proceedings and in the press could reveal further information and prolong public attention to the classified matters.[108]

In the end, the government dropped the Espionage Act charge.[109] Nickerson pled guilty to violating several Army security regulations and lost his security clearance for a year.[110] For the government, the public relations damage was compounded later in the year when the Navy missile program came in late and "far over budget," and "its first attempted satellite launch failed spectacularly—and on national television no less—exploding on the launch pad."[111] When the Army program was subsequently revived and proved successful, "[p]laudits for Nickerson poured in," with newspapers "prais[ing] his foresight."[112]

---

[105] *See* MacDougall, *supra* note 37.
[106] *Id.* ("It didn't help, of course, that Nickerson had directly challenged and attacked Wilson. Moreover, according to an FBI file, Wilson's boss, Eisenhower, was 'personally interested' in the leak . . . .").
[107] *See id.*; Sam Lebovic, *The Forgotten 1957 Trial That Explains Our Country's Bizarre Whistleblower Laws*, POLITICO (Mar. 27, 2016), https://www.politico.com/magazine/story/2016/03/the-forgotten-1957-trial-that-explains-our-countrys-bizarre-whistleblower-laws-213771.
[108] *See* MacDougall, *supra* note 37; Lebovic, *supra* note 107.
[109] *See* MacDougall, *supra* note 37.
[110] *See id.*
[111] *Id.*
[112] *Id.*

Once burned, twice shy. The government did not pursue another leak prosecution under the Espionage Act until 1973, when the Nixon Administration prosecuted Daniel Ellsberg and Anthony Russo for leaking the Pentagon Papers.[113] That experience was nothing short of a disaster for the government. The case ended in a mistrial called because of the administration's dirty tricks—including breaking into the office of Daniel Ellsberg's psychiatrist and attempting to bribe the presiding judge with the prospect of the FBI directorship.[114] Though castigated in some quarters, Ellsberg was hailed as a hero in others.[115]

In 1985, Samuel Morison became the first person convicted under the Espionage Act for leaking classified information to the press.[116] Morison had leaked photographs of a Soviet air carrier—photographs to which he had access through his employment with the U.S. Naval Intelligence Support Center—to a British periodical called *Jane's Fighting Ships*.[117] In his defense, *Morison* argued that he had sought to call attention to the magnitude of the threat posed by the Soviet Union and the need for increased defense spending.[118] The government countered this point with evidence that Morison's true motive was to receive an offer of employment from the magazine.[119] The Fourth Circuit found neither the presence nor the absence of a public interest motivation—nor, for that matter, of an objective public interest in the information—relevant to the specific legal questions at issue.[120] Judge Russell's opinion for the court treated

---

[113] *Ellsberg Case: Defendants Freed, Government Convicted*, N.Y. TIMES, May 13, 1973, at 191.
[114] *Id.*
[115] *See, e.g.*, Gabriel Schoenfeld, *Rethinking the Pentagon Papers*, NAT'L AFFAIRS (Summer 2010), https://www.nationalaffairs.com/publications/detail/rethinking-the-pentagon-papers (describing "two opposing narratives" about Daniel Ellsberg, one as a "disloyal official" and one as a "lone hero.").
[116] United States v. Morison, 844 F.2d 1057 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988).
[117] *Id.* at 1060–63.
[118] *Id.* at 1062.
[119] *Id.* at 1084–85 (Wilkinson, J., concurring). *See also* Philip Weiss, *The Quiet Coup: U.S. v. Morison - A Victory for Secret Government*, HARPER'S MAG., Sep. 1989, at 59–60.
[120] As Judge Wilkinson reasoned in his concurrence, courts are not competent to balance national security against the public interest in information: "The question, however, is not one of motives as much as who, finally, must decide. The answer has to be the Congress and those accountable to the Chief Executive." *Morison*, 844 F.2d at 1083 (Wilkinson, J., concurring).

Morison's actions as a simple theft that implicated no First Amendment rights.[121]

Still, two of the three judges on the *Morison* panel—including Judge Wilkinson, who joined Judge Russell's opinion––wrote separately to emphasize that "the [F]irst [A]mendment issues raised by [the defendant] are real and substantial and require . . . serious attention . . . ."[122] Judge Wilkinson discussed at length the First Amendment interests at stake in press-source prosecutions, observing that "[t]he First Amendment interest in informed popular debate does not simply vanish at the invocation of the words 'national security.' National security is public security, not government security from informed criticism."[123] But he also expressed doubt about judges' abilities to assess the need for secrecy in a given case and concern that "disgruntled employee[s]" could threaten government programs by exposing sensitive information.[124] Wilkinson ultimately took solace in the thought that sources for information about "corruption, scandal, and incompetence in the defense establishment," were unlikely to be charged or convicted, and if they were, First Amendment infirmities could be "cured through case-by-case [judicial] analysis of the fact situations."[125] Judge Phillips agreed that press-source prosecutions presented "real and substantial" First Amendment issues, but shared Judge Wilkinson's expectation that leaks exposing important news would not be punished.[126] This expectation, he said, was "the critical judicial determination forced by the [F]irst [A]mendment arguments advanced in this case."[127]

The Justice Department faced criticism over the potential chilling effect of Morison's prosecution on would-be whistleblowers with information of vital public importance.[128] Noting these concerns, President Clinton pardoned Morison

---

[121] *Id.* At 1068–70 (majority opinion).
[122] *Id.* at 1085 (Philips, J., concurring); *id.* at 1080–81 (Wilkinson, J., concurring).
[123] *Id.* at 1081 (Wilkinson, J., concurring).
[124] *Id.* at 1083.
[125] *Id.* at 1083–84 (internal quotations omitted) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).
[126] *Id.* at 1085-86 (Phillips, J., concurring).
[127] *Id.* at 1086.
[128] *See* Ben A. Franklin, *Morison Receives 2-Year Jail Term*, N.Y. TIMES, Dec. 5, 1985, at A21 (noting criticism of the prosecution as a threat to freedom of the press).

shortly before leaving office in 2001.[129] But the cat was out of the bag. The Morison prosecution did not involve a classic press leak of newsworthy information, given Morison's personal profit motive, but the fact that neither the jury nor the courts were persuaded by his plea to consider the public interest in disclosure laid the foundation for future Espionage Act leak prosecutions.

The effort to build on the shoulders of *Morison* started during the George W. Bush administration, after 9/11 dramatically increased concerns over terrorism and heightened sensitivity to protecting national security secrets. In 2005, a Defense Department analyst, Lawrence Franklin, was indicted and ultimately pleaded guilty to violating the Espionage Act by orally disclosing classified information about American forces in Iraq to an Israeli diplomat and two employees of the American Israel Public Affairs Committee ("AIPAC").[130] In a move that sent tremors through the media, the Bush administration then brought charges under the Espionage Act against the AIPAC lobbyists as well, under a reading of the Espionage Act that many journalists feared could criminalize a great deal of national security reporting.[131] The lobbyists' allegedly wrongful activities involved the dissemination of information they had received from a government employee while knowing the employee was not authorized to disclose it.[132] As the *Washington Post* objected at the time, this theory of wrongdoing was effectively "criminaliz[ing] the exchange of information,"[133] and raised the specter of criminal prosecutions of reporters who ask about

---

[129] Valerie Strauss, *Navy Analyst Morison Receives a Pardon*, WASH. POST, Jan. 21, 2001, at A17. Senator Daniel Patrick Moynihan supported Morison's pardon, writing to Clinton that if similar actions were taken on a widespread basis "it would significantly hamper the ability of the press to function." Letter from Sen. Daniel Patrick Moynihan to President Clinton (Sep. 29, 1998), https://fas.org/sgp/news/2001/04/moynihan.html.

[130] *See* United States v. Rosen, 445 F. Supp. 2d 602, 607 (E.D. Va. 2006); William E. Lee, *Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes*, 36 AM. J. CRIM. L. 129, 168 (2009).

[131] *Rosen*, 445 F. Supp. 2d at 607–08 (noting that the lobbyists, Rosen and Weissman were charged with conspiracy to violate 18 U.S.C. § 793 (g); Rosen was also charged violating 18 U.S.C. § 793(d)); *see* Jerry Markon, *U.S. Drops Case Against Ex-Lobbyists*, WASH. POST, May 2, 2009, at A1.

[132] *Rosen*, 445 F. Supp. 2d at 608.

[133] Editorial, *Time to Drop the Prosecution of AIPAC's Steven Rosen and Keith Weissman*, WASH. POST, Mar. 11, 2009 (urging Attorney General to drop charges), https://www.washingtonpost.com/wp-dyn/content/article/2009/03/10/AR2009031003026.html.

matters they know a government informant is not supposed to discuss—something that happens every day in Washington.[134]

Although the Obama administration eventually dropped the charges against the lobbyists in 2009,[135] this hardly signaled reticence to target government employees for suspected press leaks. Indeed, the Obama administration would go on to prosecute eight government employees under Section 793 of the Espionage Act for leaking information to the media or for retaining information in connection with suspected media leaks.[136]

Were there any doubts that the floodgates had been opened, they were erased by the actions of the Trump Administration. In the administration's first year, then Attorney General Jeff Sessions boasted that the Justice Department was investigating nine times as many leaks as the Obama administration had investigated annually.[137] During just one term in office, the Trump administration indicted eight media leakers—doubling the pace of leak prosecutions under the Obama administration.[138]

The relevant Espionage Act provisions have, in short, traveled far beyond the bounds that their drafters envisioned. Essential to their journey was the creation of a sprawling, permanent classification system by the mid-twentieth century. That system gave content to features of the Act that might otherwise have lacked meaning, including the "not entitled to receive it" language. More fundamentally, the system has inured Americans to the idea that there are vast swaths of information that they are not allowed to see or to hear. These developments, coupled with the normalizing effect that each prosecution has

---

[134] *See* Lee, *supra* note 130, at 132-34.
[135] *See* Charlie Savage, *Assange Indicted Under the Espionage Act, Raising First Amendment Issues*, N.Y. TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/us/politics/assange-indictment.html (discussing the context surrounding the Obama Administration's decision to drop the case).
[136] *See* Gabe Rottman, *A Typology of Federal News Media "Leak" Cases*, 93 TUL. L. REV. 1147, 1182–85 tbl. 1 (2019) (counting only the prosecutions brought under Section 793)).
[137] *See* Brian Stelter, *Jeff Sessions: We're Investigating 27 Leaks of Classified Information*, CNN (Nov. 14, 2017), https://money.cnn.com/2017/11/14/media/leak-investigations-jeff-sessions/index.html.
[138] *See All Incidents*, U.S. PRESS FREEDOM TRACKER, https://pressfreedomtracker.us/all-incidents/?categories=7.

upon the next, provides a partial explanation for the current state of affairs.

Technology, too, has contributed to the Espionage Act's transformation. At minimum, technology makes it easier for the government to find leakers without having to subpoena journalists. This prosecutorial advantage entails much more than expedition. Rather, it removes an important point of friction, one at which the judiciary—or even the executive branch—traditionally paused to consider the First Amendment interests at stake. We explore this change in Subpart B.

B. The Loss of "First Amendment Friction" as a Limitation on Espionage Act Prosecutions for Leaking Information of Legitimate Public Concern

1. **The Friction Traditionally Provided by The Prospect of Subpoenaing Reporters**

Attorney General Ashcroft's view that the Espionage Act sufficiently protects classified secrets from leakers, "***if*** they can be identified"[139] is telling and suggests an important factor that has played into the vast expansion of Espionage Act prosecutions of leakers in recent years. Well into the twentieth century, a federal prosecutor contemplating an Espionage Act prosecution based upon a leak to the press confronted the reality that identifying the source of a leak was likely to require evidence from the reporter who received the leaked information. This reality necessarily pulled public interest and First Amendment concerns into the prosecutor's calculus about whether to proceed, because a qualified reporter's privilege had become widely recognized in federal courts, even as the *Morison* case was making its way to the Fourth Circuit.[140] Prosecutors needed, in short, to contemplate the possibility of compelling evidence from reporters. This reality built a kind of "First Amendment friction" into the use of the Act against leakers.

---

[139] ASHCROFT LETTER TO HASTERT, *supra* note 100, at 3 (emphasis added).

[140] Every federal circuit except the Sixth and Seventh has recognized some form of a qualified First Amendment reporter's privilege. *See* LEE LEVINE ET AL., 2 NEWSGATHERING AND THE LAW (5th ed. 2018) at 20.01. Forty-nine states also recognize some form of reporters' privilege. *See Id.* at 19-4, n.14 (noting that 41 states have statutory shield laws); *id.* at 20–12 (noting that 35 states judicially recognize a reporters' privilege in certain contexts).

The Supreme Court has addressed the reporter's privilege on only one occasion, in the midst of upheavals from the Vietnam War, the Black Panther movement, and social unrest. In *Branzburg v. Hayes*[141] the Court in 1972 refused to permit reporters to assert a privilege against appearing before a criminal grand jury to testify about a confidential source.[142] But in rejecting the reporters' claim of privilege not to respond to a subpoena at all, the Court acknowledged the significant First Amendment implications presented—and five justices seemed to accept the notion that a qualified public interest privilege should be recognized in some contexts.[143]

Justice Powell, who provided the crucial fifth vote, penned a separate concurrence that proved highly influential in the lower courts. Powell underscored that "[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."[144] Although the majority rejected a blanket privilege against appearing before a grand jury, Justice Powell expressly endorsed the continuing ability of reporters to challenge specific subpoenas if they were not issued in a good faith investigation or sought testimony about a confidential source "without a legitimate need of law enforcement."[145] In such cases, Justice Powell explained, a reporter could continue to assert a privilege and would have "access to the court on a motion to quash" where "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."[146] This directive to balance "constitutional and societal interests" would impose a substantial impediment to the

---

[141] 408 U.S. 665 (1972).
[142] *Id.* at 706–08.
[143] *Id at* 707–08; *id.* at 709 (Powell, J., concurring) ("The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."); *id.* at 712 (Douglas, J., dissenting) ("It is my view that there is no 'compelling need' that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime."); *id.* at 725–26 (Stewart, J., dissenting) ("The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public.").
[144] *Id.* at 709 (Powell, J., concurring).
[145] *Id.* at 709–10.
[146] *Id*. at 710.

pursuit of leakers so long as the testimony of a reporter was critical to a successful prosecution.[147]

Possibly an even more influential source of First Amendment friction was the set of guidelines that the Department of Justice was in the process of adopting while *Branzburg* was before the Court.[148] These restrictions precluded federal prosecutors from issuing a subpoena to a reporter in a criminal case unless the U.S. attorney seeking the information first demonstrated to the Attorney General personally that (1) the information was essential to a successful investigation or prosecution, (2) all reasonable attempts had been made without success to obtain the information from other sources, and (3) negotiations with the reporter had been pursued without success.[149] They had the effect of severely limiting the number of subpoenas issued to reporters for several decades.[150]

The guidelines were first proposed by Attorney General John Mitchell in 1970.[151] They reflected a widespread recognition, in the wake of government deception during the Vietnam War, that reporters must be able to communicate in confidence with sources. Indeed, the guidelines' preamble expressly recognized "a reporter's responsibility to cover as

---

[147] Over the subsequent decades, "overwhelming numbers of state and federal courts have interpreted *Branzburg* . . . as recognizing in the First Amendment a qualified journalist's privilege of some dimension." LEVINE, *supra* note 140 at 18–41 (discussing cases). The existence and scope of the reporter's privilege, however, continues to be litigated. In the most recent reporter's privilege case to reach an appellate court, the Fourth Circuit rejected the existence of any privilege—First Amendment or common law, absolute or qualified—that protects a reporter from being compelled to testify in a criminal proceeding about criminal conduct the reporter observed or participated in. United States v. Sterling, 724 F.3d 482, 492 (4th Cir. 2013).

[148] *See* 28 C.F.R. § 50.10 (2019).

[149] *Id.* These guidelines were revised in 2014 and again in 2015 by Attorney General Eric Holder during the Obama administration to include modern forms of communication and to restrict the use of search warrants to obtain information from reporters where there is no intent to prosecute the reporter. *See Amending the Department of Justice subpoena guidelines* REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/attorney-general-guidelines/ (last visited Jan. 29, 2021).

[150] *See Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) (testimony of Rachel L. Brand, Assistant Att'y Gen. for the Office of Legal Policy, U.S. Department of Justice) (testifying that only nineteen DOJ subpoenas to the press for confidential source information were approved between 1991 and 2007).

[151] *See* Adam Liptak, *The Hidden Federal Shield Law: On the Justice Department's Regulations Governing Subpoenas to the Press*, 1999 ANN. SURV. AM. L. 227, 232–33 (1999).

broadly as possible controversial public issues" and the need to avoid legal process "that might impair the newsgathering function."[152]

So long as a reporter's testimony was needed for a successful Espionage Act leak investigation, the guidelines, combined with a widespread judicial willingness to enforce a qualified reporter's privilege, limited the use of the Espionage Act to pursue media leakers. At minimum, they forced prosecutors to think twice about initiating prosecutions unless a sufficiently compelling need could be shown to overcome the reporter's interest, and the public's interest, in news gathering.

2. A Brave New World?

Technology has fundamentally changed the rules of the game, limiting if not erasing any First Amendment friction in prosecutorial decisions to pursue media leakers under the Espionage Act. The increasing ubiquity of electronic surveillance tools—ranging from GPS devices to cell phone and e-mail records to security cameras to bar-coded entry and exit badges––eases the government's burden in identifying leakers in the first place. Recall the statement, cited earlier, of Matthew Miller, a spokesperson for Attorney General Eric Holder during the Obama Administration, to the effect that the administration found leak cases "'easier to prosecute' with 'electronic evidence.' . . . . 'Before, you needed to have the leaker admit it, which doesn't happen' . . . 'or the reporter to testify about it, which doesn't happen.'"[153] More chilling still is an exchange recounted by Lucy Dalglish, the former executive director of the Reporters Committee for Freedom of the Press. An Obama administration intelligence official told her that a subpoena that had been issued to reporter James Risen was "one of the last you'll see . . . We don't need to ask you who you're talking to. We know."[154]

---

[152] The preamble to the guidelines was revised during the Obama Administration by Attorney General Eric Holder. The revised guidelines continue to note the need "to strike the proper balance among several vital interests: Protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society." 28 C.F.R. § 50.10(a)(2) (2015).

[153] Kitrosser, *Leak Prosecutions and the First Amendment*, *supra* note 4, at 1248.

[154] Adam Liptak, *A High-Tech War on Leaks*, N.Y. TIMES, Feb. 12, 2012, at SR5 (internal quotation marks omitted).

Indeed, the Justice Department eventually dropped its pursuit of Risen's subpoena, making clear that it was able to glean the information that it sought without Risen's testimony.[155]

The power of the government's technological tools to identify leakers is evident in the search warrant affidavit submitted in connection with the leak investigation that led to the prosecution of Stephen Kim.[156] That affidavit was submitted to obtain access to the email account of a Fox News reporter, who the government already understood to be the recipient of the leak.[157] The affidavit reveals the mind-numbing extent of the government's ability to monitor personal connections and trace leaks electronically. Among other things, the affidavit recounts the Department of Justice's awareness that:

- Kim worked at the same Department of State location as the Fox reporter;[158]
- A "person with Kim's profile and password" accessed the classified material three times earlier in the same day the news report with the information was published, specifically accessing the information at 11:27, 11:37 and 11:48 a.m.;[159]
- That same day there were multiple phone calls between numbers at the Department of State

[155] *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. The Department of Justice abandoned its demand that Risen testify only after obtaining a damaging Fourth Circuit ruling denying the existence of any reporter's privilege in the federal courts. *See* United States v. Sterling, 724 F.3d 482, 492 (4th Cir. 2013). So, the Risen case marked the demise of First Amendment friction in two ways: It illuminated the vastly diminished need for prosecutors to rely on the testimony of journalists, and it denied the existence of any legal protection for journalists when prosecutors do seek their testimony.

[156] *See* Ann Marimow*, Ex-State Department adviser Stephen J. Kim sentenced to 13 months in leak case*, WASH. POST (April 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.

[157] *See* Affidavit in Support of Application for Search Warrant, 10-mj-00291 (D.D.C. 2011), https://fas.org/sgp/jud/kim/warrant.pdf. The decision to seek the reporter's email was later lamented by Attorney General Holder as his biggest regret in office. Geoff Earle, *Holder says he regrets subpoena decision on Fox Reporter,* N.Y. POST (Oct. 30, 2014), https://nypost.com/2014/10/30/holder-says-he-regrets-subpoena-decision-on-fox-reporter/.

[158] *See* Affidavit in Support of Application for Search Warrant, *supra* note 157 at ¶ 14.

[159] *Id.* ¶ 18.

associated with Kim and telephone numbers associated with the reporter;[160]

- At least one of the phone calls to the reporter's phone number was placed from Kim's desk at the same time a "person using Kim's profile" was viewing the later-reported classified information on the computer at Kim's desk;[161]
- During the hour after those phone calls, "security badge access records" indicated that Kim and the reporter departed the building at nearly the same time, were absent from the building for nearly twenty-five minutes, and then returned to the building at about the same time;[162]
- Within hours after the simultaneous exit and entries, the article containing the classified information was published by Fox News on the Internet, after which another call of about twenty-two seconds was placed from Kim's desk telephone to the reporter's telephone number;[163]

Given these electronic investigative capabilities, it is hardly surprising that in *none* of the seventeen leak prosecutions since 9/11 did the government need to call a reporter to testify. Indeed, only once—in seeking James Risen's testimony in the Sterling prosecution—did the government even issue a subpoena for a reporter's testimony, and that subpoena was abandoned before Risen had to take the stand.[164]

The net result is that the need to compel a reporter to testify has largely been removed from the equation when the government weighs whether to bring an Espionage Act charge against a leaker. Largely lost as well is the need for the prosecutor to weigh the public interest in the leaked information to determine whether a successful case can be made.

---

[160] *Id.* ¶ 19.
[161] *Id.* ¶ 20.
[162] *Id.* ¶ 21.
[163] *Id.* ¶ 22.
[164] *See* Apuzzo *supra* note 155.

III. A DOCTRINAL HOUSE OF SAND: *MORISON* AND ITS LEGACY

Courts have played an active role in the Espionage Act's evolution. The Fourth Circuit's 1988 decision in *Morison*—to this day the only federal appellate court opinion assessing the constitutionality of a media leak prosecution under Section 793––has proven particularly instrumental in the Act's transformation. As we saw in Part II, Judge Russell's opinion for the court, despite two more cautious concurring opinions, suggested that there is little if any First Amendment value at stake in cases involving media leaks of classified information.[165] This position has smoothed the government's path in subsequent cases, and lower courts routinely cite to and largely follow *Morison*'s approach.[166] Each new prosecution has helped to normalize the next, not only in a social or cultural sense, but in a doctrinal sense as well.

Yet *Morison*'s doctrinal house is built on sand. Judge Russell's opinion is steeped in anachronism, relying heavily on cases involving the prosecution of spies in the mid-twentieth century, long before the Act was embraced as a vehicle for prosecuting media leaks.[167] More so, the opinion relies partly on free speech cases from early in the twentieth century, before the enunciation of today's far more protective free speech doctrine.[168] It thus is well past time to reevaluate the precarious doctrinal foundation on which Espionage Act leak prosecutions are being so vigorously pursued.

A. United States v. Morison

As discussed in Part II, Morison was prosecuted for leaking classified photographs of a Soviet air carrier to a British periodical called *Jane's Fighting Ships*.[169] Writing for the court, Judge Russell characterized Morison's leak as conduct—specifically, as theft—rather than speech.[170] As such, the court did "not perceive any First Amendment rights to be implicated

---

[165] *See supra* notes 116–127 and accompanying text.
[166] *See infra* Part III.B.
[167] *See infra* Part III.A.
[168] *See infra* Part III.A.
[169] 844 F.2d 1057, 1060–63 (4th Cir. 1988).
[170] *Id.* at 1077.

here."[171] Accordingly, the court refused to exempt media leaks from the statute's reach.[172] The court also rejected Morison's vagueness and overbreadth arguments, deeming the Espionage Act's sweeping terms compatible with both due process and free speech.[173]

In treating media leakers as strangers to the First Amendment, the Fourth Circuit purported to stand atop a precedential edifice. Yet, that edifice crumbles upon examination, revealing a foundation of anachronisms and questionable leaps of logic. For example, *Morison*'s most radical notion—that media leaks are theft, not speech—relies on cases of questionable continuing validity given decades of subsequent, more protective free speech case law. *Morison*'s vagueness and due process analyses are even more reliant on anachronism and precedential mismatch. Indeed, *Morison*'s vagueness and due process discussions reach back to a 1941 case that long predates key developments in modern First Amendment doctrine, involved classic espionage, and applied more rigorous scienter requirements than those at issue in *Morison* and subsequent media leak cases.[174]

The remainder of Subpart A elaborates on these aspects of *Morison*. Subpart B then traces the path taken by recent district court opinions that rely uncritically on *Morison* and compound its errors.

1. Classified Speech as Theft / Conduct

In likening Morison's leak to an "act of thievery,"[175] Judge Russell made a category error that rested partly on a doctrinal anachronism. Citing *Branzburg*, the *Morison* court explained that "[i]t would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws."[176] Recall, however, that the issue in *Branzburg* was not whether reporters' or sources' speech could be

---

[171] *Id.* at 1069.
[172] *Id.*
[173] *Id.* at 1074–76.
[174] *See infra* Part III.A.
[175] *Morison*, 844 F.2d at 1069.
[176] *Id.* at 1068.

punished directly.[177] The quite different question before the Supreme Court was whether reporters had a privilege against generally applicable subpoena procedures when those procedures might impair their reporting.[178] The *Morison* court thus conflated a generally applicable procedure that could impact speech and press freedoms with a law targeting speech itself. In doing so, it also engaged in circular reasoning; it labeled it a crime to convey classified information and then explained that such conveyance cannot be speech because it is a crime.[179]

The Fourth Circuit's opinion in *Morison* contained a clue that this category error, and the resulting tautology, were grounded in doctrinal anachronism. In it, the court repeated the following line from *Branzburg*, which itself was a quote from an earlier case: "[H]owever complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing."[180] The line was originally published well before the modern era of free speech doctrine, in the 1918 case of *Toledo Newspaper Company v. United States*.[181] Writing for the *Branzburg* Court, Justice White follows the quote with a footnote explaining that *Toledo*:

> involved a construction of the Contempt of Court Act of 1831 . . . which permitted summary trial of contempts "so near (to the court) as to obstruct the administration of justice." The Court held that the Act required only that the conduct have a "direct tendency to prevent and obstruct the discharge of judicial duty." This view was overruled and the

---

[177] *See* Branzburg v. Hayes, 408 U.S. 665, 667 (1972).
[178] *See id.*
[179] *Cf.* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 987 (2016) (explaining that courts "can't justify treating speech as 'integral to illegal conduct' simply because the speech is illegal under the law that is being challenged. That should be obvious, since the whole point of modern First Amendment doctrine is to protect speech against many laws that make such speech illegal.").
[180] *Morison*, 844 F.2d at 1069.
[181] *Compare, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) (announcing the "clear and present" danger test but applying it in a relatively speech-restrictive manner) *with* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (articulating the more speech-protective modern incitement test). *Compare, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (characterizing fighting words in potentially broad terms) *with* Texas v. Johnson, 491 U.S. 397, 409 (1989) (defining fighting words narrowly).

> Act given a much narrower reading in [subsequent precedent.][182]

As Justice White's footnote reflects, the ready equation of speech that threatens security or government operations with conduct is anachronistic. Indeed, while *Toledo* initially was reversed on statutory construction grounds,[183] the Supreme Court subsequently deemed the First Amendment to limit the circumstances under which contempt-of-court can be punished.[184] Similarly, the incitement and fighting words doctrines both evolved over the course of the twentieth century from tools to punish speech for its remote potential to inspire violence, to vehicles to protect speech not closely linked to such violence.[185]

To support its conclusion that Morison engaged in unprotected thievery, the *Morison* court also cited two cases in which the Supreme Court and the Fourth Circuit, respectively, upheld contracts wherein former CIA agents agreed to submit future writings about the agency for pre-publication review.[186] The *Morison* court acknowledged that the cases were not "directly on point," but deemed them "relevant."[187] In fact, employing the pre-publication review cases—which themselves have been subject to well-earned criticism[188]—to support

---

[182] *Branzburg*, 408 U.S. at 752 n. 30.
[183] Nye v. United States, 313 U.S. 33, 48–51 (1941).
[184] Bloom v. State of Illinois, 391 U.S. 194, 206 (1968) (explaining that the Court has invoked the First Amendment "to ban punishment for a broad category of arguably contemptuous out-of-court conduct."). *See also* Volokh, *supra* note 179, at 1019 (citing mid-20th century cases that "used the First Amendment to set aside convictions for statutory contempt of court.").
[185] *See* sources cited *supra* note 181; *see also supra* notes 17–20 and accompanying text.
[186] United States v. Morison, 844 F.2d 1057, 1069 (4th Cir. 1988) (citing United States v. Marchetti, 466 F.2d 1309, 1317 (4th Cir. 1972); Snepp v. United States, 444 U.S. 507, 508 (1980)).
[187] *Id.* at 1069.
[188] *See, e.g.*, Jack Goldsmith & Oona A. Hathaway, *The Government's Prepublication Review Process is Broken*, WASH. POST, (Dec. 25, 2015), https://www.washingtonpost.com/opinions/the-governments-prepublication-review-process-is-broken/2015/12/25/edd943a8-a349-11e5-b53d-972e2751f433_story.html.; Kevin Casey, *Till Death Do Us Part: Prepublication Review in the Intelligence Community*, 115 COLUM. L. REV. 417 (2015); Diane F. Orentlicher, *Snepp v. United States: The CIA Secrecy Agreement and the First Amendment*, 81 COLUM. L. REV. 662 (1981). Last year the Knight Institute and the ACLU filed a lawsuit alleging that the system of pre-publication review violates the First Amendment right of authors to convey and of the public to hear, in a timely manner, the opinions of former government employees on issues of public importance, and also violates the Fifth Amendment by failing to provide former employees with fair notice of what they can and cannot publish without prior review and inviting arbitrary and

criminal prosecutions marks a dangerous doctrinal leap. Most importantly, each court in the pre-publication review cases—the Supreme Court in 1980's *Snepp v. United States*[189] and the Fourth Circuit in 1972's *United States v. Marchetti*[190]—was careful to hinge its holding on the existence of context-specific safeguards.[191] In *Snepp*, the Supreme Court emphasized the tight fit between the civil penalty imposed upon Snepp—a constructive trust on book profits—and Snepp's transgression of bypassing pre-publication review.[192] In *Marchetti*, the Fourth Circuit stressed that pre-publication review must include procedural limits, including strict restrictions on review time.[193] Furthermore, as one of us has detailed elsewhere, *Snepp* was rife with procedural regularities that call into question its own soundness and certainly caution against applying it to new factual settings.[194]

2. Vagueness

Among Morison's constitutional defenses was the argument that the statutory phrase, "relating to the national

discriminatory enforcement by censors. *See* Edgar v. Ratcliffe, No. 8:19-cv-985-GJH (D. Md.), No. 20-1568 (4th Cir. 2019).

[189] 444 U.S. 507 (1980).

[190] 466 F.2d 1309 (4th Cir. 1972).

[191] *See Snepp*, 444 U.S. at 515–16; *see also Marchetti*, 466 F.2d at 1317.

[192] *Snepp*, 444 U.S. at 515–16.

[193] *Marchetti*, 466 F.2d at 1317.

[194] Kitrosser, *Leak Prosecutions and the First Amendment*, *supra* note 4, at 1234 (internal citations omitted):

> In his petition for certiorari, Snepp had asked the Court to consider the constitutionality of the injunctive and damages remedies upheld by the appellate court. The government responded with a conditional cross-petition, asking the Court, if it granted Snepp's certiorari petition, also to review the appellate court's rejection of the constructive trust remedy that the trial court had approved. The Supreme Court's per curiam opinion focused on the constructive trust issue. The Court's response to Snepp's First Amendment objections were shoe-horned into a single footnote. Because the Court barely addressed the issues raised by Snepp, the dissent argued that the Court had effectively denied Snepp's petition for certiorari and thus lacked jurisdiction over the case, given the conditional nature of the government's cross-petition. More so, the Court decided the case without benefit of merits briefs or oral argument.

defense," was vague.[195] The *Morison* Court rejected this claim, deeming the matter settled by two earlier Fourth Circuit cases: 1978's *United States v. Dedeyan*[196] and 1980's *United States v. Truong Dinh Hung.*[197] A close look at both cases, however, reveals that they entail traditional espionage, or spying, rather than media leaks.[198] Moreover, both rely on a 1941 U.S. Supreme Court case, *Gorin v. United States*,[199] itself a classic espionage case.[200] It is also an anachronism, pre-dating some of the twentieth century's most important advances in First Amendment law and the rise of the modern classification system. When we unpack the vagueness precedent relied on in *Morison*, then, we are left with an empty vessel at the center of it all.

Responding to Morison's vagueness challenge, the Fourth Circuit hearkened back to its statement "in *Dedeyan* that the term 'relating to the national defense' was not 'vague in the constitutional sense.'"[201] *Dedeyan*, in turn, deemed the matter to have been resolved by the *Gorin* Court, which "found that the phrase [national defense] has a 'well understood connotation' and is not impermissibly vague."[202] The *Morison* court also observed that the respective statutory provisions at issue in *Morison* and in *Dedeyan* share a common scienter requirement, as each "prescribe[s] that the prohibited activity must be 'willful.'"[203]

The Fourth Circuit also pointed to two jury instructions employed by the district court in Morison's case, explaining that they constitute "precisely the instruction on [the] vagueness issue that we approved in *United States v. Truong Dinh Hung*."[204] The instructions included one to the effect that Morison must, given the statutory "willfulness" requirement, have violated the law

---

[195] United States v. Morison, 604 F.Supp. 655, 658 (D. Md. 1985) (holding that "there is no requirement of intent to injure the United States and only scienter required is wilful [sic] transmission or delivery to one not entitled to receive it.").
[196] 584 F.2d 36 (4th Cir. 1978).
[197] 629 F.2d 908 (4th Cir. 1980).
[198] *See Dedeyan*, 584 F.2d at 38; *see also Truong Dinh Hung*, 629 F.2d at 912.
[199] 312 U.S. 19 (1941).
[200] *See Dedeyan*, 584 F.2d at 39; *see also Truong Dinh Hung*, 629 F.2d at 918–19*; Gorin*, 312 U.S. at 21–23.
[201] United States v. Morison, 844 F.2d 1057, 1071 (4th Cir. 1988).
[202] *Dedeyan*, 584 F.2d at 39 (citing *Gorin*, 312 U.S. at 28).
[203] *Morison*, 844 F.2d at 1071.
[204] *Id.* at 1072 (citing *Truong Dinh Hung*, 629 F.2d at 919).

knowingly,[205] and another to the effect that documents or photographs "relate to national defense" if they are closely held and if their disclosure could be "potentially damaging to the United States or . . . useful to an enemy of the United States."[206] Although the *Morison* court characterized these instructions as having fixed a vagueness problem in *Truong Dinh Hung*, the court in the latter case had deemed them curative of overbreadth rather than vagueness.[207] In any event, the *Truong Dinh Hung* court cited *Gorin* and *Dedeyan* to support its conclusion that the instructions sufficed constitutionally.[208]

The *Morison* court thus relied heavily on *Dedeyan* and *Truong Dinh Hung* to conclude that Sections 793(d) and (e), coupled with appropriate jury instructions, are not vague as applied to media leakers.[209] The Fourth Circuit's readiness to liken *Morison* to *Dedeyan* and *Truong Dinh Hung*, however, belies material differences between the cases. Whereas *Morison* entailed a media leak, *Dedeyan* involved a man who knew but failed to report that his cousin, a Russian agent, had photographed classified information in Dedeyan's possession.[210] The defendants in *Truong Dinh Hung* had secretly delivered classified documents to the Vietnamese government "at the time of the 1977 Paris negotiations between that country and the United States."[211]

In the context of such classic spying, it makes some sense to reason—as did the *Dedeyan* court—that "injury to the United States" and bad faith "could be inferred."[212] Such inference is much harder to justify, however, in the context of a media leak. The district court in *Morison* addressed this point briefly, only to dismiss it.[213] The district court reasoned that "the danger to the

---

[205] *Id.* at 1071.
[206] *Id.* at 1071–72.
[207] *Truong Dinh Hung*, 629 F.2d at 919 (citing *Gorin*, 312 U.S. at 27–28; *Dedeyan*, 584 F.2d at 36).
[208] *Id.*
[209] *Morison*, 844 F.2d at 1071–72.
[210] *Dedeyan*, 584 F.2d at 37–39 and 41 n.1. Dedeyan was convicted under 18 U.S.C. § 793(f)(2). That provision makes it a crime for anyone with authorized possession of documents or writing "relating to the national defense . . . having knowledge that the same has been illegally removed . . . or . . . abstracted," to fail to report such removal or abstraction. *See Dedeyan*, 584 F.2d at 37 n.1.
[211] *Truong Dinh Hung*, 629 F.2d at 911.
[212] *See Dedeyan*, 584 F.2d at 39.
[213] *See* United States v. Morison, 604 F. Supp. 655, 660 (E.D. Va. 1985).

United States is just as great . . . whether the information is released to the world at large or whether it is released only to specific spies."[214] This cavalier rejoinder fails to account, however, for the fact that classic spying, in contrast to media leaks, aims to keep U.S. officials in the dark, for the countervailing public interests in media leaks, and for the divergent inferences that can fairly be drawn about intent in the respective settings.

Dedeyan and *Truong Dinh Hung* themselves lean on *Gorin* for support. *Gorin*, too, involved classic spying, with Gorin having delivered reports on Japanese activity in the United States to the Soviet Union during World War II.[215] *Gorin* also involved a more rigorous scienter requirement than that at issue in *Morison,* or, for that matter, in *Dedeyan* or *Truong Dinh Hung*. Gorin was convicted of obtaining and delivering documents "connected with the national defense" to an agent of a foreign nation,[216] in violation of the provision now codified at Section 794(a) of the Espionage Act.[217] That provision demanded an "intent or reason to believe that the information . . . *is to be used* to the injury of the United States, or to the advantage of any foreign nation."[218] Recall that Sections 793(d) and (e)—as well as Section 794(f)(2), at issue in *Dedeyan*—have been deemed by courts to require that disclosure be "*potentially* damaging to the United States or . . . useful to an enemy of the United States."[219] Even assuming that a broader range of information is to the "advantage of any foreign nation" than is "useful to an enemy"––a point that is, in fact, disputable[220]—the more significant difference is that between the *Gorin* provision's emphasis on whether a disclosure "*is to be* used" to injury or advantage, and Section's 793's focus on a disclosure's "*potential*" damage or utility.

---

[214] *Id.*
[215] Gorin v. United States, 312 U.S. 19, 21–22 (1941).
[216] *Id.*
[217] United States v. Rosen, 445 F. Supp. 2d 602, 618 (E.D. Va. 2006) (explaining that Gorin was prosecuted under the provision "currently codified at 18 U.S.C. § 794(a)").
[218] *Gorin*, 312 U.S. at 27–28 (emphasis added).
[219] *See* United States v. Dedeyan, 584 F.2d 36, 39 (4th Cir. 1978) (citing the district court's limiting instruction to the jury); *Morison*, 604 F. Supp. at 660.
[220] For one thing, as the *Gorin C*ourt observes, "the status of a foreign government may change." *Gorin*, 312 U.S. at 30. That status also might be unclear or might shift with the context. Indeed, the "enemy" clause may well refer to lone wolves or to groups of people, whether foreign or domestic. *Id.* at 30. The "any foreign nation" clause, on the other hand, plainly is limited to foreign nations. *Id.* at 28–29.

Morison also challenged the "potentially damaging . . . or useful" instruction itself as vague.[221] In response, the Fourth Circuit relied again on *Dedeyan*, noting that "we expressly approved [that instruction] on appeal" there.[222] The Fourth Circuit also observed that Justice White used the phrase "potentially damaging" in his concurrence in *New York Times v. United States* (the Pentagon Papers case).[223] Given the fact that all Espionage Act discussions in The Pentagon Papers concurrences were dicta, and given the extraordinary circumstances of the case—including a massively accelerated briefing and opinion schedule—Justice White's offhand use of a phrase in concurrence hardly constitutes meaningful authority to support the term's constitutional adequacy.[224] Indeed, Justice White used the phrase in the course of describing criminal remedies authorized by Congress rather than opining on their constitutionality.[225] He also supported his use of the phrase by reference to *Gorin,* which applied a more rigorous scienter standard than one involving "potential" damage.[226]

Finally, *Gorin* is an anachronism, having been decided long before some of the most important modern First Amendment precedents were established. *Gorin* came about at the very dawn of the classification system, when it was still confined to the military and was far from the government-wide behemoth that it is at present. While these factors—particularly the classification system's evolution—bear on *Gorin*'s use in modern vagueness inquiries, they are more pertinent still in the First Amendment overbreadth context. As we shall see in the next section, the *Morison* court leans on its vagueness analysis—and hence on *Gorin*—in the overbreadth setting as well.

3. First Amendment Overbreadth

The *Morison* court borrowed from its speech-as-conduct and vagueness analyses to address Morison's overbreadth

---

[221] United States v. Morison, 844 F.2d 1057, 1072 (4th Cir. 1988).
[222] *Id.*
[223] *Id.* (citing N.Y. Times Co. v. United States, 403 U.S. 713, 740 (White, J., concurring)).
[224] *See* KITROSSER, *supra* note 12 at 136 (cautioning against relying on Pentagon Papers concurrences about the Espionage Act for this reason).
[225] *See New York Times Co.*, 403 U.S. at 740 (White, J., concurring).
[226] *See id.* at 739–40 (White, J., concurring).

challenge. The court explained, first, that overbreadth doctrine applies less rigorously to statutes that "regulate 'conduct in the shadow of the First Amendment.'"[227] Given the court's view that conveying classified information is akin to thievery, it concluded that any overbreadth in the relevant Espionage Act provisions must be "not only . . . real, but substantial as well . . . ."[228]

Drawing on its vagueness analysis, the court also deemed any overbreadth in the term "national defense" cured by the district court's instructions defining matters relating to the "national defense" as those that "'directly or may reasonably be connected with the defense of the United States,' the disclosure of which 'would be potentially damaging to the United States or might be useful to an enemy of the United States' and which had been 'closely held' by the government . . . ."[229] In this, the *Morison* court effectively relied again on *Dedeyan*, *Truong Dinh Hung*, and *Gorin*.

Although the Supreme Court framed *Gorin* as a vagueness case, courts subsequently have relied on it—both indirectly, as in *Morison*, and directly, as we will see in the next Subpart—to inform both vagueness and overbreadth analyses in media leaks cases.[230] The *Gorin* Court itself acknowledged the case's implications for free speech, characterizing Gorin's plea for narrow statutory construction in "the traditional discussion of matters connected with the national defense which is permitted in this country."[231] Because *Gorin* is rooted partly in ideas about free speech, and given its influence on subsequent free speech cases, it is important to understand the nature of the First Amendment world in which *Gorin* was decided.

---

[227] *Morison*, 844 F.2d at 1075.
[228] *Id.*
[229] *Id.* at 1076.
[230] Indeed, overbreadth and vagueness analyses are so entwined in some Espionage Act cases that courts effectively conflate them. In *Morison* itself, the Fourth Circuit, though stressing that the doctrines are different and that it addresses each separately, concludes a section of its vagueness analysis by noting that it "find[s] no basis . . . for the invalidation of the statutes for either vagueness or overbreadth . . . ." *Id.* at 1070, 1073. Similarly, as noted above, the *Morison* court cited overbreadth analysis from *Truong Dinh Hung* in relation to its vagueness discussion, while the *Truong Dinh Hung* court drew from *Gorin*'s vagueness analysis in addressing overbreadth. *See Truong Dinh Hung*, 629 F.2d 919 (4th Cir. 1980).
[231] Gorin v. United States, 312 U.S. 19, 23 (1941).

For one thing, *Gorin* predated major, highly protective developments in free speech law that bear directly on Espionage Act overbreadth claims. Perhaps most importantly, *Gorin* was decided several decades before the Supreme Court established the "content distinction rule," whereby laws based on speech content—including subject matter and communicative impact—are highly suspect and subject to strict judicial scrutiny.[232] Similarly, twenty-eight years passed between the Supreme Court's decision in *Gorin* and its 1969 holding in *Brandenburg v. Ohio*.[233] The latter established the modern definition of "incitement," clarifying and substantially curtailing the circumstances in which persons can be punished for potentially inspiring violence through their speech.[234] *Gorin* also was decided more than a decade before the Supreme Court first used the phrase "chilling effect," a concept that would deeply inform and strengthen free speech doctrine.[235]

Perhaps more importantly, the classification system was in its infancy in 1941, the year that *Gorin* was decided.[236] Today's bloated, government-wide secrecy juggernaut thus was unknown, and probably unimaginable to the *Gorin* Court.[237] This change in circumstances is quite significant. Recall that the *Gorin* Court deemed the provision at issue sufficiently precise, and hence not constitutionally vague, because of its strict scienter requirement.[238] Among the requirement's redeeming features, said the Court, was that it logically confined prohibited disclosures to those involving closely held information.[239]

---

[232] *See, e.g.*, Williams, *supra* note 21, at 624–25.
[233] 395 U.S. 444 (1969).
[234] *See id.* at 448–49; KALVEN, *supra* note 19; STONE, *supra* note 20; Redish, *supra* note 20.
[235] Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1488 (2013) (identifying the "first Supreme Court reference to a First Amendment chilling effect is found in Justice Frankfurter's concurrence in Wieman v. Updegraff in 1952."). *See also id.* at 1491–95 (describing chilling effect analysis); Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 879–81 (2005).
[236] *See supra* Part II.
[237] The Truman order did not itself lead to an unbroken era of classification system growth. In response to widespread public and press criticism of the order, President Eisenhower replaced it with a more modest classification directive in 1953. Successive orders built on Eisenhower's approach, until Ronald Reagan imposed broader classification directives in the 1980s. Harold C. Relyea, *Security Classified and Controlled Information: History, Status, and Emerging Management Issues*, CONG. RSCH. SERV., Feb. 11, 2008, at 3-4.
[238] Gorin v. United States, 312 U.S. 19, 27–28 (1941).
[239] *Id.* at 28 ("Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments,

Decades later, the Fourth Circuit reiterated this aspect of *Gorin* in rejecting vagueness and overbreadth claims in *Dedeyan*[240] and dismissing an overbreadth claim in *Truong Dinh Hung*.[241] In *Morison*, the court drew on these features of *Dedeyan* and *Truong Dinh Hung* to reject vagueness and overbreadth claims regarding the term "national defense information."[242] The *Morison* court also deemed the statutory term "not entitled to receive it" neither vague nor overbroad because the court defined it by reference to the classification system.[243]

Among the threads that run from *Gorin* through *Morison*, then, is the notion that the classification system plays an essential role in narrowing the reach of certain Espionage Act provisions and curing them of potential vagueness or overbreadth. Yet even if we assume that 1941's modest military classification system played that part well, the same cannot be said of the bloated leviathan that is the modern, government-wide secrecy system. Even if the classification status of information is sufficiently clear to resolve vagueness problems, the reach of today's classification system still raises substantial overbreadth concerns.

B. Subsequent Cases

Nearly two decades passed between the decision in *Morison* and the next federal court opinion on the constitutionality of Espionage Act prosecutions outside of the classic spying context. Given the massive uptick in such prosecutions over the past decade, however, several federal district courts and one military appellate court since have weighed in on the matter. The first post-*Morison* decision—a 2006 opinion in *United States v. Rosen and Weisman*[244] from the

---

there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government.") *See also* United States v. Heine, 151 F.2d 813, 817 (2d Cir. 1945) (quoting the same language from *Gorin* and elaborating, "when the information has once been made public, and has thus become available in one way or another to any foreign government, the 'advantage' intended by the section cannot reside in facilitating its use . . . .").

[240] United States v. Dedeyan, 584 F.2d 36, 39–40, 40 n.8 (4th Cir. 1978).

[241] United States v. Truong Dinh Hung, 629 F.2d 908, 918-19, 918 n.9. (4th Cir. 1980).

[242] United States v. Morison, 844 F.2d 1057, 1071–76 (4th Cir. 1988).

[243] *Id.* at 1071–72 (concluding that the term "national defense" is not vague in part because the trial judge instructed that NDI must be closely held); *id.* at 1076 (term "national defense" also not overbroad due partly to same trial judge instruction).

[244] 445 F. Supp. 2d 602 (E.D. Va. 2006).

Eastern District of Virginia—only nominally involved media leaks.[245] *Rosen* concerned two lobbyists who received classified information from a government employee, and who, in the course of their lobbying, conveyed that information to "members of the media, foreign policy analysts, and officials of a foreign government."[246] Nonetheless, *Rosen* is an important precedent for media leaks, as the *Rosen c*ourt grappled with the constitutionality of the Espionage Act outside of the classic spying context, considering objections grounded in the First Amendment and in vagueness principles.[247] The cases that arose subsequent to *Rosen* entailed government employees or contractors accused of leaking information to the media or, in one case, to a public archive.[248] Each defendant was charged under Sections 793(d) and/or (e) for illegally conveying and/or retaining NDI.[249]

The courts in these post-*Rosen* cases largely repeat the precedential leaps and anachronisms of the *Morison* court, albeit with some variation. The sections below analyze relevant aspects of the opinions. Section 1 discusses the courts' reactions to the government's arguments that classified speech amounts to thievery or that it otherwise deserves little if any First Amendment protection. Section 2 considers the courts' approaches to vagueness and overbreadth.

1. Classified Speech as Theft or as Otherwise Unworthy of First Amendment Protection

The first court to adopt *Morison*'s reasoning to the effect that conveying classified information to a reporter merits little if any First Amendment protection was the District Court for the

---

[245] *See id.* at 608.
[246] *Id.*
[247] *See id.* at 607.
[248] *See* sources cited *supra* notes 135–138 (citing summaries of Section 793 cases brought under Obama and Trump administrations). *See also* Josh Gerstein, *Ex-Navy linguist pleads guilty in secret documents case*, POLITICO, (Apr. 25, 2014). https://www.politico.com/blogs/under-the-radar/2014/04/ex-navy-lingust-pleads-guilty-in-secret-documents-case-187436 (explaining that the removal and retention "charge to which Hitselberger pled guilty covered only two documents, but [that] earlier charges in the case accused him of taking other documents and of sending some classified documents to a public archive at Stanford University's Hoover Institution.").
[249] *See* sources cited *supra* notes 135–138 (citing summaries of Section 793 cases brought under Obama and Trump administrations).

District of Columbia in 2011's *United States v. Kim*.[250] The *Kim* court drew the same tautology as had the *Morison* court, to the effect that, because Section 793(d) criminalizes such speech, the speech amounts to criminal conduct and warrants no constitutional protection.[251] To support this reasoning, the *Kim* court cited *Morison*'s characterization of classified speech as "an act of thievery."[252] Indeed, *Kim* extended the thievery analogy even further than had the *Morison* court. The defendant in *Morison* had physically removed original photographs from the Navy's possession, sliced off their borders, and sent them to a publication.[253] In contrast, Kim conveyed information orally, and the district court deemed that speech to constitute theft.[254] The *Kim* court also cited *Frohwerk v. United States*[255] to bolster the case that there were no First Amendment rights at stake.[256] *Frohwerk*, a 1919 case, was among the earliest "clear and present danger" cases. It evinced a far less speech protective view of the First Amendment than did later incitement cases, particularly the landmark 1969 case of *Brandenburg v. Ohio*.[257] Indeed, Frohwerk's anachronistic, speech-restrictive cast is evident in the parenthetical description of it that the *Kim* court itself provides: In *Frohwerk*, the Supreme Court denied First Amendment protection for "defendants' attempts to cause disloyalty and mutiny in the military through the publication of newspaper articles."[258]

---

[250] United States v. Kim, 808 F. Supp. 2d 44 (2011).

[251] *Id.* at 56 (citing Giboney v. Empire Storage & Ice Cream Co., 336 U.S. 490, 498 (1949) for the general proposition that speech is unprotected if it constitutes "an integral part of conduct in violation of a valid criminal statute."). As Professor Volokh has very ably explained, if the First Amendment bears any weight at all, then the *Giboney* language cannot possibly mean that speech falls within the *Giboney* exception so long as a statute criminalizes the speech itself. Volokh, *supra* note 179, at 1052. He also observed that the Supreme Court itself has rejected the notion that speech can be turned into criminal conduct through statutory fiat. *Id.* at 1016–21, 1035.

[252] *Kim*, 808 F. Supp. 2d at 56 (quoting United States v. Morison, 844 F.2d 1057, 1069 (4th Cir. 1988)).

[253] *Morison*, 844 F.2d at 1061.

[254] *Kim*, 808 F. Supp. 2d at 56.

[255] 249 U.S. 204 (1919).

[256] *Kim*, 808 F. Supp. 2d at 56.

[257] *See supra* notes 17–20 and accompanying text.

[258] *Kim*, 808 F. Supp. 2d at 56 (citing *Frohwerk*, 249 U.S. at 205-06). An additional aspect of *Kim* also is worth a mention because it too demonstrates how even carefully limited doctrinal reasoning can be turned into a one-way ratchet toward speech suppression. The *Kim* Court cited the D.C. Circuit's decision in Boehner v. McDermott to the effect that "'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.'" *Kim*,

In the 2018 case of *United States v. Manning*,[259] the U.S. Army Court of Criminal Appeals drew even more wholeheartedly from *Morison*'s thievery analogy in rejecting Chelsea Manning's overbreadth challenge to Section 793(e). Manning raised the claim as a defense against her conviction for transmitting classified documents to Wikileaks.[260] The military court noted its agreement with the *Morison* court's view that one in Morison's or Manning's position is "'not entitled to invoke the First Amendment as a shield to immunize his act of thievery.'"[261] It also quoted approvingly from *Morison*'s longer explanation to the effect that no First Amendment rights are at stake, including its citation to *Branzburg* for the proposition that the First Amendment does not "confer[] a license on either the reporter or his news sources to violate valid criminal laws."[262]

In contrast to the *Kim* and *Manning* courts, the Eastern District of Virginia did not agree that there were no First Amendment rights at stake in *Rosen*.[263] The *Rosen* court stressed that the behavior at issue there—oral communications of NDI by lobbyists "seeking to influence United States foreign policy"––"is arguably more squarely within the ambit of the First Amendment than Morison's conduct."[264] More fundamentally, it rejected "the government's proposed categorical rule that espionage statutes cannot implicate the First Amendment."[265] The *Rosen* court also invoked *Morison*'s two concurrences and

808 F. Supp. 2d at 56–57 (quoting Boehner v. McDermott, 484 F.3d 573, 579 (D.C. Cir. 2007)). *Boehner* deemed this broad principle to flow from the 1995 Supreme Court case of *United States v. Aguilar*. *Boehner*, 484 F.3d at 579 (stating that "*Aguilar* stands for" this principle). Yet *Aguilar*'s reasoning was far more limited than the *Boehner* Court and the *Kim* Court would go on to suggest. In *Aguilar*, the Supreme Court upheld a federal judge's conviction for revealing a wiretap order to its subject. Citing *Snepp*, the *Aguilar* Court explained that "[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." 515 U.S. 593, 606 (1995). This statement tells us only that the assumption of duty lowers the level of constitutional protection relative to what it otherwise would be. It does not mean that First Amendment protections fail to apply at all. Indeed, the *Aguilar* Court stressed that the relevant statute targeted only disclosures of wiretap orders or applications intended to impede the same. The Court also cited the obvious state interests in preventing this narrow set of disclosures. 515 U.S. at 605–06.

[259] United States v. Manning, 78 M.J. 501 (2018).

[260] *Id.* at 505–10.

[261] *Id.* at 514.

[262] *Id.*

[263] United States v. Rosen, 445 F. Supp. 2d 602, 630–31 (E.D. Va. 2006).

[264] *Id.* at 630–31.

[265] *Id.* at 629–30.

reasoned that *Morison* does not itself demand a categorical approach.[266]

Although the *Rosen* court thoughtfully rejected the notion that conveying classified information is akin to theft, its reasoning still marked a far cry from the speech protectiveness that imbues doctrine outside of the classification context. Ultimately, the court traded an anachronistic, categorical approach for a slightly-more-modern but still anachronistic stance of deep deference to the government. The *Rosen c*ourt cited Justice Frankfurter's concurring opinion in *Dennis v. United States*,[267] a Cold War era case in which the Supreme Court upheld defendants' convictions for conspiring to organize the Communist Party of the United States.[268] Justice Frankfurter had taken the view that the Court's role was limited to asking if Congress had a "reasonable basis" for passing the legislation at issue.[269] The *Rosen* court adopted Frankfurter's approach, citing his concurrence to support the notion that "the question to be resolved . . . is not whether [Section] 793 is the optimal resolution" of the tension between national security and free speech, "but whether Congress, in passing this statute, has struck a balance between these competing interests that falls within the range of constitutionally permissible outcomes."[270]

The *Rosen* court also drew a constitutional distinction between government employees in positions of trust with the government, like Morison,[271] and outsiders like Rosen and Weisman. With respect to the former, there is "little doubt," said the court, that the government constitutionally can prosecute such persons for disclosing "information relating to the national defense when that person knew that the information is the type which could be used to threaten the nation's security, and that person acted in bad faith, i.e., with reason to believe the disclosure could harm the United States or aid a foreign government."[272] To support this point, it cited *Marchetti* and

---

[266] *Id.* at 630.
[267] 341 U.S. 494 (1951).
[268] *Id.* at 516–17.
[269] *Id.* at 525 (Frankfurter, J., concurring).
[270] *Rosen*, 445 F. Supp. 2d at 629 (following this reasoning with citation to Frankfurter concurrence).
[271] The distinction was also relevant for Rosen and Weissman insofar as they were charged not only for their own disclosures but for conspiring with Steven Franklin, the state department employee from whom they received the information. *Id.* at 608.
[272] *Id.* at 635.

Snepp, and noted that "the Constitution permits even more drastic restraints [than criminal penalties] on the free speech rights of this class of persons."[273]

With respect to persons outside the government, like Rosen and Weissman, the *Rosen* court deemed *New York Times Co. v. United States* (the Pentagon Papers case) "the most relevant precedent."[274] The court acknowledged that *New York Times* involved a prior restraint rather than a criminal prosecution.[275] It observed, however, that "a close reading" of several of the concurrences and dissents "indicates that" the government might have prevailed had it "sought to prosecute the newspapers under [Section] 793(e) subsequent to the publication of the Pentagon Papers."[276]

While the *Kim* and *Manning* courts adopted *Morison*'s thievery analogy—in *Kim*, even extending it beyond the physical removal context and reaching back to *Frohwerk* for precedential grounding—the *Rosen* court replaced the analogy with its own precedential anachronisms and leaps. Indeed, the *Rosen* court journeyed back to the Cold War to dust off and employ Justice Frankfurter's free speech minimalism. The court also repeated the *Morison* court's own leap from factually distinct and procedural extraordinary contexts—particularly those of *Snepp* and *New York Times*—to resolve the weighty First Amendment question at hand.

2. Vagueness and Overbreadth

With respect to vagueness and overbreadth, *Rosen* and subsequent cases largely echo *Morison*'s analysis, including the latter's reliance on classic espionage cases. In *Rosen*, the Eastern District of Virginia drew upon *Morison*, *Gorin*, *Truong Dinh Hung*, and *Dedeyan* to conclude that "national defense" is a capacious concept, but that the scope of NDI is sufficiently limited by the requirements that it be closely held and that its release could be "potentially damaging to the United States or useful to an enemy

[273] *Id.*
[274] *Id.* at 637–38.
[275] *Id.*
[276] *Id.* at 638.

of the United States."[277] The *Rosen* court also cited the statute's willfulness requirement, noting that the Fourth Circuit relied on it in *Morison* and in *Truong*.[278] *Rosen* further cited a heightened statutory scienter requirement applicable only to oral communications.[279] Relying on *Gorin*'s discussion of a yet more stringent scienter requirement, the *Rosen* court deemed the heightened scienter requirement before it to alleviate any additional vagueness or overbreadth concerns that might otherwise be raised by prosecutions for non-tangible leaks.[280]

The District of Maryland drew upon the same group of precedents in 2011's *United States v. Drake*,[281] which involved Thomas Drake's prosecution under Section 793(e) for retaining classified documents.[282] The *Drake* court deemed the defendant's vagueness and overbreadth claims foreclosed by *Morison*.[283] Drilling down further, the court cited *Truong Dinh Hung* to

---

[277] *Id.* at 618–22 (explaining, for these reasons, that the law is not vague); *id.* at 642–43 (largely reiterating this analysis in rejecting overbreadth claim).

[278] *Id.* at 625, 643.

[279] For intangible leaks, the Espionage Act requires the government to meet an additional requirement: it must prove that the "information was communicated with 'reason to believe it could be used to the injury of the United States or to the advantage of any foreign nation.'" *Id.* at 625–26. The *Rosen* Court likened this requirement to the predecessor provision at issue in *Gorin*, which had demanded that defendants have acted with "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." *Id.* at 626. The Court dismissed the significance of the distinction between the earlier statute's language – "*is to* be used" – and the current language—"*could be* used"—, *id.* at 627 n.35, arguing that both amount to a "bad faith" requirement, *id.* at 626–27, 627 n.35. *See also* United States v. Rosen, 520 F.Supp.2d 786, 793 (E.D.Va. 2007) (reiterating view that statutory language requires a "bad faith purpose").

[280] *See Rosen*, 445 F.Supp.2d at 626–27 (concluding that the bad faith requirement bolsters the case against defendants' vagueness claim, as it did in *Gorin*); *id.* at 643 (concluding the same with respect to defendants' overbreadth claim). In an interlocutory appeal in *Rosen*, the Fourth Circuit, in dicta, called into question the lower court's view that the statute requires bad faith. United States v. Rosen & Weissman, 557 F.3d 192, 199 n.8 (4th Cir. 2009) (noting that it lacks jurisdiction to review the question, but that "[w]e are nevertheless concerned by the potential that the § 793 Order imposes an additional burden on the prosecution not mandated by the governing statute.") Citing the Fourth Circuit's comments as well as the fact that *Rosen* involved persons not in positions of trust with the government, the district court for the Eastern District of Virginia declined to impose a bad faith requirement in United States v. Kiriakou, which also involved oral disclosures. United States v. Kiriakou, 898 F.Supp.2d 921, 925 (E.D. Va. 2012).

[281] 818 F.Supp.2d 909 (D. Md. 2011).

[282] *Id.* at 911–12.

[283] *Id.* at 916 (regarding vagueness, the court argued that "the meaning of [793(e)'s] essential terms . . . have been well-settled within the Fourth Circuit since" *Morison*); *id.* at 919–20 (explaining that "Morison controls" defendant's overbreadth claim).

support its conclusion that the statute's willfulness requirement is sufficiently clear.[284] It relied on *Truong Dinh Hung* again, as well as *Gorin* and *Dedeyan*, in concluding that the term "national defense" was amply delimited.[285]

Courts have struck similar notes in other recent media leaks cases. In 2013, the District Court for the District of Columbia rejected a vagueness challenge to Section 793(e) in *United States v. Hitselberger*.[286] The case involved Hitselberger's prosecution for retaining and removing classified documents.[287] Citing *Morison*, *Drake*, and *Rosen*, among other precedents,[288] the court explained that "courts have uniformly held that the judicial gloss on [the challenged] clauses provides sufficient notice of what conduct is criminalized."[289] The other recent media leaks opinions, including *Manning*, *Kiriakou*, and *Kim*, draw on these precedents in similar ways.[290]

Courts in recent media leaks cases have doubled down, in short, on *Morison*'s vagueness and overbreadth analyses, including *Morison*'s reliance on key precedents including *Gorin*, *Truong Dinh Hung*, and *Dedeyan*. As we saw earlier, *Morison*'s uses of these precedents were flawed; the Fourth Circuit stretched some precedents beyond reasonable contextual bounds and used others anachronistically. Insofar as subsequent cases repeat *Morison*'s applications of these precedents, they exacerbate these mistakes and the consequent damage to First Amendment values.

IV. ALIGNING THE ESPIONAGE ACT WITH THE FIRST AMENDMENT

As demonstrated above, Espionage Act prosecutions based upon leaking classified information to the press present specific and substantial First Amendment issues that have yet to be addressed by any appellate court. This First Amendment

---

[284] *Id.* at 918.
[285] *Id.* at 918–19.
[286] United States v. Hitselberger, 991 F.Supp.2d 101, 104–05, 108 (D.D.C. 2013).
[287] *Id.* at 103–04.
[288] *Id.* at 104–05.
[289] *Id.* at 104.
[290] *See* United States v. Manning, 78 M.J. 501, 512–14 (Army Crim. App. 2018); United States v. Kiriakou, 898 F.Supp.2d 921, 923–26 (E.D. Va. 2012); United States v. Kim, 808 F. Supp. 2d 44, 51–54 (D.D.C. 2011).

conflict is unavoidable given the broad reach and undefined terminology of the Espionage Act.

On its face, the Act criminalizes speech and requires the government only to prove that the defendant willfully disclosed material "relating to the national defense" to one "not entitled to receive it."[291] For oral communications, the government also must prove that the defendant had "reason to believe" that the information "could be used to the injury of the United States or to the advantage of any foreign nation."[292] Notably, the text of Section 793 nowhere requires the government to prove a specific intent to harm the national security of the United States, to demonstrate that a disclosure, in fact, caused such harm, or to consider countervailing public interests—the only obligation is to show that the disclosure itself was willful and, for oral communications alone, that the potential for harm or advantage was reasonably foreseeable.[293] Judicial narrowing constructions have centered mostly on the terms "relating to the national defense" and "not entitled to receive it"—incorporating classification into the latter term, and incorporating both classification and the criterion that the disclosure could be "potentially damaging to the United States or . . . useful to an enemy of the United States" into the former.[294]

Although the judiciary has been far from heroic in recognizing or addressing the First Amendment issues raised by media leak prosecutions, a determined optimist can spot a few breadcrumbs in the case law that might lead toward a better path. Recall, for example, that both the concurring judges in *Morison* and the District Court in *Rosen* acknowledged the serious First Amendment considerations at stake.[295] Indeed, the *Rosen* court went so far as to impose a heightened scienter requirement, albeit solely with respect to prosecutions brought for oral communications, and in the context of a case about third party

---

[291] 18 U.S.C. § 793(d)-(e).
[292] *Id.*
[293] *See* United States v. Abu–Jihaad, 630 F.3d 102, 135 (2d Cir.2010); *Kim,* 808 F.Supp.2d at 55; *Kiriakou*, 898 F. Supp. 2d at 291 (E.D. Va. 2012); *See also* Daniel Ellsberg, *Snowden Would Not Get a Fair Trial—and Kerry Is Wrong*, GUARDIAN (May 20, 2014), https://www.theguardian.com/commentisfree/2014/may/30/daniel-ellsberg-snowden-fair-trial-kerry-espionage-act (noting that motive is irrelevant under the Espionage Act).
[294] *See supra* discussion at Part III (a)(2), (a)(3), (b)(2).
[295] *See supra* notes 116–127, 263–266 and accompanying text.

speakers rather than government employees or contractors.[296] The strength of *Rosen*'s scienter requirement is somewhat unclear,[297] and courts in subsequent cases have refused, in any event, to impose it.[298] While this aspect of *Rosen* was never directly reviewed on appeal,[299] the Fourth Circuit called it into question in dicta on an unrelated interlocutory appeal in the case.[300] Nonetheless, the *Rosen* court was correct to recognize the First Amendment conflict inherent in the attempt to protect national security by imposing criminal penalties for the disclosure of information of significant public concern, with no obligation to show that the disclosure was made with an intent to cause harm or that any harm actually occurred.

In *In re Grand Jury Subpoena, Judith Miller*,[301] D.C. Circuit Judge Tatel faced a similar conflict between competing interests—the conflict between the common law's protection of the confidentiality of a reporter's sources in order to promote the flow of information to the public, and the need of grand juries to obtain evidence in their law enforcement investigations.[302] Judge Tatel concluded that the scope afforded to the reporter's privilege must "account for the varying interests at stake in different source relationships," and therefore applied a balancing test that asked whether the reporter's source "released information more harmful than newsworthy."[303] If so, he explained, "the public interest in punishing the wrongdoers—and deterring for future

---

[296] *See supra* notes 279–280 and accompanying text.

[297] The Court held that the government must demonstrate that the defendants disclosed the information with a "bad faith purpose." United States v. Rosen, 445 F.Supp.2d 603, 626 (E.D. Va. 2006). It alternatively described this burden as simply mirroring the statutory language that the defendant "has reason to believe" that the information "could be used to the injury of the United States or to the advantage of any foreign nation," and as "requir[ing] the government to demonstrate the likelihood of defendant's bad faith purpose to either harm the United States or to aid a foreign government." *Id.*

[298] *See, e.g.,* United States v. Kiriakou, 898 F. Supp. 2d 921, 924–27 (E.D. Va. 2012) (surveying contrary precedent); United States v. Drake, 818 F. Supp. 2d 909, 916 (D. Md. 2011) (distinguishing intent requirements between disclosures involving documents and disclosures involving information).

[299] The government concluded that it was in the public interest to dismiss the charges, given "an unexpectedly higher evidentiary threshold in order to prevail at trial," and the "nature, quality, and quantity of evidence" that would be required. Motion to Dismiss Superseding Indictment, United States v. Rosen, 05CR225 (E.D. Va., filed May 1, 2009).

[300] *See Rosen*, 445 F. Supp. 2d at 625–27. *See also* United States v. Rosen, 520 F. Supp.2d 786, 793 (E.D.Va. 2007).

[301] 438 F. 3d 1141 (D.C. Cir. 2006).

[302] *Id.* at 1165 (Tatel, J., concurring).

[303] *Id.* at 1174–78.

leaks—outweighs any burden on newsgathering and no privilege covers the communication."[304]

So too, the scope of the First Amendment protection afforded to speech implicating the national security must "account for the varying interests at stake." To secure the First Amendment's protection of truthful speech on matters of public concern in the national security context, Espionage Act liability based upon a leak to the press must be limited to those cases where the government's legitimate interest in suppressing information whose disclosure would threaten national security outweighs the public's legitimate interest in knowing what its government is up to. The dilemma is finding a way to strike this balance with clear standards and proper incentives.

Following *Rosen*, and in response to the transformation of the Espionage Act into the government's primary weapon against leaks of classified information, some commentators have explored potential fixes to remedy the First Amendment encroachments. We review a few key proposals below. Each seeks to resolve the tension between protecting state secrets and ensuring democratic oversight by drawing upon First Amendment remedies adopted in other contexts.

Judicial balancing of the competing interests. Requiring judicial balancing of the competing interests at the liability stage was explored in a series of papers published by one of us, Heidi Kitrosser.[305] This approach seeks to develop standards that could be used by courts to define and limit the subsets of classified information whose disclosure the government can constitutionally prosecute. It begins with the recognition that leakers are government employees subject to control by the executive branch but also are uniquely situated to bring to light government abuses and mistakes. As such, a judicial balancing of interests must be calibrated to account for the employee's "institutional role," while not chilling information that the public needs to know. This led Kitrosser to propose liability standards that vary depending on the severity of the punishment the government is seeking:

---

[304] *Id.* at 1178.

[305] *See generally* Heidi Kitrosser, *Leaks, Leakers, and a Free Press*, HARV. L. & POL'Y REV. BLOG (Mar. 9, 2017); Kitrosser, *Leak Prosecutions and the First Amendment*, *supra* note 4; Kitrosser, *Free Speech Aboard the Leaky Ship of State, supra* note 4; Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881 (2008).

> For prosecutions or civil actions seeking substantial sanctions, such as several years in prison or very large monetary penalties, courts might require the government to show that the leaker lacked an objectively reasonable basis to believe that the public interest in disclosure outweighed identifiable national security harms. For actions seeking less severe sanctions, courts might require the government to demonstrate that the leaker lacked an objectively substantial basis to believe that the public interest in disclosure outweighed identifiable national security harms.[306]

As Kitrosser acknowledged, "there is nothing magical about any given standard or approach."[307] What is essential is that courts recognize the First Amendment interests at stake and find a way to assess the harms and benefits of particular leaks, rather than deferring to sweeping legislative rules and largely unconstrained acts of executive discretion. The precise formulas developed toward this end are less crucial than is that fundamental shift in approach.

Affording a First Amendment defense. Writing in 2014, Yochai Benkler proposed giving those prosecuted for media leaks an affirmative "accountability" defense rather than placing additional burdens on the government.[308] His public accountability defense would be generally available to individuals who violate a law in order to "expose to public scrutiny" substantial illegality, or substantial incompetence or malfeasance that "falls short of formal illegality."[309] As Benkler conceives of the defense, it could be asserted both by leakers and journalists, and it would provide a defense against any charge brought arising out of the dissemination of classified information.[310]

---

[306] Kitrosser, *Leak Prosecutions and the First Amendment*, *supra* note 4, at 1264; *see also* Kitrosser, *Free Speech Aboard the Leaky Ship of State, supra* note 4, at 441.
[307] Kitrosser, *Leak Prosecutions and the First Amendment*, *supra* note 4, at 1264.
[308] Benkler, *supra* note 4, at 283–84, 303–04; *see also* Takefman, *supra* note 4, at 924-25 (arguing for a balancing test at whistleblower sentencing that weighs harm against national security with public interest benefits but without addressing at length the First Amendment concerns).
[309] Benkler, *supra* note 4, at 286.
[310] *Id.*

Under Benkler's proposal, defendants would have an affirmative defense to criminal liability where (1) they held a reasonable belief that the information disclosed revealed "a substantial violation of law or substantial systemic error, incompetence, or malfeasance[;]" (2) available steps were taken "to avoid causing imminent, articulable, substantial harm that outweighs the benefit of disclosure[;]" and (3) the information was disclosed in a manner "likely to result in actual exposure to the public."[311] Additional factors that could be relevant to his public accountability defense include whether the defendant plausibly believed the disclosed information was not properly classified, whether other means existed to expose the government wrongdoing, and the extent to which the disclosure generates public debate or other public response.[312]

Benkler's approach follows the logic of Judge Tatel and urges that the significance of the government wrongdoing disclosed is the most important factor to consider; that factor can even be outcome determinative without substantial efforts by a defendant to mitigate the harm caused by disclosure.[313] Benkler reasons that such a defense would retain most of the deterrent effects of criminalizing leaks by placing on the defendant the risk that the defense will be found not to apply, while also changing the prosecutorial calculus in deciding whether to pursue cases involving leaks that informed the public of substantial abuses of government power.[314]

First Amendment mitigation. In 2018, we urged a judicial weighing of the public interest in the disclosed information at sentencing in the prosecution of Terry Albury, who had pleaded guilty to revealing information concerning law enforcement's targeting of Somali residents in Minnesota.[315] As we urged there, courts may consider whether circumstances warrant a departure from the sentencing range that would be appropriate for an offense within a criminal statute's "heartland;" more broadly, courts may evaluate whether Sentencing Guidelines punishment is "just" under the

---

311 *Id.*

312 *See* Kitrosser, *Leak Prosecutions and the First Amendment*, *supra* note 4, at 1271–76 (identifying factors relevant to a First Amendment defense).

313 Benkler, *supra* note 4, at 276.

314 *Id.*

315 *See* Brief of Amici Curiae Scholars of Constitutional Law, *supra* note 28.

circumstances.[316] Prosecutions of leakers to the media target conduct well-outside the "heartland" of the Espionage Act.[317] Achieving what is "just" in such cases requires some assessment of the public importance of the information disclosed.

Courts are thus empowered to craft sentences in Espionage Act leaks cases that reflect the grave First Amendment concerns raised when individuals are prosecuted for speaking to the press on matters of serious public importance. Weighing the public interest in the disclosed information would also address the Supreme Court's concern that "[t]he severity of criminal sanctions" themselves may "cause speakers to remain silent rather than communicate even arguably unlawful" speech.[318] Under a sentence mitigation approach, courts could consider at the sentencing of a leaker such factors as:

> (1) the strength of the decision to classify the information in question and any actual sensitivity of that information the government may present; (2) how and to whom the information was disclosed – *i.e.* selectively to the responsible press [or] indiscriminately to the public; (3) whether . . . reasonable arguments could be made that the information disclosed reveals illegal government activity; (4) whether alternative means of disclosure were available, were exhausted, or would have been effective; and (5) the extent to which the disclosure in fact prompted public deliberation, debate, or action.[319]

Weighing the public interest as a factor in sentence mitigation was also recently advocated by Marilyn Fidler, who argued that sentencing is the most appropriate place to consider public accountability factors in whistleblower cases.[320] As she observes, courts have long taken constitutional interests into

---

[316] As the Supreme Court has observed, "[b]oth Congress and the Sentencing Commission [ ] expressly preserved the traditional discretion of sentencing courts to 'conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.'" Pepper v. United States, 562 U.S. 476, 489 (2011) (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)).

[317] *See* Brief of Amici Curiae Scholars of Constitutional Law, *supra* note 28, at 36–37.

[318] Reno v. ACLU, 521 U.S. 844, 872 (1997).

[319] Brief of Amici Curiae Scholars of Constitutional Law, *supra* note 28, at 29–31.

[320] Fidler, *supra* note 4, at 215.

account at sentencing, as they did with rescuers who violated the Fugitive Slave Act and with absolutist conscientious objectors during the Vietnam War.[321] Fidler argues that a similar judicial accounting of the public interest at sentencing in an Espionage Act leak prosecution is particularly appropriate because Congress never conceived of that Act as an official secrets act.[322] Congress thus did not itself weigh the relevant interests in fashioning the law's scope. Nor has the executive branch shown much appetite for exercising discretion and declining to prosecute Espionage Act cases involving leaks of great public importance.[323]

Each of these approaches seeks to resolve the inherent conflict between protecting state secrets and ensuring democratic oversight by drawing upon First Amendment remedies adopted in other contexts. The fixes identify several factors relevant to an accounting of the competing interests at stake: Was the disclosed information properly classified because its disclosure was likely to harm national security? Was the information widely known before the disclosure? How and to whom was the information disclosed? Was there a reasonable basis to believe the leaked information disclosed illegal or improper government action? What was the public response to the disclosure? The proposed approaches differ as to when and how these considerations should be raised in an Espionage Act prosecution, and by whom, but each embraces the essential point that Espionage Act prosecutions of media leakers raise unavoidable First Amendment concerns.

We view these proposals as complementary instruments that collectively can safeguard both the government's legitimate secrets and the flow of national security information essential for public oversight and democratic accountability. Indeed, the First Amendment interests should be considered at each stage of an Espionage Act prosecution, whether the defendant is the leaker or the recipient of a leak. The proposals above, or something much like them, could accomplish that goal. They could do so by: (1) imposing a First Amendment burden on the government in any leak case to demonstrate that the leaker had a bad faith

---

[321] *Id.* at 224–25; *see also id.* at 228 (noting that Miller v. Alabama, 567 U.S 460 (2012) found Eighth Amendment interests relevant at sentencing but not to the determination of guilt).
[322] *Id.* at 248–49.
[323] *Id.* at 249–51.

motive as required in *Rosen,* or at a minimum lacked an objectively reasonable basis to believe the public interest in disclosure would outweigh any likely harm; (2) providing a First Amendment defense that bars liability if the factfinder determines that the public importance of the leak outweighs the actual, articulable harm to national security; and (3) mitigating sentences imposed in cases where the publicly disclosed information is of substantial public interest. Collectively, such measures would enable the judicial system to strike an appropriate balance between the government's legitimate need for secrecy and the public's legitimate need for information, on a case-by-case basis with workable standards.

CONCLUSION

There is considerable room to debate optimal solutions to the deep constitutional conundrums posed by media leak prosecutions. One point, however, is plain: No legislative or judicial fixes will be forthcoming until policymakers and courts acknowledge that serious First Amendment problems exist in the first place. To get to this point, it is not enough to invoke core principles of free speech theory, basic rules of free speech doctrine, or the bloated and unreliable nature of the classification system. These factors comprise a compelling case, to be sure. But the case is not complete until we confront a growing body of judicial opinions that fly in the face of those core theoretical, doctrinal, and experiential insights.

We must, in short, reassess the growing doctrinal edifice to which courts and prosecutors increasingly point to suggest that media leak prosecutions raise no serious First Amendment concerns. Despite the weight that it has gained through sheer repetition, the edifice is a house of sand. It is built on long-unexamined anachronisms, logical leaps, and inapposite precedents. And it increasingly enables a state of affairs that the concurring judges in *Morison* warned against, one in which "those who truly expose governmental waste and misconduct"[324] can be prosecuted for so doing.

[324] United States v. Morison, 844 F.2d 1057, 1069 (4th Cir. 1988) (Wilkinson, J., concurring); *see also id.* at 1085–86 (Phillips, J., concurring) (expressing agreement with Judge Wilkinson's concerns).

Without the edifice of *Morison* and its progeny to obscure our view, we can look anew at the Espionage Act, its application to media leaks, and the compatibility of both with the First Amendment. From this vantage point, it is much easier to grasp the truly radical nature of an approach that permits the use of the Espionage Act as something akin to an official secrets act. With our perspectives so refreshed, we can begin the work of building new legislative, judicial, and executive frameworks to protect necessary national security secrets while safeguarding free speech and democratic accountability.

KEYNOTE ADDRESS: EXAMINING THE ASSANGE INDICTMENT

Mary-Rose Papandrea*

The following is a transcript of the keynote address given by Dean Mary-Rose Papandrea at First Amendment Law Review*'s 2021 Symposium on National Security, Whistleblowers, and the First Amendment.*[1] *The virtual event also featured two panels on (1) Classification and Access to National Security Information*[2] *and (2) The Press, Whistleblowers, and Government Information Leaks.*[3]

I thought I would set out some of the issues that matter a lot to me. And I thought we shouldn't get going without thinking a little bit about the timing of this symposium. I know for some of you, including some of the panelists, you probably thought, well, these issues aren't really new. Most of us have been working on them getting close on to decades now. Multiple decades. The tension between the need to protect our most sensitive national security secrets while at the same time trying to promote an informed democracy is something we've been struggling with for a very long time. But for me, the attack on the Capitol on January sixth gave rise to a new urgency to consider how our democracy works and what doesn't work. I do not take anything for granted. We have weathered the last four years, a prolonged attack on our institutions, on all three branches of government, on universities and, of course, on the press.

As we go forward, we are going to have to start looking at how we are going to rebuild and heal as a nation. And an essential part of this rebuilding and healing process will involve truth and figuring out what is true and what is not true. An important way of figuring this out is to rely on the press, the respected members of the media, the journalists who have played such an important role in this country in making sure that we

---

* Mary-Rose Papandrea is the Samuel Ashe Distinguished Professor of Constitutional Law and Associate Dean for Academic Affairs at the University of North Carolina School of Law.

[1] This transcript has been lightly edited for clarity. The editors have also inserted footnotes throughout the transcript where there are references to specific cases, statutes, works of scholarship, or other sources.

[2] Mary-Rose Papandrea, Margaret Kwoka, David Pozen & Stephen I. Vladeck, *Panel One: Classification and Access to National Security Information,* 19 FIRST AMEND. L. REV. 222 (2021) [hereinafter *Panel One*].

[3] David S. Ardia, Heidi Kitrosser, David McCraw, Mary-Rose Papandrea & David Schulz, *Panel Two: The Press, Whistleblowers, and Government Information Leaks,* 19 FIRST AMEND. L. REV. 253 (2021) [hereinafter *Panel Two*].

know what our leaders are doing in our names. I should also add, truth—this is not just about national security. Of course, racial justice, the history of white supremacy in this country. We have a lot to resolve, and the role of the press is going to be important.

I'm going to use the prosecution of Julian Assange as a lens to view some of the key issues that we as a nation will need to struggle with going forward. And it is this prosecution and not, of course, the attack on the Capitol on January sixth that was the impetus for this symposium. Julian Assange, of course, is the founder of WikiLeaks. He's Australian. WikiLeaks is an online platform that's committed to radical transparency. It was founded in 2006, and it became noticed in the public eye when it published a series of leaks from Chelsea Manning, a U.S. intelligence analyst, around 2009.

Julian Assange is a highly polarizing figure. On the one hand, he has won journalism awards for essentially calling out truth to power. But he's also been attacked by many on both sides of the aisle. President Biden, not since he's been president, but in the past, has referred to him as a high-tech terrorist. It remains to be seen whether Biden's administration will continue this prosecution, but we shall see. I will say that the possibility of prosecuting Julian Assange is something that the Obama administration seriously considered and ultimately decided against, fearing that it wouldn't be possible to distinguish the established press like *The New York Times*. And they also feared a First Amendment defeat. The Trump administration, however, did go forward with prosecuting Assange, and we found out about it in late 2018.

Since then, there have been two superseding indictments. The current operating indictment, the second superseding indictment, has eighteen counts.[4] Notably, the indictment doesn't focus on some of the really problematic publications of WikiLeaks—for example, the publication of the hacked emails from the DNC during the 2016 election, believed to have been

[4] Press Release, DOJ, WikiLeaks Founder Charged in Superseding Indictment (June 24, 2020), https://www.justice.gov/opa/pr/wikileaks-founder-charged-superseding-indictment; *see also* Charlie Savage, *Assange Indicted under Espionage Act, Raising First Amendment Issues*, N.Y. TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/us/politics/assange-indictment.html.

orchestrated by the Russians.[5] Instead, it focuses on thousands of emails that Chelsea Manning gave them in 2009 and 2010 and, in particular, the publication of some sources, including the names of some informants.[6] The Chelsea Manning trove of information has thousands and thousands and thousands of pages of information, and it covered a number of military operations, including Iraq war logs, Afghan war diaries, and Afghan war logs.[7] One point that's worth noting is that a number of news outlets also published parts of these leaked materials. So, that's where it does become particularly difficult to make any distinction between the publication by WikiLeaks and the publication from some mainstream media outlets.

Now, in the second superseding indictment, there are eighteen counts, and a lot of people who dismiss this prosecution as not posing a big threat to journalists focus on the parts of the indictment that alleged that there was a conspiracy to commit computer intrusion—that Julian Assange helped Chelsea Manning try to crack a password hash stored on the U.S. Department of Defense computers. And, rightfully, people point out it is not normal journalistic practice to help sources crack passwords per se. This was unsuccessful, the attempt to crack. But what I want to mention and highlight for everyone here is that the indictment goes much, much further than just talking about the involvement with hackers and being intimately involved with getting that information. There are seventeen other counts.[8] And most of these counts are under the Espionage Act for conspiring to obtain national security information or even just for simply publishing this national security information, regardless of how it was obtained.[9] These counts surely do implicate the First Amendment rights of the press.

At present, there are many unresolved First Amendment issues. First, on the obtaining of the national security information, national security reporters work very closely with their sources. Although, as I said, they don't routinely try to help their sources crack passwords, they certainly will work with sources and may even encourage them to obtain material when

---

[5] *See* Second Superseding Indictment, U.S. v. Assange, No. 1:18-cr-111 (CMH) (E.D. Va. June 24, 2020), https://www.justice.gov/opa/press-release/file/1289641/download.
[6] *See id.*
[7] *See id.*
[8] *See id.*
[9] *See id.*

possible. There is a case called *Bartnicki*, where the Supreme Court held that the First Amendment protected the publication of sensitive information as long as there were clean hands.[10] In that particular case, a radio station received a tape anonymously, basically dropped in their mailbox, and they went ahead and published it.[11] The tape was of an intercepted phone call, an admittedly illegally intercepted phone call.[12] The problem with the *Bartnicki* case is threefold. Number one, in most situations you will not have a clean hands defense. Most journalists have ongoing relationships with their sources, and it's unclear what would be sufficient to lose that *Bartnicki* protection. So, in *Bartnicki*, there was no involvement whatsoever in the obtaining of that information from the source.[13] But what if, for example, the reporter said, "here's my email address, send me whatever you have." It may take very little to lose that protection.

Secondly, the *Bartnicki* case is not a national security case. And I think for any of you who've studied constitutional law, you know that all bets are off as soon as national security is involved. This could not be more true than in the First Amendment context. I'll just cite the *Holder v. Humanitarian Law Project*[14] case as an example of where the Court did not follow its usual rules and doctrine in the First Amendment context.

Thirdly, it's, of course, very clear that the indictment's counts that allege that Assange published national security secrets would raise the specter that the media, the more mainstream media, could also be prosecuted for the same thing. We have lived in a state of what some scholars have called a "benign indeterminacy."[15]

So, then in the Pentagon Papers case, the Supreme Court held that the government could not get a prior restraint on the publication of very sensitive material, historical materials about the U.S. involvement in the Vietnam War.[16] But if you read that opinion closely, it's not hard to find a majority of the justices, if

---

[10] Bartnicki v. Vopper, 532 U.S. 514, 528–35 (2001).
[11] *Id.* at 517–19.
[12] *Id.* at 517.
[13] *Id.*
[14] 561 U.S. 1 (2010).
[15] *See* Harold Edgar & Benno C. Schmitt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 936 (1973) ("We have lived since World War I in a state of benign indeterminacy about the rules of law governing defense secrets.").
[16] N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

you add up the votes, left open the possibility that subsequent criminal prosecution would be permissible. So, since that time, we haven't had efforts to prosecute the press. The closest we had was the prosecution of two lobbyists from the American Israel Public Affairs Committee (AIPAC) in the Eastern District of Virginia.[17] And this prosecution ended up getting dropped after some unfavorable opinions for the government.[18] Those lobbyists had received information from a Department of Defense source,[19] and, although they were lobbyists and not the press, they were similar to the press in that they were third parties. In other words, they were not people who had obtained the information through their jobs or through contracts and then revealed it directly—they had obtained it from someone else.

So, I said that I wanted to use this prosecution to think about a lot of issues, and I do regard these issues as fundamental to the successful operation of our democracy. Number One, this prosecution and the facts underlying it reveal the unbelievable state of our classification system. Overclassification is rampant. The sheer volume of secrets that the United States keeps is mind boggling. And now, we have a volume of leaks that are possible with technology, flash drives, and so on that were not possibly contemplated before. We also have the ease of leaks that we never had before.

On the one hand, the security of our republic could be threatened. And I do want to give credence to the national security concerns that this prosecution reveals. You know, the idea that people should have carte blanche freedom to leak and publish national security secrets does raise some serious national security concerns. I think everyone agrees that there are some national security secrets that must remain secret. Some of the focus of the indictment is the identity of informants in Iraq and Afghanistan, and protecting their security is a really big deal. There are, of course, movements of ships and troops, secret communication methods, that sort of thing, codes. We know that there is clearly protected information that we need to keep secret. So, the ease of leaks and the volume of leaks is disconcerting. But, at the same time, it can't be that everything that is classified

---

[17] Neil A. Lewis & David Johnston, *U.S. to Drop Spy Case Against Pro-Israel Lobbyists*, N.Y. TIMES (May 1, 2009), https://www.nytimes.com/2009/05/02/us/politics/02aipac.html.
[18] *See id.*
[19] *See id.*

needs to be classified. There is grave concern—and history bears this out—that the government has used and misused the classification system to hide government wrongdoing. So, it's hard to know what our leadership is doing in our names if we don't have access to this information.

The other point is that the indictment rests in large part, as I said, on the various counts in the Espionage Act.[20] The Espionage Act itself is written in broad, capacious terms. I know some of our panelists have testified before Congress, particularly Steve Vladeck, and in those hearings, when asked, the government officials typically will say, "you know, we're good. We like the Espionage Act the way it is," because the Espionage Act and a number of other laws that are on the books basically allow the government real authority to prosecute anyone they would want if they want to go after someone. These problems with the Espionage Act are really well known. As Steve Vladeck said in a recent podcast, "let me get out my dead horse and beat it," when talking about how the Espionage Act needs to be rewritten.[21] But this prosecution, if it goes forward, is going to highlight more of these problems.

Another point this prosecution highlights is the need for us to come to grips with the importance of transparency. I want to mention specifically the work of David Pozen, who's on the first panel and who has been writing a lot about transparency and how we should think about the importance of transparency.[22] As he's rightly mentioned, transparency for transparency's sake

---

[20] *See* Second Superseding Indictment, *supra* note 5.

[21] Stephen Vladeck is the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law and a nationally recognized expert on national security. *Stephen I. Vladeck*, UNIV. OF TEXAS SCH. OF LAW, https://law.utexas.edu/faculty/stephen-i-vladeck (last visited Apr. 21, 2021). Professor Vladeck is also the co-host of *The National Security Law Podcast*, "a weekly review of the latest legal controversies associated with the U.S. government's national security activities and institutions." THE NAT'L SEC. L. PODCAST, https://www.nationalsecuritylawpodcast.com/ (last visited Apr. 21, 2021). Professor Vladeck was a panelist at *First Amendment Law Review*'s 2021 Symposium on National Security, Whistleblowers, and the First Amendment. *Panel One*, *supra* note 2.

[22] David Pozen is the Vice Dean for Intellectual Life and Charles Keller Beekman Professor of Law at Columbia Law School and a nationally recognized expert on constitutional law and information law. *David Pozen*, COLUM. L. SCH., https://www.law.columbia.edu/faculty/david-pozen (last visited Apr. 21, 2021). Professor Pozen has written extensively on government secrets and access to information. *Id.* Professor Pozen was a panelist at *First Amendment Law Review*'s 2021 Symposium on National Security, Whistleblowers, and the First Amendment. *Panel One*, *supra* note 2.

cannot be our goal. We have to think more purposefully about why we want transparency. What is the underlying purpose? What do we hope to achieve? As I mentioned, there could be some real harms with complete transparency. How much should we know? How much do we need to know? And it may be that just having everything laid bare is not actually going to help our democracy. In fact, one of the biggest problems with the volume of secrets these days is that it's very hard to process if you have these thousands and thousands of pages. The average person doesn't have time to go through that, and trying to figure out what is important and what's not important can really get lost in the shuffle. So, we need to be thinking clearly about what we would need to know and what, maybe, we can continue to keep secret.

One of the problems we see with all these leak prosecutions and the Assange prosecution is that, because our classification system is so broken, we have come to rely on leakers and the publication of leaked information by the press in order to reform our democracy. And I think most people have said it's a terrible system, but it's the best that we've got. Nevertheless, it illustrates that we need to continue the battle to reform the system. The systems we have set up in place are not working particularly well. In the last four years, we have seen some of the problems with our inspectors general and how they've been attacked, particularly by President Trump, and the failure, the utter failure, of Congress to be a meaningful check on the executive branch. I'll just nod to Heidi Kitrosser's amazing work in this area, separation of powers, to illustrate some of the issues that we have there.[23]

Most importantly, the Assange prosecution highlights my concerns about the press. When announcing the Assange indictment, DOJ National Security Division Team Chief John Demers said Assange is "no journalist."[24] Well, what did that mean? I'm sure he was trying to assure everyone they're not

[23] Heidi Kitrosser is the Robins Kaplan Professor of Law at the University of Minnesota Law School and the Newton N. Minow Visiting Professor of Law at the Northwestern Pritzker School of Law. *Heidi Kitrosser*, NW. PRITZKER SCH. OF LAW, https://www.law.northwestern.edu/faculty/profiles/HeidiKitrosser/ (last visited Apr. 21, 2021). Professor Kitrosser is a leading expert on federal government secrecy, and her scholarship focuses on leak prosecutions, government whistleblowers, government secrecy, and separation of powers. *Id.* Professor Kitrosser was a panelist at *First Amendment Law Review*'s 2021 Symposium on National Security, Whistleblowers, and the First Amendment. *Panel Two*, *supra* note 3.

[24] Savage, *supra* note 4.

going after the press. But that's a meaningless assurance. In this country, we don't credential our journalists and, perhaps more importantly, our First Amendment protections do not belong exclusively to journalists. And they have no special protections under the First Amendment. Depending on, or relying on, prosecutors and then, ultimately, members of the jury to determine who is a journalist is no way to protect our democracy. We have seen that the norms that govern our society and our democracy are under attack. And one of the things that we have depended on for the last two centuries is that the press is given this protection, but it's not by law. It's a norm.

It's this benign indeterminacy, in part, but it's also a much bigger norm that the press plays an important role in our society. And I'll point to something that's related, which is the rules that govern the reporter's privilege. So, there is no federal reporter's privilege, and, instead, the attorney general's office has guidelines that restrict subpoenas to the press to reveal their sources or to require them to turn over work product.[25] I do think one miracle of the Trump administration is that we didn't see more subpoenas to the press, given that it is only norms and not law that protect the press from having to turn over their source identity and their work product. But I fear for the future. I'm hopeful, under President Biden, that the protection of the press will continue. But I think we all know Biden is in office four years, and what happens after that?

We need to be thinking in the long term, and relying on the norms is particularly problematic when the public at large doesn't like the press. So, it's not just that we have to rely on the prosecutors, but we have a much bigger societal problem where the press is now not sympathetic. I feel like the Assange prosecution is part and parcel of this attack on the press. Assange is not a sympathetic character to most Americans. You will find people who trumpet him as a brave journalist exposing wrongdoing, but, for the most part, I think most Americans are not superfans of him. He's also not an American, so that doesn't help his cause. And I fear that this kind of case could make some bad law for the press in general. So, what I would say going

[25] Linda Moon, Bruce D. Brown & Gabe Rottman, *New DOJ reports provide detail on use of law enforcement tools against the news media*, REPS. COMM. FOR FREEDOM OF THE PRESS (Nov. 9, 2018), https://www.rcfp.org/new-doj-reports-provide-detail-use-law-enforcement-tools-against-new/.

forward is that we should see this as a call to action. We need to rehabilitate the press in the public's eye.

I always ask my students, where do you get your news and what do you think about the news media? And, of course, none of them read papers anymore. They get a lot of their news through social media. But, most disturbingly, last year I think it was the first time my students, most of the class, said they didn't know what was true or false anymore. They didn't know who to trust. My heart broke right there on the spot. So, we need to commit ourselves to finding out what the truth is and establishing the public's trust in our institutions. So, in other words, although the Biden administration may decide to drop the Assange prosecution, this prosecution itself illustrates the urgency of rehabilitating the press.

The role of the press in this country is essential. It's known as the Fourth Estate for a reason. It provides an essential check on our government. Is it perfect? No. But the role of the press is essential. Rehabilitating the press will not be easy, but this is important work that needs to be done. Along the way, all of us here—and I'm pointing to you students too, not just the esteemed scholars—we need to continue the good fight against excessive government secrecy, work to protect the reporter's privilege, and work to reform and revise the laws that govern the publication of national security information. We need to fight for the protection of leakers who reveal information that's important for the public's interest. And, so, this is my call to action.

We have so many things we need to do in this country. Again, I think the January sixth attacks really brought to light for all of us the need to engage in so many ways. But I urge you all, no matter what your cause is—if it's not national security, perhaps it's racial justice, it could be any number of topics—to think about the role of the press in allowing us to come to a national consensus on what is truth. Because some things are true, and some things aren't true. And getting that information is essential for a democracy to work effectively.

PANEL ONE: CLASSIFICATION AND ACCESS TO NATIONAL SECURITY INFORMATION

Moderator:
Mary-Rose Papandrea*

Panelists:
Margaret Kwoka, David Pozen, Stephen I. Vladeck**

The following is a transcript of the first panel, discussing classification and access to national security information, of First Amendment Law Review*'s 2021 Symposium on National Security, Whistleblowers, and the First Amendment.*[1] *The virtual event also featured a keynote address by Mary-Rose Papandrea*[2] *and a second panel on The Press, Whistleblowers, and Government Information Leaks.*[3]

Papandrea: You guys are in for a treat. We have three of the leading scholars, maybe the leading scholars, on this panel and the next panel on these issues. First, I'll start with introducing Margaret Kwoka. Margaret is a professor at the University of Denver Sturm College of Law, where she teaches administrative law, federal courts, national security, and civil procedure, which you all know I love. We are meant to be soulmates. I can tell. Her research focuses on government secrecy, FOIA, procedural justice, and judicial review of agency actions. She's been published in the Yale Law Journal and a number of other journals, and she is perhaps the leading expert on FOIA. So, thank you, Margaret, for joining us today.

Next, I'll introduce David Pozen. David is the Vice Dean of Intellectual Life and a Charles Keller Beekman Professor of Law at Columbia Law School. He is a leading expert—maybe

---

* Mary-Rose Papandrea is the Samuel Ashe Distinguished Professor of Constitutional Law and Associate Dean for Academic Affairs at the University of North Carolina School of Law.
** Margaret Kwoka is a Professor of Law at the University of Denver Sturm College of Law. David Pozen is the Vice Dean for Intellectual Life and Charles Keller Beekman Professor of Law at Columbia Law School. Stephen I. Vladeck is the Charles Alan Wright Chair in Federal Courts at the University of Texas at Austin School of Law.
[1] This transcript has been lightly edited for clarity. The editors have also inserted footnotes throughout the transcript where there are references to specific cases, statutes, works of scholarship, or other sources.
[2] Mary-Rose Papandrea, *Keynote Address: Examining the Assange Indictment,* 19 FIRST AMEND. L. REV. 213 (2021).
[3] David S. Ardia, Heidi Kitrosser, David McCraw, Mary-Rose Papandrea & David Schulz, *Panel Two: The Press, Whistleblowers, and Government Information Leaks,* 19 FIRST AMEND. L. REV. 253 (2021).

we'll go with the leading expert—on constitutional information law. In 2019, he received the Early Career Scholars Medal from the American Law Institute. I mention that not just to show that he has lots of credentials, but I really like the way they described his work. They described him as a remarkable, widely influential scholar, also creative and thought provoking. And that is exactly the way I would describe him. So, thank you, David, for being with us today.

And finally, last but certainly not least, Steve Vladeck. He is the Charles Allen Wright Chair in Federal Courts at the University of Texas. Many of you probably already know him. He is a nationally recognized expert on federal courts, constitutional law, national security law, and military justice. He is a prolific scholar, so, I'm not even going to start to mention all of his publications. But I will mention he is the coauthor on the leading casebooks on National Security Law and Counter-Terrorism Law. So, some of you are probably reading out of his casebooks in your classes this semester. He is a co-host of a popular blog called *National Security Law Podcast*.[4] He does this with Bobby Chesney, his colleague at UT. It is quite entertaining and really well done, so I highly recommend you check it out. He is also CNN's Supreme Court analyst. And we're just so thrilled you're here, Stephen—thank you for coming.

So, thanks to everyone for coming. My job as moderator is just to pose some questions and let you guys bat them around. I will try to stay out of your way. I thought, Steve, if you don't mind, I'll start with you just to get us started and give the students in the audience some background on our classification system. So, if you don't mind, you can go in any direction you want with this question. But can you just explain how our classification system works? Why does it seem like the executive branch controls the public's access to national security information? What is Congress's role here or what should it be?

Vladeck: That's a great question. And I like going first because then Dave can come in and clean up everything I get wrong, and Margaret can scold both of us. Let me say first, Mary-Rose, this is a real treat, and I really appreciate the chance to be with you guys today. So, national security classification, at least as so described, is a relatively modern phenomenon. We've

[4] THE NAT'L SEC. L. PODCAST, https://www.nationalsecuritylawpodcast.com/ (last visited Apr. 21, 2021).

obviously always had secrets in this country, but the idea of national security classification, per se, is very much a product of World War II and its aftermath—where the government was trying to figure out how to handle massive amounts of national security information; where secrecy, especially as the Cold War was ramping up, became such a critical priority; where there was more need for secrecy on the civilian side of government as opposed to just in the military, as was true during the war. And, so, it starts actually very much, or at least it really ratchets up, during the Truman administration. Harry Truman was the first president to issue a comprehensive executive order with regard to national security classification, even though FDR had taken some steps in that direction during the war. But I think one of the critical points for our conversation is that, at least at first, it was not obvious that this was exclusively a prerogative of the executive branch.

So, there are a couple of early statutes—the Atomic Energy Act of 1954,[5] foremost among them, in which Congress claimed a fair amount of authority to set standards for national security classification, to identify what kinds of information should be classified, and to actually assert a constitutional role in the conversation. I think part of how we've gotten to where we are today, which is a classification system that is very badly, in my view, broken, is that Congress has mostly abandoned the field in the decades since. What started as, I think, an interest in, not perfect, but thoughtful power sharing arrangements has really drifted toward almost pure unilateral executive branch control, to the point where, today, the executive branch asserts, almost reflexively, that national security classification is an inherent power of the President and, perhaps even in some circumstances, one that Congress lacks the power to regulate at all. So, as we talk about what's wrong with the state of national security information today, I actually think the foundational problem is the drift in power, in regulatory authority, away from a sort of joint approach between the political branches and toward the executive, where Congress has basically just dropped the ball and no longer even thinks it's its job to really be actively involved in regulating national security information.

[5] The Atomic Energy Act of 1954, 60 Stat. 755 (1946) (codified as amended in scattered sections of 42 U.S.C.).

Papandrea: Yeah, that's great. I had a feeling that was your view, and that is why I asked you that question. David and Margaret, do you have anything to add on that point? David, go ahead.

Pozen: Thanks. It's an honor to be here for me, too, in this amazing group and also with Mary-Rose moderating. We didn't get your introduction, but a leading scholar in the area. I would echo Steve's points and just note that there's a great book by historian Sam Lebovic called *Free Speech and Unfree News*, in which he has a section about how in the late 1960s and early 1970s Congress had not clearly accepted the legitimacy of the executive branch's growing classification system.[6] And there was this window in the wake of the Vietnam War and the Watergate scandal in which Congress was willing to enact framework national security statutes in areas like war powers and foreign intelligence surveillance, even against presidential vetoes, and assert itself in the national security context.

Both houses of Congress considered bills in the early 1970s that would have legislated a classification system and set the rules for what could be classified and how. But, in the end, in my view, fatefully, Congress decided not to try to, itself, legislate the national security information classification system. Instead, they left that to the executive branch, as Steve said, and allowed people to bring FOIA lawsuits challenging certain information as being improperly classified. Then, in 1974, telling judges they should not give much deference. It's debatable how much Congress meant them to give, but the judges should really actively review assertions of improper classification. And I say a fateful choice because it turned out pretty quickly that judges had no interest in playing that role. They did not want to scrutinize secrets the executive branch said were necessary for national security, and they ended up deferring very, very heavily to the executive branch. So, I think there was a major missed opportunity in that moment when Congress was asserting itself for Congress to take over classification, or at least to assert itself more than it did. Basically, the drift ever since then, ever since the early 1970s, has been toward executive branch supremacy in this area, I think to our democratic detriment. But I won't say more, for now.

---

[6] *See generally* SAM LEBOVIC, FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA (Harvard Univ. Press 2016).

Papandrea: Yes. We're going to talk a little bit more about that. If you don't mind, Margaret, David mentioned FOIA.[7] And, as I mentioned in the introduction, I think you're the leading expert on FOIA. Can you tell us a little bit about the history and purposes of FOIA and then if you want to share some of the problems you've seen with FOIA?

Kwoka: Absolutely. Thank you. And let me add my thanks both to you, Mary-Rose, for organizing and to the students at the Law Review for organizing this great event. So, the concept of government transparency is old. It dates back at least to the advent of modern-day democracy—the idea that the public would have enough information about what government is doing to participate actively in government. But the idea of FOIA is pretty new. And, so, the statute was enacted in 1966 and, as only the second such government records access provision in the world, the legislative history is pretty clear that the purpose of the law was to promote democratic accountability in this kind of vast and growing administrative state. And journalists were actively involved, not only in lobbying for but, in fact, drafting the very first version of the statute.

So, although there is no limit to who can use FOIA, journalists were imagined to be the prime intended users. But the statute, as drafted, allows any person to request any government records for good reasons, bad reasons, or no reasons at all.[8] And it lists out nine enumerated exemptions to disclosure,[9] one of which is the exemption that, in fact, bakes the classification system into FOIA. Exemption one essentially just exempts out any information that is properly classified pursuant to the governing executive order.[10] And that decision sort of ratifies the idea that the executive branch should be making these classification decisions. Certainly, as Dave mentioned, this is an area where the amount of oversight that the judiciary should exercise is debated. I would say lots of people are unsatisfied with the amount of oversight that is exercised, which is to say not very much, in terms of deference that's given. And that certainly is one problem that has been greatly explored in the literature.

---

[7] The Freedom of Information Act, 5 U.S.C. § 552.
[8] *See id.* § 552(a).
[9] *Id.* § 552(b).
[10] *See id.* § 552(b)(1).

The other thing that I'll just briefly highlight in terms of the issues with using FOIA for national security oversight is that not only is that not policed very well by the courts, but, in addition to that, mostly FOIA isn't used the way we thought it would be for oversight at all, national security or otherwise. So, if you look at our nearly a million requesters a year, maybe two and a half to three percent of them are news media or journalists. What has happened over time is that instead of requestors seeking to inform the public about government activities, including in the national security arena, we see just volumes and volumes of very predictable routine requests for information that the public has, potentially, a very legitimate need for but has nothing to do with what we imagine FOIA would be used for. And, so, now FOIA has become, I would say, gummed up, in a word, with just huge volumes of non-oversight requesters.

Papandrea: Yeah, that's great. We're going to talk a little bit more about the national security issues specifically. If you don't mind, David, you have written some really illuminating work on the history, purposes, and evolving function of FOIA, if you wouldn't mind sharing some of your thoughts on that as well.

Pozen: Well, one place to start is where Margaret ended. Who uses FOIA? So, I guess there's no very simple way to tell this story, but there has been, I think, a lot of ways in which the initial vision of FOIA has failed or at least not been fully realized. And we might start that story with who uses it. So, as Margaret says and as her own research has documented, at a lot of agencies, it's overwhelmingly commercial requesters. At others it's, what Margaret calls, first-person requestors trying to learn about themselves and what the government has related to their own lives. And you could make a case about commercial requesters trying to learn about the regulatory environment or about competitors or about relevant things agencies are doing to their business, that there are reasonable causes for them to want to use the statute. And same with the first-person requesters.

But, the fact that the overwhelming number of requesters are from those groups has served to crowd out other more public interested actors like journalists, who were envisioned as the primary beneficiaries of this law. When Congress, in FOIA, said anyone can submit a request for any reason at all—you don't have to tell us why you want information, ask away—it seemed

supremely democratic that it was open to everyone. But in not making a choice, Congress was actually making a choice. There's no escaping making these kind of allocative moves even if you think you're not. Congress basically was saying whoever has the resources and wherewithal to figure out how to use this ostensibly open to everyone system will functionally, effectively get prioritized. And, so, when you open the queue to everyone, parties with the most money and time and attention to focus on FOIA get to use it more. Because agencies withhold a lot of information using the exemptions in FOIA, you have to credibly threaten to litigate to get a lot of the most important information in many contexts, and you're going to need money and lawyers to do that credibly. So, one way in which I think FOIA has evolved in unintended ways and in disappointing ways is in the skew toward commercial requesters and not these public interested requesters.

The second theme, already noted in our first set of comments, is that FOIA has proven largely toothless in the national security context in which, at least for some of the constituencies, a key goal of FOIA was to open up the national security state. I think instead it's largely entrenched and legitimated that state and afforded only modest glimpses into what's going on in the rare lawsuit that produces records. So, there's also been this this story of national security failure.

The third thing I'll say, for now, is I think FOIA also has effectively skewed the way we understand how the government works. I say this because FOIA itself has strict deadlines on when agencies have to turn over documents that have been requested that are really unrealistic in light of the resources that Congress allocates to executive branch agencies to implement FOIA. So, the deadlines are routinely being missed and the volume of requests is such that it's overwhelming for a lot of executive branch agencies to deal with the FOIA requests that come in. So, on the one hand, a lot of people experienced disillusionment and disappointment in government through the FOIA process itself. There's a whole kind of genre of journalism on how horrible FOIA is and how it reveals that our government is feckless and incompetent. Then, you get the records that FOIA produces, and overwhelmingly what journalists do with them is tell stories of government failure and fecklessness. So, at a second level, we have FOIA kind of producing negative images of government.

There has been some literature in the journalism community about why is it that muckraking journalists—journalists who want to tell stories about corruption and abuse in society—shifted in the mid-twentieth century period from looking as much or more at corporate private sector abuses than governmental abuses, and that's been a kind of market shift in where this kind of muckraking journalism focuses. I think FOIA is part of that story. FOIA is a low-cost tool for journalists to get certain sorts of information about bad stuff happening in the world, namely, information about government abuse. So, it channels journalists toward the now cheaper sort of information that they can use to tell those stories—it doesn't reach private sector actors directly, some other countries' freedom of information laws do. So, I think FOIA has given us a distorted and far too negative view of how government works, kind of baked into the very structure of the law. While it was meant to expose real abuses and help promote accountability, I think that the way in which it focuses our critical attention on a certain sort of government behavior and not on what the most violent parts of the states are doing—the national security law enforcement agencies that are most immune from FOIA have enjoyed the strongest exemptions—or what is happening in the private sector has also distorted policy conversations and is a kind of failure. So, I hope that's responsive to the question, Mary-Rose, but in those three ways, I see FOIA as not fulfilling some of [its purposes].

Papandrea: Yeah, and I do recommend that if you want a deeper dive on any of these topics, these three panelists have written extensively on all of them. So, we're just trying to get at the surface of them today. Steve, if you don't mind if I turn back to you, could you tell us a little bit more about what's going on in the courts? So, one of the things I'm going to be pressing you on today are all the different branches of government and how they might play as a checking function on the executive branch. We talked a little bit about Congress, and we'll return to Congress momentarily. Can we talk more about the courts and why is it that the courts have rejected Congress's call to not defer to the executive branch and look and see if something is properly classified? Can you tell us a little bit more? And, Margaret, just to tee you up, you're next to tell us more about what you see going on in the courts.

Vladeck: Yeah, I mean, I think it's the right question. And, I think Dave already alluded to a lot of this—that courts have, in many respects, underread both the plain text and the clear purpose of FOIA. But it goes so far beyond FOIA. And I think that's actually a larger part of the problem, which is that in non-FOIA contexts, there has been, over the past forty years, built up this massive doctrine of judicial deference in national security cases that then seeps into contexts where statutes expressly contemplate a role for the courts. So, FOIA is one example. There's a statute called the Anti-Terrorism Act[11] that's supposed to be an aggressive civil remedy for acts of international terrorism that courts have construed implausibly narrowly because of concerns of interfering with national security and foreign policy. So, I think, there's a larger trend that really, again, started in the 1970s. This time, I think because of shifts in the ideological balance of the federal court, shifts in appointments to the federal courts where, starting with the Supreme Court, but really quickly seeping into the lower courts, there is more and more of this idea that it's not appropriate for courts to, "second guess," determinations that the executive branch makes in national security cases and giving that definition a very broad ambit.

So, national security cases are everything from classic national security disputes to the dispute between Amazon and the Department of Defense over the Jedi contract where everything is national security. And this sort of goes back to where we started because the justification for this deference doctrine is constitutional avoidance—the idea that Article II blesses the executive branch with a broad range of national security powers and that it's actually a separation of powers problem for the courts to unduly intrude into the sphere of the executive in national security cases. The irony being that, again, as came through in our in our prior colloquy, I think the premise is flawed. I don't think Article II gives the executive branch undisputed primacy in this space. I think the problem is that Congress has largely abandoned its role in this context. So, we see this starts during Vietnam as a military deference doctrine about how we're not going to second guess things the military is doing, but it quickly expands beyond the military to what the intelligence agencies are doing, to what the FBI is doing. The enactment of FISA, the Foreign Intelligence Surveillance Act in

[11] 18 U.S.C. §§ 2331 *et seq.*

1978,[12] which creates an express judicial review mechanism, is nevertheless perceived as further reaffirming. All of this is Article II dominance in national security.

When courts start scaling back damages remedies against federal officers under *Bivens*[13]—the idea that the Constitution provides for damages remedies when federal officers violate the Constitution—they start in national security cases. The first steps toward getting rid of *Bivins* come in cases implicating national security. So, I think Margaret can say a bit more about the specific ways that the courts have, I think, underread FOIA. But, I think it's part of this broader disease where, even the context of a prepublication review dispute where it's a contract dispute that obviously needs an arbiter, courts are like "oh, it's not our job to really second guess what the executive branch is doing." I think it is a fundamental misunderstanding of the judicial role, of what it was originally, of what the founders intended, of what Congress intended, and of how this sort of judicial abdication reinforces the significance of the legislative abdication.

Papandrea: Yeah, thank you so much for that, Steve. If you don't mind if I just ask you a follow up before I turn to Margaret. Can you say a little bit more, not just about the constitutional delegation of this authority to the executive, but the capacity and the ability of courts to be involved in these decisions? Because I know a lot of people generally, maybe I'm looking at a lot of my students actually, say the courts are not well equipped to get involved in these decisions. So, I think it might be worth pausing on that just for a moment and talking more about whether the courts can do this.

Vladeck: It's an assertion you hear a lot. And, I think Harvie Wilkinson might be the most prominent espouser of this assertion on the federal bench today. And here's the problem—it is utterly belied by experience. What do I mean? Let's take a couple of categories of cases. So, first, there is FISA, the Foreign Intelligence Surveillance Act, where Congress specifically creates a judicial process for secret review of incredibly secret national security processes and foreign intelligence

[12] The Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, Oct. 25, 1978, 92 Stat. 1783 (1978) (codified as scattered sections of 50 U.S.C.).
[13] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

surveillance.[14] The government has never complained that that process has unduly jeopardized national security information. It hasn't identified a single case where a leak came out of the FISA Court. And the courts have shown they haven't always, I think, gotten the law right—I suspect that we can each identify decisions from the FISA Court that we disagree with—but no one's questioned their competence to do it. And, indeed, in 2001 and 2008, Congress expanded the role of the FISA Court in foreign intelligence cases, at least largely because Congress, I think, rightly understood that reviewing highly sensitive factual proffers in foreign intelligence surveillance cases is actually not beyond the capacity of federal courts.

Let's take a second example. Guantanamo habeas petitions. So, we spent the better part of seven years fighting over whether the federal courts could hear Guantanamo habeas petitions at all from 2000 to 2008, and it culminated in the Supreme Court's 2008 decision in *Boumediene*, which said yes.[15] Then, we actually had sixty-five plus Guantanamo habeas petitions heard by the federal courts, even though the circumstances of their detention were highly classified. Even though the factual disputes animating the review were highly classified, the federal courts did their job, and no one—at least in the district court who was hearing these cases—none of the district judges said, I have no idea how to do this. None of the district judges said, this is beyond my competence. It was only a couple of the appeals judges, who didn't actually have to review any of that information, who complained about whether this was an appropriate judicial exercise.

And then, last but not least, there's criminal prosecutions in national security cases, whether under the Espionage Act[16] or for criminal counterterrorism violations, where there's often an awful lot of classified information that is at stake, whether as part of the government's case in chief or as part of the defendant's defense. Congress has passed a statute to deal with the graymail concern that defendants could use classified information, CIPA, the Classified Information Procedures Act.[17] But, there's also a pretty sophisticated body of case law about how the government

[14] *See* 50 U.S.C. § 1803 (establishing the FISA court).
[15] Boumediene v. Bush, 553 U.S. 723, 793–96 (2008).
[16] The Espionage Act, 40 Stat. 217 (1917) (codified in scattered sections of 18, 22, 46 and 50 U.S.C.).
[17] The Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified in scattered sections of 18 U.S.C.).

can strike the balance between preserving national security secrets and protecting the constitutional rights of defendants under the Fifth and Sixth Amendments. And so, every time a judge or an observer says courts can't handle these cases, I want to point them to thousands of FISA cases, dozens of Gitmo habeas petitions, and hundreds of criminal prosecutions and say, what about those? And, actually, the Federal Judicial Center put out a book called *National Security Case Management Challenges*,[18] which is meant to be a guide to courts. It's on my shelf, I should have brought it as a prop. But it's like here's thousands of pages of examples of federal courts dealing with national security challenges, and not always getting them right, Mary-Rose, but just dealing with them. So, every time someone trots out the lack of competence argument, I say, well, I've got thousands of pages of evidence to the contrary.

Papandrea: Excellent, excellent. Margaret, now that I realize that you're a civil procedure professor, your work makes a lot of sense to me. I know you've written extensively about maybe what we should do in the court system or some sort of reforms to help this FOIA litigation in the national security context be a little more effective. It would be great if you could build on some of the things Steve said and share some of your ideas in this area.

Kwoka: Absolutely. And, in the same way that I completely agree, we have ample evidence that courts are competent at resolving these disputes, I also think they're just very reticent to in many cases. So, in some ways, Congress has tried to re-empower the federal courts at various times. And I think FOIA is a good example of that where Congress tried to reinstate essentially de novo review after the Supreme Court took it away in classification cases. And it was unsuccessful, to be honest. If we look at FOIA litigation, there's been recent empirical work done showing that it's almost impossible to win an exemption one case, a classification case, under FOIA. And I think there's various reasons why.

If you have some of your Civ Pro students on as audience members, maybe they'll appreciate a couple of the ways in which I think courts are sort of shirking their duty. And a lot of it is procedural. So, for example, in FOIA cases, courts routinely

[18] ROBERT TIMOTHY REAGAN, NATIONAL SECURITY CASE STUDIES: SPECIAL CASE-MANAGEMENT CHALLENGES (6th ed. 2015).

start with the premise that discovery is inappropriate. That's not in a rule anywhere. Nobody has a statute about that. It's not in FOIA. It's just a federal case with the federal rules of civil procedure governing. There's no reason why people can't get discovery. But, the courts say, "well, FOIA cases, that's not appropriate." Yet, there may be many factual disputes that are not about the contents of the records that matter in classification. It could be about the classification authority. It could be about other things that were considered at the time, reasoning that could be given without revealing the contents of the records. And pushing past discovery, you get to summary judgment. I'm hoping your Civ Pro students are appreciating this.

Papandrea: If they don't, I will kill them.

Kwoka: So, you get to summary judgment, and in FOIA cases, the government bears the burden of proof even though they're the defendant. So, that's different from a lot of litigation, but it means that, at summary judgment, it's up to them to kind of show their best hand and win or lose. And, yet, what happens is they show their best hand, and, even when the court thinks it's not good enough, they just let them go try again. This is certainly true in national security cases, among others. Another, and I think this might be the biggest one in national security cases, courts do not want to use their power to engage in in-camera review. And it's something that everyone agrees the courts have the power to do. In cases where they use in-camera review to actually look at the disputed records, we have no evidence that this goes wrong. Just as Steve just said, we have no evidence that courts are not competent to look at these records and make these determinations. And yet, you will see case law saying, we only use in-camera review in extreme circumstances or as a last resort. So, they won't actually use the power they have to review these cases.

And then, and this is maybe the most blatant national security related kind of deference, but the standard is de novo review. You will see court after court say, "yes, yes, but we give substantial weight to the government's affidavits in these cases," and so much so that you will see cases that say we review exemption one under a substantial weight review standard, which is not a standard. They are in every way giving deference to the government. I will say—and I know we've really listed quite a parade of problems, and I agree with all of them—I think

like Steve said, courts can do this, like we have volumes of evidence that this kind of role is appropriate. That's true in FOIA cases, too. And we also do see glimmers of success. And I'm happy to talk more about ways in which I think there is some evidence that, even in the national security context, FOIA can be useful in terms of oversight and for journalists. That said, the courts are not the place where they're mostly winning those battles.

Papandrea: Here's a question I didn't send to you all, so feel free to tell me that you have no comment. Do you think it would help to replace FOIA or supplement FOIA with the recognition of a constitutional right of access to this information? So, I know that such a right is not established by any means in the jurisprudence of this Court. But drawing in part on Heidi's work, Heidi's on the next panel, and I was asked to write about this recently for Geoffrey Stone's book on national security secrecy.[19] So, I was thinking a lot about whether there should be a constitutional right of access to national security information rather than a statutory one. Do you have any thoughts? Maybe David, I'll go to you. Do you have any thoughts on whether we should think of this as a constitutional right, rather than as a statutory right?

Pozen: I guess I don't see the distinction as being very meaningful in practice in terms of what it would mean for people seeking access to this information. Although, there's a lot of literature on how FOIA is effectively a quasi-constitutional measure. In the absence of an affirmative right to know, as some other countries' constitutions provide for, we've basically legislated the equivalent, and it provides for judicial review—ostensibly under de novo, very favorable to the requestor standards—and has a highly reticulated scheme for how you can get this information. I can't really imagine that a constitutional right would be stronger on the substance or that it wouldn't be qualified by the same limitations, like for national security information. So, I think the bigger problems here are not in the formal classification of the requesting right—is it statutory, is it constitutional, or both—but in the kind of problems that Margaret and Steve were discussing, which have to do more with judicial incentives than with judicial competence.

[19] NATIONAL SECURITY, LEAKS AND FREEDOM OF THE PRESS (Geoffrey R. Stone & Lee C. Bollinger eds., 2021).

I'll just add another anecdote quickly on that front, which is my first job out of law school was working as an aide for Senator Ted Kennedy on the Senate Judiciary Committee, and we worked on a bill called the State Secrets Protection Act.[20] It was a response to perceived Bush administration abuses in overusing the state secrets privilege to defend against civil actions alleging torture, extraordinary rendition, and other abuses. And the Bush administration would come into court and say, "no, it's all privileged, it's a state secret, whether or not we do extraordinary rendition." And judges were deferring in a blanket fashion and just throwing out the cases at the outset. What was so striking about our bill was it really just reaffirmed stuff the courts already could be doing, just as Margaret and Steve were saying. You should use in-camera review, you already can, but it's a great idea. Special masters, if you find something really complicated you can appoint a special master to help you figure it out. You can ask for summaries of information if it would be overwhelming to see the full scope of it.

So, the fact that judges already have this authority but don't want to exercise it, I'll just note, could point us in two reform directions. One is just keep bashing the judges. Pass statutes like the State Secrets Protection Act, which just nudge them all the more so to use the authority they have. Maybe try to appoint some new judges who want to review this material in a more robust manner. Or it could counsel moving away from the courts and just basically realizing that even though they are capable of doing it—as Steve notes, they do it in other contexts––they've shown time and again they don't want FOIA national security review to be a big part of what they do. And if that's a more or less stubborn, if regrettable, feature of our system, that might suggest that Congress needs to do more itself, as far as active oversight. It might suggest that stronger whistleblower protections would be useful, or other affirmative disclosure obligations where executive agencies just have to put stuff out rather than respond to individual requests that can be litigated. At a high level of generality—we're all noting the same problem, which is judicial review—we could say "bad judges, do more," and try to prod them to do that, or we could actually just move away from the courts, if we think what we've really learned from many years of trying to get judges to do more on FOIA is that

[20] S. 2533, 110th Cong. (2007-2008).

it's going to be a very, very hard lift to get them to play the role that many civil libertarians want them to.

Vladeck: I'll say really quickly, I mean, my reaction to that is, can't we have both? Right? Which is to say, I think there's no reason why these reforms are inconsistent with each other. The other piece of this, and I'm curious what Dave and Margaret think about this, is, at least in theory, we now have a larger number of judges who claim fealty to textualism on the bench than was true for a long period of time. So, it seems to me that if Congress were—to borrow Dave's [thought]—to sort of bash the judges a little bit, amend FOIA to make clear that various prior decisions and interpretations were incorrect, and provide clearer access to information in non-FOIA cases, it seems to me that, yes, judges will still resist that. But if we're going to have judges who claim that when this text is clear they have no latitude, my reaction is, well, let's take advantage of that. Right? And let's take that out for a spin. As opposed to the judges who are into more purposive interpretations who could say, "oh, Congress surely didn't mean for us to play such a role in these cases."

Papandrea: Yeah. And I think, David, I read in your work, and probably Steve as well, thinking about affirmative disclosure obligations that don't wait for someone to ask for something. And, this goes to a bigger question I wanted us to talk about. You've given me so much to think about. I know Margaret has written about your work, and I know that provoked her to think a lot about whether we have fetishized transparency, and whether we should rethink how important transparency is. You've really made me think about how transparency, just to be transparent, can't be the way we approach this, we need to think a little bit more thoughtfully. I think in the national security context, that's really important because, as we all know, there certainly have to be some national security secrets that are kept secret, even if judges did their duty to review FOIA requests and so on and so forth. To preserve the ability of this country to defend itself, some secrets are essential. So, I think that your work has particular salience in this area, and I was hoping you could share your thoughts on how we should think about transparency—you're really changing the conversation with your scholarship.

Pozen: Thanks. Well, I'll try to be really brief and just note in recommending affirmative disclosure where agencies just

have to put out certain categories of information even in the absence of a request, I am really building on Margaret who's talked a lot about how that could work. It actually does exist in the FOIA we have to a limited extent, and I think we both think it's a promising general approach to build on, rather than waiting for a request to come in, responding, subjecting it to the exemptions, litigating, and all the other issues we've just raised.

On the bigger issue, Mary-Rose, on how to think about transparency in a democracy, I can't give a very succinct answer, but I'll just say my main argument in some recent work has been no one really thinks transparency is a first order primary virtue of a good society. I think it borders on mysticism to think that it is. Transparency may contribute in important ways to first order values like self-rule and in some kind of deontological democratic sense or effective government performance at delivering important social goods or human flourishing or journalism, you know, accountability journalism that works. There are a lot of things that transparency may contribute to, but, actually, if it's right that transparency is never the goal, it's other things, we need to always ask, how well does transparency serve those other ends? And when we dig into the empirical, experimental, and theoretical literature, which is now global and voluminous, it turns out to be really complicated. When transparency well serves democratic accountability or effective agency performance or pick your primary value, turns out to be highly contingent and contextual. In a lot of cases, transparency can inhibit deal making by members of the legislative branch. It can produce skewed representations of government, as I was suggesting earlier. It can kind of distort more than it reveals. And working through when and how it does that is complicated and probably not something I should get into now. But the big message is, if it's right, that transparency is not something to be reified or fetishized in itself. It's not a first order value of government. There is no theory of a just society or political morality that I know of that would say that transparency is the maximand. It's just an input into other things that we really care about. And then we just have to be kind of relentlessly pragmatic and empirical and always ask well when does transparency produce better or worse government? And that is going to lead us in some cases to want less transparency, actually, and in other contexts, like I think the national security one, to want a lot more.

Papandrea: Could you say just a little bit more, if you don't mind, because I'd love to hear a little bit more of your thoughts, applying your thinking on transparency specifically to national security. You just said something super interesting, which is that maybe we do need more transparency in national security. Part of it is what we were just discussing how we're not getting a lot of information, would you mind saying another word about that?

Pozen: Yeah, I guess this reflects in part my contestable priors, my views about what the world should look like that not everyone will share. But, I tend to think that we should be most concerned about operations of government that are violent, physically coercive, and so there's a kind of, I don't know, liberal primacy of state violence and just what we should worry about. And so that directs our attention to what the national security and law enforcement agencies are doing right at the outset. Second, we have a very well-established historical pattern of over concealment, I think, in the national security and law enforcement context. So, we tend to know that this sort of information about areas where the state is using coercive force and violent force, which we really want to know about, also is an area where the government has persistently shown itself to be unwilling to produce that information. If I were designing a transparency regime afresh, I would think that we would want to home in on the national security area as a kind of starting point for where we need most transparency. In contrast, I'll just note the U.S. regulatory and social welfare agencies—the National Labor Relations Board, HUD, the EPA—these are world historically transparent administrative bodies. They are some of the most accountable and visible regulatory entities the world has ever seen. It's not clear to me that marginally more transparency for them would do good at all. It might actually be perverse and prevent them from promoting environmental protection, civil rights, and their statutory mandates. In contrast, I think our national security agencies are relatively unchecked, have way more money, way more power to do dangerous things in the world. And, so, I would start from there. But that's a crude first pass of an answer, Mary-Rose.

Papandrea: No, that's awesome. Margaret, I want to apologize for failing to give you credit for advocating for some affirmative obligations. So, please accept my apologies. I saw you had written a response or a reflection on David's work

attacking this sort of fetishism with transparency. I would love to hear a little bit more of your thinking on how we should think about what information the public actually needs.

Kwoka: Yeah thanks, and certainly no apology is necessary. This is an open field with lots of people having interesting thoughts about how we should move forward. I think affirmative disclosure is one of them. I want to go back to something that Steve said earlier—why can't we have both, or maybe all, of these kinds of mechanisms is maybe where I come down. Requestor driven transparency does become sort of this burden on regulatory agencies and social welfare agencies. That said, I haven't seen any alternatives that we know of that really do some important things that FOIA does, and that really does lead me to say I think one of the problems with this debate about kind of costs and benefits is that with FOIA, you can sort of maybe take a stab at quantifying the cost, both just in terms of money and personnel time and burden on agencies and other things like that. It may be imperfect, but you can sort of try. With the benefits, it's almost impossible to quantify. What do we say are the benefits of knowledge we get from FOIA requests? Most news stories, journalists, don't show their work. They won't even mention maybe how they got information. So, you don't even know when FOIA or other open records laws at the state level might have played a role. Even when we do know, how do we quantify the benefit the public gets of knowing something? And that's assuming that we're only counting the oversight benefits, and I think it serves some other important roles as well.

But even in its imperfect state, a couple of years ago, I did a series of interviews with journalists who are using FOIA a lot.[21] And one of the things that I found really interesting was that I was trying to group people by what subject matter they were using FOIA to get at. These are, of course, a select group of mostly investigative journalists who have the time to go through this kind of process. One of the three areas I found that journalists were really using FOIA was national security. And it's counterintuitive because of all the things that we just said about how ineffective it is. For example, you're going to have David McCraw on later today, and he'll tell you that the reporter he represents most at *The New York Times* in FOIA cases is Charlie Savage, who's a national security reporter, who does

[21] MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT (forthcoming 2021).

more FOIA requesting than anyone else at *The Times*. I did these interviews sort of seeing how journalists are making use of FOIA and why in this area, and a couple of themes emerged. One is, oftentimes, even if the security agencies themselves, like the NSA or the CIA, are sort of impenetrable with FOIA, adjacent agencies have a role in these matters, and, actually, you can get really useful information. I talked to, for example, Will Parrish at *The Intercept*, who uses FOIA in his reporting routinely and used it extensively at the FAA concerning some issues that were arising at the Dakota Access Pipeline protest at Standing Rock. And Seth Freed Wessler uses it extensively in his investigative reporting. I talked to him about a series he did for *The Nation* about immigrant-only private prisons. So, [using FOIA to request information from] security and law enforcement adjacent agencies has been more successful.

Another theme that came out is that security agencies also don't want to turn over information through non-FOIA mechanisms. So, their public relations office, or their public information officer, or generally their press secretaries, they're not as free turning things over. There aren't actually as many leaks out of those agencies as there are out of non-security, non-law enforcement agencies. So, given that the other mechanisms for getting information from these agencies actually are also more buttoned down, FOIA is oftentimes the only option. I talked to reporters who said, yeah, it's not great, but it's the only thing I've got left. And, so, I do think here we're talking about the only mechanism we have in some instances. It's driven by an outside agenda. Unlike affirmative disclosure, someone doesn't have to preview what journalists might need one day or what might be interesting or what might arise and come up with a category that would encompass all of that. Unlike whistleblowers or leakers, it doesn't depend on the individual decision making of a single government official and their willingness to risk some amount of personal consequence, sometimes great personal consequence, to expose that information or their own view of what the public should know.

FOIA is the only kind of enforceable statutory right where the agenda is set by the outsider, and I don't see a replacement for that. Now, I think that there are a lot of things we could do to be making it work better. And I think a lot of them center on trying to, as Dave said, have it do more of the work we want it to be doing and less of the work that we don't want it to be doing.

I think there are ways we can do that without sort of throwing it out as a mechanism amongst the tools.

Papandrea: You just said a million interesting things, and I wish I could follow up on all of that. But for the sake of time, I'm going to let Steve follow up on whatever he found interesting in what you and David have just said.

Vladeck: And I'd rather hear Margaret talk, but I'll just say really briefly, I think one thing about this is a First Amendment problem, right? I really do think that I go back to Potter Stewart's famous speech *Or Of The Press*.[22] There are reasons why we don't want to overprotect speech with the First Amendment and why one of the ways that we preserve First Amendment values is by neither shielding nor prosecuting, particularly protected behavior. I think that's an important part of the transparency conversation as well. I think what Stewart said was that the First Amendment is neither an official secrets act nor a freedom of information act,[23] and I think that's the balance that is the right one to strike. The reason why I think it has gotten so off kilter is because striking that balance requires active participation by all three branches. So, just to tie these threads together, the balance is messed up because the branch most likely to move the First Amendment toward an official secrets act in that paradigm is the one that today has most of the power.

Papandrea: Do you have any thoughts you want to add before we conclude? And Steve, just staying on you, what sorts of things should Congress be doing that it's not doing? And you can go anywhere you want with that question.

Vladeck: A lot. Just to take a couple of things that I think are relevant to this conversation, I think there should be penalties for misclassification. As of now, the only incentive for wrongly classifying a document is that it gets declassified. That's not what we call a good incentive structure. So, Congress should think about some way of actually putting teeth into classification limits. Congress should reassert its own ability to actually have a role in defining what national security information is and is not. Congress should provide much more expressly for judicial

[22] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).
[23] *Id.* at 636.

review of classification decisions in other contexts, collateral attacks on classification outside of the FOIA context. Congress should overrule a whole bunch of pretty bad D.C. Circuit FOIA decisions that Margaret could probably cite chapter and verse. There are so many things, but they all to me, Mary-Rose, circle around the same core principle, which is reasserting that the national security information is a three-branch conversation, not a one branch homogeneity.

Papandrea: Well, before we turn it to questions, and I snuck a peek at the chat, we have some very interesting questions coming our way. I want to give you guys a chance to, and this will be a lightning round, offer your thoughts on the legacy of the Trump administration and maybe what we can expect under Biden. And so, David, go.

Pozen: I mean, disgrace, brutality. I'm not sure in the transparency area that it's been so notable on FOIA so much as it has been in ramping up assertions of executive privilege vis-a-vis Congress. Kind of consistent with Steve's story of congressional decline, the Trump administration made more sweeping assertions of executive privilege. We're not just going to withhold specific documents, it's whole categories of inquiry we're not going to allow you to pursue. And then Congress went and litigated those disputes rather than just try to directly punish the Trump administration by blocking appointees or not appropriating funds for programs. So, I didn't love the congressional response to Trump administration stonewalling on issues of executive privilege separate from FOIA but connected maybe.

Just one other quick thing, which is on Steve's theme about Congress. I find, Josh Chafetz's work very useful.[24] He has talked about how there are some limited examples of members of Congress using their power under the Speech or Debate Clause in the Constitution, which protects members of Congress from penalty for things they say in carrying out their official duties.[25] He notes, for example, that in the Pentagon Papers[26] controversy, one member of Congress, right around the time that

[24] Josh Chafetz is a Professor of Law at Cornell Law School. *Josh Chafetz*, CORNELL L. SCH., https://www.lawschool.cornell.edu/faculty-research/faculty-directory/josh-chafetz/ (last visited Apr. 26, 2021). Professor Chafetz's scholarship focuses on constitutional law and American politics. *Id.*

[25] *See* Josh Chafetz, *Congress's Constitution*, 160 PA. L. REV. 715, 745–50 (2012).

[26] N.Y. Times Co. v. U.S., 403 U.S. 713 (1971).

the newspapers were breaking the story, took to the floor of Congress and just read into the record some of the most relevant portions of what Ellsberg had leaked without fear of criminal or civil sanction.[27] And he documents how that has dried up. Members of Congress basically doing their own version of declassification, which is constitutionally protected in this manner, isn't something we see happening with any frequency nowadays.[28]

Ron Wyden at points in recent years was crying foul about terrible things that were being done in terms of electronic surveillance of Americans, the kind of stuff that broke with the Snowden leaks. He wrote anguished letters about how upset he is that the American people would be furious if they knew how the executive branch was interpreting various statutory authorities in the surveillance area. But, it didn't seem to be something he was seriously thinking about that he would just go and tell the American people. You know, he'd probably be removed from the Intelligence Committee, but he would have otherwise been free of sanctions. So, just another power of Congress that's sitting there unused. The intelligence committees, also, they have rules that allow them to declassify against executive branch objections information they think has been wrongly declassified. They almost never have used that authority. So, sorry for going on and moving away from Trump.

Papandrea: You all have so many interesting ideas. I'm sorry we don't have all day to spend with this panel. Margaret, do you have any closing thoughts on Trump vs. Biden or anything like that, reflections?

Kwoka: I'll just add that I think one of the legacies that's going to be really hard for us to climb out of is the damage to the reputation of the press and the view of the press amongst the American public. Now, I'm not saying we were at a great place before the Trump administration on this front, but I think there has been a deep cut into the role of the press, the view of the integrity of the press. I don't know how we come back from that any time soon, and I do worry about that legacy.

---

[27] Chafetz, *supra* note 25, at 745–50.
[28] *See id.* at 742–53.

Papandrea: I share that same concern. Thank you, Margaret. And Steve, before we go to questions, do you have any thoughts on the legacy of Trump and moving forward under Biden?

Vladeck: Margaret's point is complicated yet further by the ongoing fight over whether First Amendment-like ideas should apply to social media in light of Trump's suspension from Twitter and Facebook and everything else. I think the problem is that we are certainly going to be having a national conversation about free speech principles on social media. But in the wrong direction, from my perspective, and in response to the wrong prompts, where the notion that there's no such thing as bad speech or that the right way to combat false speech is true speech. I think we've seen a lot of evidence that that may not actually be true anymore. Leaving aside Trump to Biden, I think Trump himself is an incredibly complicated inflection point for the First Amendment because even folks like me—who I would never think of myself as a First Amendment absolutist, but certainly err on the side of more speech than less—I'm not as uncomfortable with some of these more restrictive things as maybe I ought to be. I think that's a sign of just how much the conversation has gotten messed up and just how much the dangers of leaving everything to the executive branch going forward have been exacerbated by the administration that was just not beholden to conventional political checks.

Papandrea: Yeah, great observations there. I'm going to turn it over to our symposium organizers to run a Q&A.

McNeil: First of all, thank you so much. This was brilliant, and on behalf of everybody at *First Amendment Law Review*, I am so grateful that you all shared this with us today. I'm going to turn over to some questions now, and I will say to audience members, you can continue to submit questions if you like. But first, let me start with this one: Professor Vladeck just touched on the prepublication review system for books and articles by former military and intelligence officials. But could you elaborate on the concerns with that system and the court cases currently challenging it? How does that fit into this framework and what you've talked about with regards to the courts providing deference to the executive branch? Professor Vladeck, if you would like to talk on that. And then anybody can add on.

Vladeck: Sure. And I'll just use John Bolton[29] as a foil for why the prepublication review process sucks. And I don't mean to put too fine a point on it. The problem is that the prepublication review process is basically almost whatever the executive branch says it is. So, even if the executive branch approves a book like John Bolton's book, and the book goes to the publisher, if they change their mind before the book is out they can just revoke their prepublication review. It's mostly contractual, which is part of why it's so hard for those on the other side to ever prevail in disputes because they've waived most of their rights. But it's contract law on steroids, where basically every presumption is made in favor of the executive branch—the executive branch can change its mind with no sanction, the executive branch can't really be challenged on whether the information it's claiming is sensitive national security information actually is. There's no real mechanism to collaterally attack the assertion that information is not appropriate for publication in the prepublication case review process. So, it's this remarkable thing where powerful people who aren't worried about those sanctions can try it anyway, like John Bolton did, but where the power is all sort of in one direction. And, there's almost no mechanism to push back if the executive branch is blocking publication or objecting to certain information for purely partisan or political reasons as opposed to for legitimate national security reasons.

Pozen: I'll just note there's a lawsuit right now being brought by a group at Columbia, in part, the Knight First Amendment Institute at Columbia University, along with the ACLU, challenging on First Amendment grounds the prepublication review system.[30] In addition to the points that Steve makes, that lawsuit highlights just how much standards seem to vary. Depending on which agency you worked at, you may face a very different prepublication review procedure, and it is very hard to tell what the standards are. So, it's just kind of a

---

[29] In 2020, the Trump administration sued John Bolton, a former national security advisor in the administration, trying to prevent Bolton from profiting off of his memoir because, according to the Justice Department, the memoir contained classified national security secrets in violation of Bolton's prepublication review agreement. Maggie Haberman & Katie Benner, *Trump Administration Sues to Try to Delay Publication of Bolton's Book*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/us/politics/john-bolton-book-publication.html.

[30] *Edgar v. Haines: A lawsuit challenging the government's system of "prepublication review,"* KNIGHT FIRST AMEND. INSTIT., https://knightcolumbia.org/cases/edgar-v-haines (last visited Apr. 21, 2021).

labyrinthine and opaque process. And if it's right that FOIA is so weak, much weaker than Congress initially intended in the national security area, that makes it all the more important that other transparency mechanisms can fill the void. The writings of former employees about what they experienced, which come with a kind of time delay for that reason are, I think, generally less likely to be very damaging. These are people who generally have been socialized, at least to some extent, into the bureaucratic culture. They're going through a publisher, that's another round of review, and there's some time lag between what they observed and what they're writing. I think it's a kind of publicity generally that we should want, and, so, I join Steve's criticisms of the existing system of prepublication review.

McNeil: Thank you both. Our next question is, can Professor Kwoka share more about courts tendency to grant substantial weight to the government's position or evidence? Has this been a tendency as long as there has been FOIA litigation, or is it a recent trend? How are those opposing to the government able to overcome the substantial weight given to the government? Professor Kwoka, if you would like to speak to that, and, then again, I'll open it up.

Kwoka: Yeah, absolutely. The "substantial weight" language arises with the national security exemption. In addition to exemption one, which covers classified information,[31] exemption three incorporates other statutory exemptions,[32] and one of them that's notable is a statutory exemption that applies to most CIA information and intelligence information. It's about intelligence sources and methods, which it turns out is defined very, very, very, very broadly. When one of those two exemptions is at stake is when you see that language crop up. In 1974 is when the amendments sort of tried to reify the de novo review for national security cases in FOIA,[33] and it was shortly thereafter that you start to see courts develop this new set of language that says, "yes, the review is de novo, but we grant substantial weight to the government's affidavit describing the factual circumstances that are dispositive to whether the exemption applies." And so, the answer is yes, it's been around for a very long time.

---

[31] 5 U.S.C. § 552(b)(1).
[32] *Id.* § 552(b)(3).
[33] *Id.* § 552(a)(4)(B).

And the other, how you can get over it. Frankly, very infrequently. Very, very, very infrequently. That said, there's a couple of things that I think are worth saying about FOIA litigation dynamics that change the calculation a little bit. One is—especially those folks who can litigate because they have the resources for a lawyer, either in-house counsel, say at *The New York Times*, major media outlets who have the resources to litigate or who have found pro bono counsel or something of the like—if you have the resources to litigate, once you sue, everyone sort of agrees that you get a better response. There's a second set of eyes, there's an AUSA government attorney who's representing the agency who's also looking at it, and says come on, you can't really withhold all this stuff. So, there's sort of a backend thing that happens between the agency and their lawyer that improves the quality of the response and increases the amount that's disclosed.

The other thing that I would like to say about FOIA litigation is that a lot of it is winning by losing slowly. Oftentimes if you sue a government, you've asked for a category of records––all records mentioning, relating, pertaining, talking about, referencing blah, blah, blah subject matter, whatever it might be, like the Unabomber. Then the question is, what do you start to get as the litigation proceeds? Once you sue, oftentimes the government says, okay, well, we'll give you this stuff, but we're still withholding that. Then you might negotiate a bit more, then release a bit more. By the time you get to summary judgment, your dispute may have been narrowed down to a very small amount of records. And along the way, you might have gotten a lot of what you want, and then you'll lose. But you got a lot of what you want before you lost. So, I think just looking at the point of judicial decisions in FOIA is too myopic a view of what the potential is there.

McNeil: Thank you. I'm going to read two questions at once because I feel that they will be cohesive. What kinds of reformations would you like to see in the judiciary to ensure that the executive is not given excessive deference in national security issues? And would creating more transparency in the FISA Court help? And then the other question is, if FOIA doesn't work as well as we hope it would and the courts and Congress are deferential to the executive branch, is there any way to check the executive's power in national security matters? It's a little scary thinking that the executive has such control and is only being

checked by the secretive FISA Court. Professor Pozen, since I haven't started with you yet, or actually, Professor Vladeck, you're unmuted. So, I assume you want to talk.

Vladeck: David can go first.

McNeil: Okay, Professor Pozen, and then we can hear from Professor Vladeck.

Pozen: There are various ways I could go with that. How to make the courts do more I think is a really tough puzzle because if the underlying reason why they're not doing more already has more to do with their preferences and incentives than with tools that Congress could give them, as I think it does, then it's hard to solve a problem that comes more from judicial psychology, motivation, reputational incentives or the like. Then I think we, both civil society and Congress more importantly, could nudge the courts to really do something more like de novo review, do more in-camera review. At a minimum that could be mandated. Rely on special masters and the like. The substantial weight piece that Margaret was talking about, that's from a committee report. And Steve was noting how atextual judges are being—perhaps ironically, in the case of textualist judges here. The statute says de novo review; it's actually a committee report that's being used to vitiate Congress's words.

Beyond that, I'll just note that there are other models of getting at executive branch national security information other than FOIA and judicial review. I think congressional oversight is a huge one that could be ramped up. There are inspectors general within the executive branch, but quasi-independent, who have already grown in significant numbers in recent decades and could be relied on even more extensively. There are leaks and whistleblowing. So, I don't think we're trapped in that kind of FOIA or bust, judicial review or bust, binary. I think there are these models which have been to some extent developed in recent decades, but I think FOIA gets so much of the attention in these transparency conversations, sometimes to the neglect of these other mechanisms.

McNeil: Professor Vladeck, do you have anything to add?

Vladeck: No, I mean, I agree with David. I don't think we have to put these things in contest with each other. I think it's all swimming in the same direction of providing more accountability for the executive branch's assertions in this space.

McNeil: I think that we are going to end on this one final question. If citizens have to go through FOIA to obtain federal agency records that are not harmful to national security or other exemptions, such as certain records from an agency like Fish and Wildlife, is it feasible for agencies to make these records publicly available on their websites or create a separate online government database that the public can access? Could this help decrease the amount of FOIA requests and lawsuits and help return FOIA to some of its intended purposes, like national security? What are the concerns about affirmative disclosure? I'll open it up to anybody who wants to start.

Pozen: I think Margaret should lead us here.

Kwoka: Yes, absolutely, is the short answer. And, in fact, this is something I've spent really a lot of time writing about—you know, there is currently no mandate, incentive, or money to do that. But if there were, and I think there's various ways one could design those things to be operationalized, it would make a huge difference. So, I'll give you a couple of examples that support exactly the point that the question raises. So, for all of these businesses that are requesting information from the government, lots of them are just—by lots I mean thousands of requests at many agencies, at EPA, at the SEC, at FDA, big regulatory agencies in particular—they are routine. The FDA gets thousands of requests every year for their facilities inspection reports. It's just a different inspection every time, but they could just post a database of all their inspection reports. The SEC gets thousands of requests for publicly filed documents that were originally under a confidentiality order and that's expired. They could just be published online. So, for some of these things we could make this whole category of records affirmatively available and preempt the need for those requests.

The other piece of that is for individuals requesting their own files. Most of them are actually immigration files. So, DHS now gets more than half of all FOIA requests in the federal government—medical files, law enforcement files, family histories, a lot of genealogy going on in FOIA. We could find

other mechanisms for people to get their own records, including administrative discoveries. For example, any of you who might be interested in immigration, in removal proceedings there is no administrative discovery. So, the only way you can get the government's file is through FOIA. We could look at other things that are non-FOIA reforms that would preempt the need for all these folks to resort to FOIA as a really second best [mechanism]. Most of these folks aren't well served by FOIA either. It's just that they don't have an alternative.

The last part was what are the concerns about this? The real concern is just that agencies have no incentive structure to make these kinds of changes. And I think there's ways that we could structure incentives, but there hasn't been any push in that direction.

Pozen: I'll just add really briefly that I agree with everything Margaret said. Where affirmative disclosure can realistically be done, I think we should be looking to do more of it. I would just note that it's political economy and kind of sociology are different from FOIA requests. It's not so easily weaponized. You know, the most well-resourced entities like regulated firms in FOIA, they have a tool with which they can get basically extremely cheap discovery with no limits on relevance. They could just ask for everything in an attempt to needle their overseers and kind of find out things with which they can threaten to sue regulators, and FOIA we've seen weaponized in a lot of contexts by regulated entities. That's not so easy to do with affirmative disclosure, nor do you need deep pockets to use affirmative disclosure. So, who's benefiting and who's losing? The profile looks different and, I think better, when you have affirmative disclosure. And, the sociology point, FOIA introduces a kind of adversarial dynamic in the relationship between citizen and government. You want something, you demand something from government, and you threaten to sue them if they don't provide it. There's some maybe European scholarship on how this creates a kind of anti-governmental, anti-statist gloss to it, the way that you're invited to see the government as your litigation opponent through a mechanism like FOIA. Affirmative disclosures, the government on its own is proactively giving you stuff you might want, and it has a different kind of sociological valence. So, I am all for affirmative disclosure where it can be done.

McNeil: Thank you all so much. This was so impressive and such a wonderful experience. Dean Papandrea, do you have anything you want to add?

Papandrea: Just that was an hour of heaven for me. So, thank you so much for coming to hear the three leading experts in this area. This discussion really made my year. So, thank you.

PANEL TWO: THE PRESS, WHISTLEBLOWERS, AND GOVERNMENT INFORMATION LEAKS

Moderator:
David S. Ardia*

Panelists:
Heidi Kitrosser, David McCraw,
Mary-Rose Papandrea, David Schulz**

The following is a transcript of the second panel, discussing the press, whistleblowers, and government information leaks, of First Amendment Law Review*'s 2021 Symposium on National Security, Whistleblowers, and the First Amendment.*[1] *The virtual event also featured a keynote address by Mary-Rose Papandrea*[2] *and a second panel on Classification and Access to National Security Information.*[3]

Ardia: I'm going to do very brief introductions of the panelists. Honestly, I could go on for the entirety of the panel just doing them justice with regard to their backgrounds on these issues. All four of our panelists today are true experts on this topic. So, we have with us Heidi Kitrosser. She's the Robins Kaplan Professor of Law at the University of Minnesota and currently a visiting professor of law at Northwestern Pritzker School of Law. We also have David McCraw, who's Senior Vice President and Deputy General Counsel at *The New York Times* Company. We have Mary-Rose Papandrea, who probably doesn't need any further introduction, but she is the Samuel Ashe distinguished Professor of Law and Associate Dean for Academic Affairs at the University of North Carolina School of

* David S. Ardia is the Reef C. Ivey II Excellence Fund Term Professor of Law and Co-Director of the Center for Media Law and Policy at the University of North Carolina School of Law.
** Heidi Kitrosser is the Robins Kaplan Professor of Law at the University of Minnesota Law School and the Newton N. Minow Visiting Professor of Law at the Northwestern Pritzker School of Law. David McCraw is the Senior Vice President and Deputy General Counsel at *The New York Times* Company and a lecturer at Harvard Law School. Mary-Rose Papandrea is the Samuel Ashe Distinguished Professor of Constitutional Law and Associate Dean for Academic Affairs at the University of North Carolina School of Law. David A. Schulz is a Floyd Abrams Clinical Lecturer in Law and Senior Research Scholar at Yale Law School.
[1] This transcript has been lightly edited for clarity. The editors have also inserted footnotes throughout the transcript where there are references to specific cases, statutes, works of scholarship, or other sources.
[2] Mary-Rose Papandrea, *Keynote Address: Examining the Assange Indictment,* 19 FIRST AMEND. L. REV. 213 (2021).
[3] Mary-Rose Papandrea, Margaret Kwoka, David Pozen & Stephen I. Vladeck, *Panel One: Classification and Access to National Security Information,* 19 FIRST AMEND. L. REV. 222 (2021).

Law. And we have David Schulz, Floyd Abrams Clinical Lecturer and Senior Research Fellow at Yale Law School.

My goal here is to really just get the conversation flowing and then stay out of the way. Occasionally, I'll nudge the conversation to keep things moving from topic to topic. We're going to cover a number of different themes. I've given the panelists some sense of what those areas are ahead of time. But, I want to start by tying it together with the earlier panel and placing it in the broader context of the issues that arise as we think about national security, whistleblowers and the First Amendment. I want to start really with an observation and a question. And that is from Bush through Obama to Trump, the government has launched a really unprecedented number of leak investigations and Espionage Act[4] prosecutions based on the disclosure of classified information to the press. The Reporters Committee for Freedom of the Press reports that there were only four leak prosecutions against media sources related to the leaks in the entire period leading up to 2009.[5] But in the decade that followed, the number of prosecutions exploded, by their count, to eighteen through 2019.[6] And I want to ask Heidi to help us understand what is driving this increase. Why has this issue become so common compared to what it was historically?

Kitrosser: Well, there is a great deal of debate about that. Dave Schulz and I talk about this in our paper that we wrote for the symposium. My sense is that you could place the answer into two buckets. One is about technology, and one is about normalization. So, the technology part is quite simply that it is so much easier now because of technology to find leakers, to determine the source of stories for which the government wants to find leaks using technological footprints than it ever used to be. You know, every time somebody makes a call, it's quite easy to trace it. Emails are very traceable. Even the classic meeting in a dark alley, reporter-source interaction that we're all so familiar with going back to All the President's Men. Now you're surrounded by surveillance cameras, every time you go in and out of the government building you're swiping your digital pass. So, part of it is technology. And, one anecdote that we put in the

[4] The Espionage Act, 40 Stat. 217 (1917) (codified in scattered sections of 18, 22, 46 and 50 U.S.C.).
[5] Katie Beth Nichols, *Bringing the Reporters Committee's List of Unauthorized Media Disclosures to Life*, REPS. COMM. FOR FREEDOM OF THE PRESS (Aug. 15, 2019), https://www.rcfp.org/leak-investigations-chart-explainer/.
[6] *Id.*

paper that I think really speaks to this in kind of a chilling way is that Lucy Dalglish, the former head of the Reporters Committee for Freedom of the Press, recounted a meeting that she had with some Obama folks during the Obama administration where they were talking about a reporters' privilege federal statute.[7] And she recounts that one of the aides told her, you know what, you'll get your statute, but we don't need it anymore.[8] We don't need to go to the journalist anymore in order to really get what we're looking for.[9]

So, I think technology is part of the story. But I think there's another part that's maybe more fundamental, and that's normalization. There is a way in which I think each prosecution feeds the next, paves the way, and things get more normalized. And this is the thing that Dave and I really trace in our paper. We talk about how, first of all, when you look back at the drafting and the passage of the Espionage Act, it seems by all accounts that really nobody anticipated it or intended it to be the quasi-official secrets act it's become.[10] So, there just wasn't that expectation. Plus, we didn't have a classification system outside of the military until after World War II. There was no intention or idea that it was going to be what it is. So, it's not surprising when it was for the first time used to go after a reporters' source in the 1950s, there was a lot of consternation. There was a great deal of publicity. There was an outcry. It wasn't used again until the early 1970s with Daniel Ellsberg and Anthony Russo. That also was quite controversial. Plus, that prosecution ended in a lot of embarrassment for the government. It wasn't used again until *Morison*.[11] Then, slowly, as you said, starting in the Bush administration it has been increasingly used. So, I think it gets normalized over time. Also, as we trace in our paper, and, of course, we'll talk more about later, the *Morison* case really paved the way doctrinally for future prosecutions.[12] So, I think that's part of the story as well.

One last thing I'll mention is I should give a nod to the main additional argument that is sometimes made to explain

---

[7] Heidi Kitrosser & David Schulz, *A House Built on Sand: The Constitutional Infirmity of Espionage Act Prosecutions for Leaking to the Press*, 19 FIRST AMEND. L. REV. 153, 182 (2021).
[8] *Id.*
[9] *Id.*
[10] *Id.* at 166.
[11] *See* United States v. Morison, 844 F.2d 1057, 1060 (4th Cir. 1988).
[12] Kitrosser & Schulz, *supra* note 7, at 185–203.

this, which is that while technology is the reason, it's not in the way that I said. It's technology because the government has more reason to be concerned now about leaks because of the ability to create these massive leaks like we saw with Chelsea Manning, for example. And certainly, as we've seen with WikiLeaks and Julian Assange. I think that may be part of it. I think that by no means fully explains it, though, in part because most of the prosecutions aren't these massive leaks. I think it's much more the other elements, and then that might provide some additional justification.

Ardia: Everyone else on this panel probably has a view on this question as well and a lot of experience with these issues. Are you seeing the same things that are driving this? Actually, if I can ask David McCraw this question, I was really shocked in how candid Edward Snowden was after his leaking about his feelings about the lack of OPSEC, the lack of security that the reporters who were covering national security issues were using in order to protect the identity of their sources. As I say to my students, the Internet giveth and the Internet taketh away. It gives us this perception of anonymity and ephemerality when, in fact, it's just the opposite. These technological tools create a trail that is almost impossible to erase. Is that something that you've seen? You've been your position for a while and seen the evolution of national security reporting. Is that something that comes up in your conversations with reporters?

McCraw: I think it was much truer at the time of Snowden. I think Snowden was a bit of a wakeup call. I think Reality Winner was even more of a wakeup call. You'll recall that after Reality Winner was arrested, there was much discussion over whether the reporters had, in fact, caused her detection and ultimate indictment and conviction. I thought there was a lot of finger pointing in that debate, and I'm not sure what the ultimate facts would have shown. But, I do think that the outcome of that was that no reporter who's serious about national security reporting wants to be that person who gets blamed. I think there's much better work being done on that, at least at the publications and outlets that I know of. We obviously spent a lot of time talking about that. We bring in outside experts to talk about how leak investigations are done. It's always a difficult topic. I remember doing a seminar now more than fifteen years ago at *The Times* and having another publication, which wasn't particularly fond of us, say that we were teaching

reporters to act like drug dealers. It was a little unfair, but just a little. So, all of Heidi's points are on point there that it is easier for the government to find people. It's easier for the government to do it without us. I often wonder why that doesn't add up to why don't we have a shield law. Since they don't need us, they might as well get some credit for protecting us.

Papandrea: David, I would just like to add, in addition to the great points that Heidi and David M. have made, I also think there might be, and I'm just guessing, some anxiety within the executive branch of their ability to control all of the information, not just since 9/11, but especially since 9/11, just the explosion of the national security state and the number of secrets and who has access to the secrets. The leak prosecutions are one very powerful, but not the only, tool that the executive branch has been trying to wield to keep control over national security secrets. So, for example, when Trump took office, he made everyone dump their cell phones on the table while they worked in the White House or something like that. There's been a crackdown on the ability of government employees to talk to the press, restrictions on when they can do that and the need to get authorization and so on. So, there's a lot of other things going on, and I think these leak prosecutions are part and parcel of those of those efforts.

McCraw: And it's really driven by overclassification in a lot of ways. A lot of things that are treated as leaked classified information should never been classified in the first place. As Justice Potter Stewart said in the Pentagon Papers case, overclassification leads to carelessness and cynicism.[13] I see that all the time. You have five million people plus with security clearances. And, as I now have hot keyed into most of the briefs that I write, we have the famous quote from President Obama: "There's classified, and then there's classified."[14] You know, there's stuff that's really secret, and there's stuff that we just say is secret. How is a reporter, how is the source, supposed to deal with that when the President of the United States is telling Fox

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

[14] Michael D. Shear, *Obama Says Hillary Clinton Wouldn't Intentionally Endanger U.S. with Emails*, N.Y. TIMES (Apr. 10, 2016), https://www.nytimes.com/2016/04/11/us/politics/obama-hillary-clinton-email-fox-news.html.

News that classification is not at the margins but is, in a much larger swath, a joke?

Ardia: Heidi, I really like your point about the normalization, and part of this is cultural. One of the other things that the Reporters Committee study shows is that the outcomes in these prosecutions has shown a substantial increase in the length of sentences that the courts have been imposing.[15] One thing you might take from that is that the information that's being disclosed is more damaging and, therefore, warrants a longer sentence. Though, it's hard to see that. It could just be that what society expects and accepts has changed over time since we lionized Ellsberg. We don't have that same view as a society, and that could be affecting some of this.

Kitrosser: Yeah, in terms of the sentencing lengths, I think there are many things going on. But two things that come to mind are, one, in some cases, given the sweeping nature of the Espionage Act, given that there is no possibility of a public interest defense or even an opportunity to really seriously challenge how much if at all national security was at risk, increasingly, you end up having situations where people plea out because they don't really have an alternative. Then, you have no real oversight, or at least you are lacking oversight, with respect to the sentence. So, one thing that comes to mind, for example, is when Shamai Leibowitz, who was one of the first people prosecuted under Obama, was sentenced, the sentencing judge said something that was really stunning. He said something like, I don't even know what was leaked, but I know it was some information.[16]

Then, on the other hand, when you have judges attempting to do comparative analysis, for purposes of sentencing propriety, of past sentences under the Espionage Act, you then run into this problem that the Espionage Act was, of course, predominately designed for classic spying. So, then you have the propriety of sentencing someone for leaking information about troubling FBI surveillance practices to *The Intercept*, [and you're] comparing that to someone who was sentenced for leaking information to Russian spies during the

[15] Nichols, *supra* note 5.
[16] Josh Gerstein, *Judge gives leaker 20 months, but isn't sure why*, POLITICO (May 24, 2010), https://www.politico.com/blogs/under-the-radar/2010/05/judge-gives-leaker-20-months-but-isnt-sure-why-027212.

Cold War. So, that's among the issues that we have floating around.

Ardia: And obviously, the motivation of leakers varies, and we'll come back to this question of whether their intent matters in terms of First Amendment analysis. But, it clearly is the case, when we think about the relationship between the panel earlier today and the panel this afternoon, that in the national security space, other than whistleblowers, it's very difficult for the public to get information about what the government is doing here. For some of these folks who are willing to put their freedom on the line, many of them knowing that the ability to cover their tracks is limited, but they still go forward and do that. What are we to make of that? That there are people within the government who feel strongly enough about disclosing the information that they're willing to put their freedom on the line to do that? And I throw that out to anyone.

Schulz: Maybe I could jump in. This goes, really I think, to one of the points in the paper that Heidi and I worked on, and Heidi has been dealing with this issue for over a decade, which is the need for some sort of First Amendment-type protection to be built into Espionage Act prosecutions. As Heidi mentioned, right now, there's no sense that the First Amendment applies at all. And that just can't be as the Espionage Act has morphed from what was intended into a quasi-official secrets act. And, just to go back over a little bit of the history so people understand the point that Heidi was making, this was passed during the First World War.[17] It essentially has not been materially amended in the last 104 years. But it was intended to reach spies, and in World War I and World War II, they were focused on enemy-to-enemy information with a few early exceptions with pamphleteers.

When Congress passed it in 1917, President Wilson wanted some language in about how it could reach the press and leaks to the press, and Congress wouldn't do it. When they amended the statute and modified it in 1950 to separate out what's now Sections (d) and (e) of 793—to separate out people who have information because they got it from a government versus people who are the recipients of leaks—there, again, was concern that this would have an impact on the press and their

[17] The Espionage Act, 40 Stat. 217 (1917) (codified in scattered sections of 18, 22, 46 and 50 U.S.C.).

ability to report on what the government is doing. Language was put into the bill that said nothing here is intended to allow censorship of the press. And Congress, again, seemed to think that was sufficient and that people kind of understood you weren't supposed to use this law to go after the press.

That all has changed, starting with *Morison*, but I think really accelerated after 9/11. And I just want to underscore a point Mary-Rose was making on top of Heidi's good points. I do think 9/11 changed a lot. It changed how deferential judges are willing to be, their concern about the impact of getting it wrong. And to David McCraw's point about "classified and classified," I think that goes right to some points that were made this morning that a problem that we're dealing with right now in trying to figure out how to solve this issue is that judges are unwilling to step in and do this. So, when you have a leak investigation, if someone wants to say, "well, this wasn't really an important leak, you know yes, it was classified, but there was no harm," judges don't want to hear that. They don't want to get involved. They don't want to play the role that they need to play if we're going have some kind of a viable thing.

One other thing which ties into where we are and how you get the First Amendment, the point has been made that technology allows the government to find people very easily now. I think it's not coincidental that in this explosion of prosecutions in the last ten, fifteen years, there hasn't been a single reporter called to testify. In fact, there hasn't been a single reporter subpoenaed except for James Risen, who fought it and fought it and fought it under the Obama administration, ultimately lost in the Fourth Circuit,[18] and then the government didn't call him.[19] While that's a sign of the fact that technology means you don't need the reporter to identify the leaker anymore, it also has the effect of removing a layer of First Amendment protection that used to exist. Back in the old days if the government wanted to prosecute a leaker, they had to find the leaker. And, as one of the Obama administration lawyers mentioned in a similar speech, in the old days you either had to get the leaker to confess or you had to get the recipient of the leak to tell you who it was. If you wanted to do that, you had to go in

[18] United States v. Sterling, 724 F.3d 482, 499 (4th Cir. 2013).
[19] 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?.

and, in most parts of the country, you'd have to deal with the press who would be asserting a First Amendment defense not to tell you who their source was. And the judge would have to do some sort of balancing of public interest. That's all gone. If you don't need the press under the Espionage Act, there's no notion of public interest balancing. So, we're at an important threshold.

And one other minor point is we really have transformed this into an official secrets act. Back in the 1990s, in the Clinton administration, Congress actually passed an official secrets act to deal with these types of leaks in a way the Espionage Act wasn't, and President Clinton vetoed it because he was concerned about the First Amendment implications. In response to that, it was at the very end of his term, Congress comes back the next session and the republicans did not push to put it back in and have President Bush sign it. Instead, they said, well, let's study the issue, and Attorney General Ashcroft came back two years later with his report. He says, I think the Espionage Act gives me all the powers I need to go after leakers, and they have now taken that and run with it all the way up to the point where, if you followed the extradition of Julian Assange in England, one of the things that government had to prove to get him extradited was that the crime he was being charged with here would be a crime in England. The judge goes through at great length the arguments our Department of Justice was making that the Espionage Act crimes that he was charged with are equivalent to the Official Secrets Act in England.[20] So, it's that confirmation we've come full circle, and this is being used as an official secrets act in a way it was never intended.

Ardia: So clearly, David McCraw, the explosion in these investigations and prosecutions is an effort to stem the flow of this information, to stop these leaks from taking place. From your perspective, has that been successful? Are you seeing this impact national security reporting in a way that makes it more difficult for your reporters to do their work?

McCraw: I think I'm professionally required to answer that, yes. Even though the empirical proof of that is completely nonexistent. Anecdotally, the reporters will tell you that they have sources that don't talk to them. Many of those aren't

[20] United States v. Assange [2021] EWHC (QB) 2 [30]-[51] (Eng.) https://www.judiciary.uk/wp-content/uploads/2021/01/USA-v-Assange-judgment-040121.pdf.

necessarily national security. They may be White House sources and Justice Department sources that aren't national security sources as we think of them. When this question comes up—is there a chilling effect caused by the prosecutions—it takes me back to the different way the chilling effect was discussed in *N.Y. Times v. Sullivan*[21] in 1964 and then in *Branzburg v. Hayes*[22] eight years later. In *Sullivan*, they assume there's a chilling effect from libel suits.[23] They take that as an article of faith that if libel suits are too easy, that the press is going to be chilled. You then get to *Branzburg* and the majority opinion spends a great deal of time saying, well, look, they don't have any proof of this, if they make their record maybe we'll feel differently.[24] And the dissent, takes them on on that.[25] But, it really frames how much a chilling effect in all of these areas touching the press is in many ways more religious belief than empirical belief, and I'm a religious man on this one. I do think it is a chilling effect.

One thing that makes this hard is what kind of reporting we're talking about. What's the scope of the reporting, the fabric of reporting, that's likely affected? In my experience, the WikiLeaks, the Snowden type of information drop is the rare exception, even the kind of things you're seeing in some of the prosecutions where there are suspicious activity reports from Treasury, where there's a volume of documents. Most of the national security reporting that I'm familiar with through my reporters deals with a much more granular, mosaic approach to reporting. They're hearing it from trusted sources in bits and pieces. And, that has continued, I think, in part, because it's done by very high-level people in many cases, and, in part, because it doesn't involve documents. So, there's also sort of an ambiguity about what is classified. You're not looking at a document that has a stamp on it.

And I think it's important to think about the prosecutions. By my count—and, of course, getting the count right is always hard because you've got to know what is media and what's national security—but, if you look at the seven prosecutions during the Trump years besides Assange, [there have been] three people who leaked to *The Intercept*, two who leaked to BuzzFeed,

---

[21] 376 U.S. 254 (1964).
[22] 408 U.S. 665 (1972).
[23] *See Sullivan*, 376 U.S. at 278–79.
[24] *See id.* 693–95.
[25] *See id.* at 732–34 (Stewart, J., dissenting).

and one to WikiLeaks. The other one was NBC. I think that pattern is telling in that it tends to be low-level government employees and media outlets that share none of whatever remains of a good feeling of institutional government toward mainstream media. So, I don't think that's random, and I don't think those reporters at those sites are sloppy or more careless. I do think that they're seen as more likely targets.

I guess the last thing I'd say about this goes back to my overclassification point. There's so much that's classified, and so much of what's going on here is putting bits and pieces together to make a story that I'm not always convinced that the leaker even knows that he or she is the leaker. A few years ago, attorneys for a person who ultimately was prosecuted came to my office and said, can't your reporter help us out here? Can't your reporter say that my guy wasn't the one? And I couldn't decide whether their client was lying to them or their client just didn't understand that in conversations classified information comes out. And that goes, in part, to the point David was making earlier, that you have to understand the motivation, what drives people to leak and what would stop them from doing it. Obviously, if you're not even sure you were the source, it's very hard to see the effect of the law to deter that kind of conduct.

Ardia: We've been hinting at the First Amendment's operation in this space, and I want to move now to explore that a little bit more directly. One of the things that's quite shocking for someone who looks into the court's view of the First Amendment issues here is that there is a dearth of appellate decisions. There's one appellate court decision from 1988, we mentioned *United States v. Morison*,[26] the decision by the Fourth Circuit. That's it, that's the extent of the appellate treatment of the First Amendment issues under the Espionage Act. That's rather shocking David Schulz, why is that? That was a long time ago.

Schulz: Yeah, it was a long time ago, and that was actually the very first case involving a leak to the press that actually went to trial and led to a verdict. As Heidi mentioned, there were a couple earlier, one in the 50s and one in the 70s that kind of fizzled and didn't go forward. And it's an interesting case because the Fourth Circuit upheld the conviction on a very bad

[26] 844 F.2d 1057, 1060 (4th Cir. 1988).

set of facts. In terms of trying to frame the First Amendment or the public interest involved, the facts weren't particularly compelling. Mr. Morison worked for the Navy.[27] He was trying to get a job with *Jane's Defence Weekly*, a big defense magazine, and so he leaked a spy photograph showing the capabilities of U.S. spy plane cameras that we're able to pick out very small things on the ground.[28] This was like something our government considered very secret, keeping concealed the technical capabilities that they have. And he leaked a photo to *Jane's*, and the intent, you know the notion that he knew he was doing something wrong, not only was he trying to get a job when he did this, but he put it in an envelope to the editor that was anonymous.[29] He physically cut off of the photograph the secret designations and sent it in a separate envelop, so, in theory, he couldn't get caught.[30] And how did he get caught? This goes back to the whole thing about the reporter's privilege. He got caught because of old fashioned, gumshoe detective work. The Department of Justice went to *Jane's*, got the photo, there was not a reporter's privilege issue over in England, and they found his fingerprint on it.[31]

So, they had him, they had his bad intent—this knowledge that he was doing something wrong. So, he's convicted, and when he's making these First Amendment arguments that the Espionage Act doesn't have a sufficient intent requirement and that there are other problems with it, the court is able to say, well, to the extent we should be worried about an intent, we have enough bad intent here.[32] And they don't really grapple further with the First Amendment issues. One of the reasons, which Heidi goes into at great length in our paper, is that they view this not as a First Amendment problem, but as a theft of government property, which changes the First Amendment analysis.[33] But, even in that context, two of the judges concur separately to say, you know, the First Amendment concerns would be different here if we were going after *Jane's Weekly* rather than going after the leaker because we have the bad

[27] *Id.*
[28] *Id.* at 1060–62.
[29] *See id.*
[30] *See id.*
[31] *Id.* at 1061–62.
[32] *See id.* at 1068–70.
[33] *Id.* at 1068.

intent and we have other things.[34] Now, that's the state of the law in terms of it.

The next time that the government went after someone for leaking was the AIPAC case[35] that Mary-Rose talked about this morning. It involved a leak to two lobbyists for the American Israel Political Action Committee.[36] There was a lot of concern then because if they were responsible—they were people who received information, not leakers—then it raises all these same issues about what's the First Amendment protection for the press? Are they in any different posture than the press? So, it was intensely litigated at the district court level. The judge handling the case ultimately concluded, well, I'm going to read the Espionage Act to say that the government will have the burden of proving here that this information that was passed on to the defendants, which they then passed on to the government of Israel, that they're going to have to show that the defendants had a bad intent when they passed it on.[37] That was a switch in the law, because the government's argument had been and has always been that the language of the Espionage Act only requires them to show that this was national security information and that a reasonable person would understand that it had the potential to cause harm to United States or to aid an enemy. You don't have to have the intent. It's just sort of like a negligence standard. Anybody would have known not to pass this on. And the judge said that's not good enough given the First Amendment issues here—you're going to have to show an actual intent.[38] The government then dropped the case,[39] basically saying we don't think we can meet that burden.

So, even that First Amendment requirement in terms of how the act gets applied hasn't been reviewed on appeal. Although in an interlocutory motion dealing with some evidentiary rulings, the Fourth Circuit went out of its way to

---

[34] *See id.* at 1085 (Wilkinson, J., concurring) ("This prosecution was not an attempt to apply the espionage statute to the press for either the receipt or publication of classified materials."); *see also id.* at 1085 (Phillips, J., concurring) ("I agree with Judge Wilkinson's differing view that the first amendment issues raised by Morison are real and substantial . . . .").

[35] United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006).

[36] *Id.* at 607–08.

[37] *See id.* at 626–27.

[38] *See id.* at 626–27, 640–41.

[39] *See* Neil A. Lewis & David Johnston, *U.S. to Drop Spy Case Against Pro-Israel Lobbyists*, N.Y. TIMES (May 1, 2009), https://www.nytimes.com/2009/05/02/us/politics/02aipac.html.

suggest that the district court got it wrong.[40] So, there's a reason to believe that even that level of protection doesn't exist from the First Amendment. Why we don't have other decisions, I think it was touched upon earlier, I think a lot of these plead out. A lot of them go in other directions, and the fact is from a protection of the press point of view, the sort of concerns David McCraw would have, there hasn't been anyone else other than the two AIPAC lobbyists who were recipients of information who've been charged with violating the Espionage Act. It's always the leaker. The leaker is a problem under the First Amendment, but it's one step removed from going after a journalist, which is why now Julian Assange is such a big issue because he's the next one in line who's been accused of being the recipient of information rather than the leaker.

Ardia: And I'm hoping we'll get to Assange in a moment or two. I do want to ask Heidi, after *Morison* the district courts have been quick to reject First Amendment arguments at the threshold under a theory that it's conduct and not speech. Someone mentioned earlier, this is thievery. The court says you've stolen something. The First Amendment doesn't have anything to say about that. Is that right under the First Amendment? What is going on in the courts with regard to even being willing to address First Amendment issues?

Kitrosser: So, I think there are huge things going on. Part of the story is national security exceptionalism, right? We see that not only in the classified information context, but in other contexts. In the 2010 case of *Holder v. Humanitarian Law Project*[41] there we saw, in a different context, the Supreme Court was very, very quick to say, oh, strict scrutiny, which is normally such a punishing standard, is very easily met in the context of an aid organization that could be deemed to be providing material support to terrorists when they engage in training, etc.,[42] for reasons that were clearly steeped in national security exceptionalism. So, that's part of the story, quite simply. That manifests itself in these cases as this argument that there really isn't even a First Amendment concern here and specifically this argument that, in so far as classified information is involved, conveying the information is no longer simply speaking in a way that triggers First Amendment concerns, but is really more akin

[40] *See* United States v. Rosen, 557 F.3d 192, 199 n.8 (4th Cir. 2009).
[41] 561 U.S. 1 (2010).
[42] *See id.* at 28–39.

to some kind of harmful action, more akin to theft. So, that's part of the story.

I also think part of the story is simply, again, that these things kind of build on each other. Once the court said that in *Morison* then it becomes sort of easier to take, what I think is probably, a judicial intuition that, again, there's just something special about national security and cloak it in that [analogy] of thievery. I also do wonder, and this is just me speculating, but I do wonder to what extent the thievery analogy took hold because the facts of *Morison* lent themselves to that a little more readily because it involved not only a tangible document, but as they've said, it involved somebody literally taking the document off of their coworker's desk, cutting around the edges, putting it in an envelope, and mailing it away. It wasn't even a photocopy, they actually took the tangible document. So, I wonder to what extent that lent itself further to the analogy. Then other courts just ran with it in a way that was compatible with their intuitions because of national security exceptionalism.

All of that said, I don't think it's right. I mean, it's taken hold. And, obviously, several courts have sort of run with it. So, it's "right" in the sense that a number of courts have sort of embedded it into doctrine. I don't think it is right, though. I think that the minute we take a few steps back and say, well, wait a minute, somebody might have stamped the words classified on this, at least when we're talking about tangible documents, but if we just put that aside for a minute, what are we talking about? We're talking about information that involves foreign affairs and involves matters of public concern. And we're talking about somebody conveying the information. Now, that's not to say they should necessarily prevail. Certainly not to say that they're absolutely protected. No speaker is absolutely protected. Everyone is subject to potential limits compatible with First Amendment standards. But the conveyance of information that under ordinary First Amendment law, punishing that on the basis that the content conveyed is dangerous raises all kinds of alarm bells and should be triggering pretty strict standards. Nonetheless, under this doctrine, under the thievery analogy, etc., we have this world where, in fact, the classification stamp just takes you into a different universe. The First Amendment rules don't apply. So, I think that is very problematic, but that is the reasoning a number of courts have run with.

Papandrea: I just wanted to underscore the disconnect that Heidi is illustrating between the limited case law in this area and the rest of the Supreme Court's doctrine. When David McCraw a moment ago was mentioning *N.Y. Times v. Sullivan*, we have this robust commitment to the discussion about public affairs and public officials. And we see this in a number of the Supreme Court's opinions. Everyone agrees leaks are not a good scenario. No one wants leakers to be the way that we find out about information. It's a very flawed system, but a lot of people agree that we have no better system. To say that there is no First Amendment issue is ridiculous. It doesn't mean, as Heidi said, that every leaker should prevail.

As I mentioned this morning, certainly there are some secrets that need to be kept secret, but there is a real disconnect here with our commitment to the robust discussion of public issues. And I'll just highlight something that I prodded the panelists this morning with about whether there actually should be a First Amendment right of access to this information that may help leakers. The idea that actually the public has a right to hear this information is a longshot to ever get accepted, but if it ever were accepted, it's like the structural value of the First Amendment in informing our democracy. Heidi is nodding because she's written a lot about that, so I'm really just borrowing her ideas. But I think that there's a lot of just, again, disconnect with our commitment to informed public discussion.

McCraw: I just wanted to underscore what Heidi, Mary-Rose, and Dave were saying about the judges essentially surrendering any role in this process. The Second Circuit had a criminal case decided in 2019 where they drop a footnote thanking these security agencies, the intelligence agencies, for helping them redact their decision and saying that they had neither the expertise nor the inclination as a court to second guess them.[43] I remember when *The New York Times* and the ACLU sued over the targeted killing memo, which we won, in part. The lawyer for the ACLU and I sat in the Second Circuit courtroom while the court met privately with the lawyers for the government. We later found out, because it's in the decision, in

[43] United States v. Hasbajrami, 945 F.3d 641, 646 n.1 (2d Cir. 2019) ("[W]e have neither the authority, nor the expertise, nor the inclination to overrule classification decisions made by the relevant executive branch agencies. We respect the need for such classification of sensitive national security information, and appreciate the cooperation of the agencies in the effort to limit the need for modifications and redactions.").

that secret session the government refused to identify one of the people who was at the session with the judges, that there was somebody whose identity was classified. And the Second Circuit judges were unable to convince the attorneys for the Justice Department that it would be a nice thing to identify everybody in the room to the judges. In the opinion, the Second Circuit criticized them for that. But he's never identified, and we've seen over and over that kind of deference taking hold. It goes to what, I think, Steve Vladeck was saying this morning, that essentially it's a single branch of government that is deciding these issues. And it happens to be the branch that has the most investment in hiding embarrassment, hiding unlawfulness, and hiding a lot of things that the public should know.

Schulz: If I could just say a point on that to follow up, because, Mary-Rose, I think your point about having a constitutional right of access is a really interesting point. We've litigated the issue of the conflict between classification and a constitutional access right in court cases. One that went to the D.C. Circuit, about five years ago, arose out of a Guantanamo habeas hearing where certain videotapes that were classified were admitted into evidence, and *The New York Times* and other press organizations went in to get it, asserting a constitutional right of access.[44] Basically, the argument we made was, look, there's no question that the right of access applies here.[45] It's a court record. There's solid precedent in the D.C. Circuit. And the district court judge agreed with us that there was a right of access. And we said, therefore judge, you have to decide whether it meets the Press-Enterprise standard, a heightened First Amendment standard for the government to keep it secret. The district court judge said, yes, you're right, said they haven't met the standard, and ordered it released.[46]

On appeal, you have a train wreck, right? You have a three-judge decision, one of which says there is no right of access to classified information ever, even in the court,[47] which to me raises lots of separation of powers questions. Can the executive order a trial to be done in secret because they want to have classified information? The court has no role? Another judge said the district got it right on the legal analysis, but on the facts here

[44] Dhiab v. Trump, 852 F.3d 1087, 1089 (D.C. Cir. 2017).
[45] *Id.* at 1090.
[46] *See id.* at 1089.
[47] *See id.* at 1094–98.

it should still be secret.[48] So, you had two judges to reverse. And the third one said, I can't even tell if the right of access should apply here because the teaching the Supreme Court has given us is too ambiguous.[49] Like at what level do we decide the history and the logic? So, it's a train wreck, and it hasn't been decided. I think the problem we face, it goes back to Steve Vladeck's problem. Judges don't want to decide these issues. And, ultimately, I think if you push the constitutional right of access and give it to a judge, even if they accept the existence of the right, the legal analysis is going to come down to, "well, as a judge, what I have to decide is is it properly classified? Because if it's properly classified, then there's a threat to national security, and I should defer to the executive." That turns out to be exactly the same standard under FOIA. You're entitled to get it under FOIA unless it's properly classified, and we've seen how far that has gotten us. So, we have an institutional problem with judges who are not asserting their right to look at this stuff. It goes back to what David McCraw was saying, there's so much classification, and there's so much stuff that even the executive branch recognizes doesn't really need to be kept secret. Judges are unwilling to look at that or to consider the importance to the public of knowing the information. There's no balance that comes into play.

Ardia: So, I want to make sure we get a chance to talk a little bit about the Assange prosecution. But, I have a segue into that, and that is the phrase that David and Heidi use in their article about this whole edifice being built on "a house of sand."[50] And now we've got a storm coming through, and it's this prosecution against Julian Assange. Obama, under a lot of pressure, declined to bring a case against Julian Assange, and the Trump administration decided to go forward with it. I was really struck in the earlier panel that they excluded from those charges anything related to the DNC email hack and disclosure. So, that may tell us something about the thinking within the Trump administration. But, Mary-Rose, what do we make of the Trump administration's willingness to plow forward with this, and what might we expect to come?

Papandrea: Well, I think I tipped my hand pretty strongly this morning about this case. You know, I do think it's part and

---

[48] *See id.* at 1098 (Rogers, J., concurring).
[49] *See id.* at 1106–07 (Williams, J., concurring).
[50] Kitrosser & Schulz, *supra* note 7, at 211.

parcel of the Trump administration's attack on the press. And I know that's a bit controversial because many people don't regard Julian Assange as part of the press. I know early on—I think things have changed, David McCraw can speak more to this—the more traditional mainstream media really has distanced itself from WikiLeaks in many ways, and they are different in some ways. But the problem is they're not really different in currently any legally recognizable ways. So, for example, we have a press clause in the First Amendment, but it hasn't really been given any meaning. If it were, we'd have to define who the press is, and I don't know whether Julian Assange and WikiLeaks would or wouldn't fall within that definition. It would be difficult to draw a line that would distinguish WikiLeaks and Julian Assange from the mainstream traditional media and journalists. They are collecting information. They're disseminating information. It's public information. There's value to a lot of this information. So, if a prosecution against Julian Assange goes forward—and, again, I'll be anxious to see what the Biden administration's view is on this—it very much threatens the press because it is not a good set of facts.

I don't think Julian Assange is very sympathetic. It doesn't help that he's an outsider. He's not part of *The New York Times*. People question his motives. And there also is this atmospheric hacking and all of that. So, I would expect very bad law. The case that the press would want would be salutary. They revealed government wrongdoing of NSA hacking or that the NSA is following all Americans, for example, like the Snowden leaks or something like that, something where there was clear public interest that was revealed. And through established news outlets, you know, not through WikiLeaks, then we might have a chance. I don't think it would be for sure that the press would win or the leaker would win, but a chance that the courts would recognize First Amendment protection for publishing national security information of great public value. This question has been left open since Pentagon Papers. Pentagon Papers was a prior restraint case and didn't answer the question of whether the press could be held criminally responsible, after the fact.[51] So, I hate to see this prosecution go forward because I fear what would happen, because the DOJ's assertions that Assange is not a journalist do not reassure me in any way whatsoever.

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

Ardia: Bad facts led to *Morison*. We could see this just steamrolling. Does everyone else share Mary-Rose's pessimism?

Kitrosser: Yeah, I would say that I do. I, too, am eager to see what the Biden administration does, and, hopefully, they will decide to follow suit with the approach the Obama administration had taken and just decline to go forward with it and dismiss it. But I share Mary-Rose's concerns absolutely as to what would happen if they do go forward with it. It's potentially a perfect storm of this very unsympathetic set of facts that gives courts an opportunity to say, and perhaps tell themselves even, that this is different. This is not *The New York Times* combined with national security exceptionalism, and [there are] a lot of bad precedent from other contexts, from leaker context for example, that they could import into this. Not to mention some of those troubling concurring opinions that I think were referenced this morning from the Pentagon Papers case. So, I would be very concerned if the Biden administration does decide to go forward with this.

McCraw: If I could just follow up on that, and Mary-Rose will remember the last time we did this show, it was in Pasadena for the Ninth Circuit, and I got induced into saying nice things about Julian Assange, which isn't easy. And my reward was to be quoted in his civil brief when he was sued by the DNC, which I wasn't talking about. So, I'm going to not step into that particular sinkhole today. I'm not going to speak about the DNC hack and what WikiLeaks did or didn't do. And this will go back to 2010, which is what the indictment's about. I think the interesting thing about this case, or one of the interesting things about this case is that the point that Mary-Rose highlighted, is when the time comes, if a prosecution ever goes forward in the United States, will the mainstream media be writing an amicus brief? Will they feel the need to wrap their arms around a person who reviles them and they return the favor, in large part?

What was interesting, as you'll recall, was in the first indictment, the only charge that dealt with Julian Assange was assistance given to Private Manning in a failed attempt to get more classified information through disguising of a computer hack.[52] And if you look at the press coverage after that, if you

[52] *See* Indictment, U.S. v. Assange, No. 1:18-cr (E.D. Va. Mar. 6, 2018), https://assets.documentcloud.org/documents/5816933/Assange-Indictment.pdf.

look at the editorials around the country, very few mainstream media editorial pages said that's cool, that's perfectly allowable, that should be protected by the First Amendment. To the contrary, they said over and over again, real journalists don't do that. They don't help their sources hack. They don't help their sources engage in computer intrusion. It was when the first superseding indictment comes out, and Assange is now charged not only with his role in aiding that failed attempt at accessing a secure database, but is actually charged with publishing information,[53] that the editorial pages turned very sharply and realized the problem that this kind of prosecution would cause. As Dave Schulz said earlier, it had been an established hallmark of the Espionage Act prosecutions that they were done on government employees and contractors, not on those who receive information and publish it. So, I think it's a hard case because of the facts. But I think it's going to be very hard for people on the mainstream media, established press side of the world to not see some peril if the prosecution goes forward on the publishing aspect of that indictment.

Ardia: David Schulz, you may be drafting one of these amicus briefs on behalf of your clinic.

Schulz: Yeah, and, you know, this goes to one of things Heidi and I grappled with in the paper that was written for the symposium, how do you factor in the First Amendment? I do think that, at least absent some congressional action to change the law or to address some of these issues, there will come a day when there is going to be a case against a recipient of information where these issues are going to be resolved. Is there a First Amendment defense? How do the courts deal with a recipient? And Assange may be that case. But I don't think that there is going to be, well, maybe I should watch what I say here, or I'll end up in David McCraw's sinkhole. But I think it's very difficult to come up with a factual distinction that will carry the day to say what Julian Assange did is not what journalists do. It's different in degree, maybe, but not in kind. And maybe the degree is a way to deal with it. But ultimately, there's going to have to be some way of importing the First Amendment concerns here, and it may be the kind of line drawing that we're going to advocate. At some point, you cross the line between

[53] *See* Superseding Indictment, U.S. v. Assange, No. 1:18-cr-111 (CMH) (E.D. Va. May 23, 2019), https://int.nyt.com/data/documenthelper/1037-julian-assange-espionage-act-indictment/426b4e534ab60553ba6c/optimized/full.pdf#page=1.

being a recipient of information and being an active participant in the wrongdoing.

The example I would point to is there are some cases back in the beginning of this century, I think, I can't remember maybe it was in the 90s. But a case called *Bartnicki* that went to the Supreme Court about whether someone who was the recipient of information that had been illegally obtained through an eavesdrop, listening in on someone's wireless phone, [committed] a crime.[54] The law that made that a crime said if you receive information that has been illegally obtained, you are also guilty if you further disseminate it.[55] It went up to the Supreme Court, and they said, well, that goes too far because there are First Amendment protections.[56]

But then, following *Bartnicki*, there were two cases, *McDermott*[57] and *Peavy*,[58] where this issue was litigated again. In *McDermott*, they allowed the liability for different reasons because there were ethical issues involving a congressman.[59] In *Peavy*, the situation was that a reporter had been the recipient of some of this information.[60] A neighbor recorded his neighbor talking about some insurance scam dealing with a local school district.[61] And the reporter said, this is really interesting stuff—it's newsworthy, involves the school board, but I need more, will you keep recording?[62] Even in light of *Bartnicki* about the innocent recipient being protected under the First Amendment, the Fifth Circuit said no, you became an active participant in this.[63]

And there was a case in the Second Circuit that shows the same principle following the flight T.W.A. 800 crash.[64] That was a big thing because there were a lot of conspiracy theories that it had been shot down by a U.S. missile or a hand-to-ground something, a plane that crashed right after takeoff from Kennedy Airport. In the course of the investigation of that, a reporter was

---

[54] Bartnicki v. Vopper, 532 U.S. 514, 517–18 (2001).
[55] *Id.* at 517–521.
[56] *Id.* at 517–18.
[57] Boehner v. McDermott, 441 F.3d 1010 (D.C. Cir. 2006).
[58] Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000).
[59] *See McDermott*, 441 F.3d at 1016–17.
[60] *See Peavy*, 221 F.3d at 164–65.
[61] *Id.*
[62] *See id.* at 163–66.
[63] *See id.* at 188, 193.
[64] United States v. Sanders, 211 F.3d 711, 714–15 (2d Cir. 200).

talking to someone who was working on the reconstruction of the aircraft in a hangar on Long Island and was being fed information that, yes, we found the remnants of an explosive or a missile.[65] So, this is proving the conspiracy. And the reporter said, well, that's not good enough—I can't go on your say so, but if you will get me a piece of this seat fabric that has some of this on that, I can independently test, then maybe we'll have a story.[66] The reporter was prosecuted under a law that says it's a crime to interfere, and where they drew the line was he became an active participant when he asked his source to go back and get him the fabric.[67] So, it may be that we're going have to draw that sort of a line and that we can push Assange safely to that he got too involved. There are allegations against him of aiding, abetting, and conspiring to do a whole series of things that arguably go beyond what a reporter does. That may be that the safest exit ramp if this all comes to a head.

Kitrosser: If I could just jump in, David A., for a second. It strikes me in thinking about this Assange question that one of the reasons that the stakes are so high here is because of the way that we have traditionally accepted a really sharp line between source and distributor. And because there are so few cases here, that's not a line that's deeply embedded in the case law so much as it's a line that I think has been sort of respected in practice with, for example, the Department of Justice, until Assange, declining to prosecute distributors, et cetera. Of course, cases in the doctrine like *Bartnicki* suggest that we're much less inclined to find recipients blameworthy. And although I do think it's warranted to draw some line between the two, I do think one of the things that is so troubling about the spate of Espionage Act prosecutions against the leakers themselves in the last twenty years or so is the sense that they essentially have no protections, which is one of the problems that we were talking about in the first half of this conversation. So, I do think the two issues are somewhat tied together, even if there should be some different level of protection. I think one thing that puts so much pressure on the Assange case is this notion that if Assange falls into or if the press generally falls into a category where they're "no better" or treated not much differently than the leakers themselves, then all bets are off. And part of that stems from the fact that the leakers at present are accorded virtually no protection, just to

[65] *See id.* at 715.
[66] *See id.*
[67] *See id.* at 716, 723.

highlight how there is a real connection between the two things. So, I think that's something that's important to keep in mind as well as we keep our eyes on what's going on with Assange.

Ardia: So, I do want to ask if you could wave your magic wand and craft the rule that a court would apply in the Assange case and in cases in the future that are brought not against the leaders, but against—and maybe this line is a fuzzy one, as Heidi points out—entities that look like media entities, that look like journalistic entities, what would what rule would you come up with? What do you think would comply with the First Amendment and be workable for the courts to apply in these kinds of cases? I'll let any of you be the first to take a stab at that. My guess is you've already thought about this.

Kitrosser: Well, I'll just jump in really quickly. Although I was just stressing the connection between the leakers and the recipients, I don't know that I would make the standard exactly the same. I would be inclined to provide meaningful protections to leakers but, nonetheless, probably more protection to the recipients, such as the press. So, when we're talking about the press, when we're talking about the distributor, I would be nervous really about any lessening of the ordinary First Amendment protections that already apply outside of the classified information context, particularly given, as David McCraw has been stressing, the earthshaking scope of the classification system. If I could wave a magic wand, I would be disinclined to create a special rule that demands anything less.

Ardia: So, you're thinking, Heidi, an intent requirement? A balancing of the public interest?

Kitrosser: Yes, I'm thinking probably strict scrutiny, but meaningfully applied, not a *Holder vs. Humanitarian Law Project* version. And this isn't really a fit for the incitement context, but perhaps borrowing elements from the incitement context. I think intent probably should be a part of it, and not watered-down intent but intent to actually create the national security disaster that government is prosecuting on the basis of.

Ardia: David, David, or Mary Rose want to weigh in on this?

Papandrea: Just to piggyback on Heidi, no surprise, I would actually, maybe, go a little farther and embrace the Pentagon Papers standard. Even though Pentagon Papers was a prior restraint case,[68] I would embrace that same standard, which arguably is higher than even strict scrutiny depending on how you think about it. But risk of imminent and serious damage to national security, and not only public interest, that would be part of it if it's a third-party publishing. I think the intent standard, and I've argued this elsewhere, can help us. Rather than try to distinguish among publishers and try to figure out who's a journalist, who's not a journalist, maybe we use the press clause––I'm very much opposed to that. But I do think that intent can be helpful in protecting those who truly are trying to inform the American people rather than those who are trying to aid our enemies. How that works in practice, I appreciate that's tricky, but that would be the way I would go.

Schulz: I could go next, because I agree. I would have two things I would do if I had a magic wand. One is to have some sort of intent criteria, whether it's Heidi's or Mary-Rose's, that there would be a burden to show an intent to harm at the liability phase on the government, but that the public interest would have to come in either as a defense by the defendant or at the sentencing phase, in either phase. Some sort of balance along the lines of what Judge Tatel tried to do with the reporter's privilege, where you were balancing when you have a leak investigation, how do you apply the reporter's privilege? He said, well, we've got to balance the importance of the leak against the importance of whatever the crime was and decide. There will be some cases where it's more important for the people to know what was leaked than for the government to prosecute the crime, and I think some sort of balance like that has to come in, which is totally missing at the moment, where a judge is going to have to weigh the importance. I would say that the sorts of things we learned from Snowden—the wiretapping, surveillance, all the things we didn't know are going on—are orders of magnitude different in terms of their public importance from what was disclosed in WikiLeaks. Somehow that needs to factor into both the liability phase as an affirmative defense by the leaker, that this was something the public had a right to know, and at the sentencing stage, potentially.

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

McCraw: There's not much I could add to all of that, other than I'd like to underscore Heidi's point, that I would not look forward to seeing a tampering with the First Amendment standard for the recipients or publisher. I think between *Bartnicki* and what can be drawn from the Pentagon Paper decisions, the protection is strong and right. I think for the government employee who provides the information, there should be an opportunity to argue public interest, probably along the way that Dave Schulz is talking about with harm versus interest.

Ardia: Ashley did you have some questions from the virtual audience?

Fox: Yes. I think we can start with this one continuing our discussion about the Assange case. If we do see this Assange case go the route of drawing a line when reporters can get too involved in encouraging sources to bring them information, as Professor Schulz suggested could happen, how many problems would that create for investigative journalists as far as feeling that they are limited and, maybe, they have to sit back and wait for sources to come to them as opposed to going out to sources themselves? If anyone wants to take that one.

Papandrea: I volunteer David McCraw to say what you would think, and then I'll offer my thoughts. But given that you see this upfront with your journalists, what would happen?

McCraw: Yeah, I think that this is one of the problems with the way the Assange indictment is written. Encouraging people, encouraging sources to provide documents is part and parcel of what journalists do. This idea that there's only complete passivity, only the Trump tax returns coming in a brown envelope to Sue Craig's mailbox, if that's the only thing being protected, not a lot's being protected. And it's not actually good for journalism because getting something like that in a brown envelope with no markings on it is great legally and awful journalistically. How do you know it's authentic? So, I think that that there is a broad definition of routine newsgathering that should remain protected, and that includes asking people for proof of what they're saying, if somebody tells you something, asking for the document. I find in the Assange indictment when they're talking about him encouraging by posting something on the Internet—him asking does anybody have these ten documents, I'd love to see them—has none of the hallmarks of

pressure or overbearing somebody's will or threatening it or something, it's really quite remote. But even in the direct reporting situation, I think asking a fully sentiment adult, would you give me a document, with that fully sentiment adult being able to say no, shouldn't cross a First Amendment line.

Papandrea: Yeah, I'll just underscore that. Remember, I think everyone on this panel has agreed that there might be a different standard for government employees or contractors and the third-party publishers. Assuming the government can prosecute and does prosecute the original leaker, we can afford to give more protection to the publishers. And even if it means that they cajole and encourage and so on and so forth, unless they're like beating someone up, tying them up, and forcing the disclosure, which is not what we're talking about, I have no confidence that the judiciary could draw a line that would be workable. I do want to point out in the AIPAC prosecution, the conspiracy aiding and abetting charges rested on the provision of inviting the source to a baseball game and providing a fax machine to which the source could send documents.[69] I mean, that is outrageous, but it's also exactly what the government alleged was sufficient to constitute aiding and abetting the leak of the information. So, I don't have any confidence that that line can be drawn. But if they did draw it, I think it would cause just a whole bunch of problems, and it's not necessary to hold the publisher responsible when we can hold the leaker responsible under certain circumstances.

Schulz: In response to the question, I certainly acknowledge there are a lot of problems. I guess I was offering that as one way of trying to sever Assange from bigger problems. And I do think there is a difference to be made between a reporter pursuing a story, knowing information, and trying to get support or authentication. It seems to me different in kind than Assange saying, just give me anything you've got. I want this whole file. I want that whole file. I'm on a fishing expedition. That does seem to me to be a different factual scenario that maybe alters the presumptions that should apply in terms of his intent and the government's legitimate ability to protect those secrets.

Fox: Thank you, I think those are all great answers. I had another question about the intent that different types of leakers

[69] *See* United States v. Rosen, 445 F. Supp. 2d 602, 609, 644 (E.D. Va. 2006).

might have: should there be a different legal or ethical paradigm applied to people who maybe hack and then leak information as opposed to government employees who have authorized access to information and leak it? And how is this affected by whether the employees are acting as private citizens or whether whistleblowing or communicating with the press is a part of their job description?

Kitrosser: Well, I'll take at least the last part of that because I've written a bit about how the First Amendment protection differs depending on whether it's part of the employee's job or not. So, as all the panelists know and many of the people in the audience might know, the Supreme Court did draw a pretty sharp line in the case of *Garcetti v. Ceballos*.[70] This isn't just for national security employees, but for government employees generally, when the Supreme Court said that if you speak in the course of actually doing your job, that receives no First Amendment protection at all.[71] Now, as to how they have drawn that sharp line, I think that's deeply problematic for reasons I won't expand on given the limited time we have left. But suffice it to say, I think that sacrifices a great deal of speech that is of utmost First Amendment value. I will say, in terms of how that relates to national security leakers who leak classified information, in the immediate wake of the *Garcetti* decision, there was some speculation because of some of the language in the case that might mean that there's no First Amendment protection under *Garcetti* for people who come into the possession of classified information as part of their job and leak it because that's information that they wouldn't have had but for their job. I will say the subsequent case of *Lane v. Franks*,[72] I think, actually eliminates that argument and makes pretty clear that just because you came into possession of information due to your job does not mean that when you convey that information you are doing your job.[73] So, I actually think there's a pretty good argument a leaker could make that, almost by definition, if they're leaking information that they're not supposed to be leaking, they're not doing their job. So, in that sense, they're not unprotected by the First Amendment from a *Garcetti* perspective. Rather, the problem they run into is, again, this national security exceptionalism argument that they keep hearing about. So, this

[70] 547 U.S. 410 (2006).
[71] *Id.* at 412.
[72] 573 U.S. 228 (2014).
[73] *See id.* at 238–41.

question of whether you are doing it in the course of doing your job or not, that, I think, is not really the hurdle that they have to worry about.

Papandrea: On the hackers, you know, that is a really good question because that has been a problem. It could be an increasing problem, and I do worry about privacy of people whose emails are hacked in that way. It's not distinguishable from *Bartnicki*, just on the facts of it, except that one thing that a lot of people don't focus on in the *Bartnicki* decision is that the decision did say that they didn't need to hold the radio broadcaster liable because they usually can identify who the interceptor was. In the hacking, I think increasingly we're seeing that the government has a lot of trouble identifying who the hackers are, so that is perhaps a distinguishing factor. Dave McCraw, maybe you have thoughts on hacking. I know that the news outlets have their own journalistic ethics on reporting out hacked information. So, in some ways, they're gatekeepers and do not just republish everything that they get if it's hacked. But I understand those are very difficult types of decisions. To me, this whole hacking thing is distinguishable. I think we've been focusing on this discussion more about government employees who have access to this information as part of their jobs. But people who are hacking is a whole different level, and I could imagine it's going to be an increasing societal problem.

McCraw: And the First Amendment protection, I feel very strongly that should be the same for the publisher. But I think the ethical considerations are really troubling. When Sony was first hacked by the North Koreans, *The Times*, as a matter of standards, decided not to break stories from that hack. But if others were writing about them, the secrecy was out, and it was newsworthy, we'd write about it. It seemed that was different, a private entity being hacked [as opposed to] the government having its secrets purloined, as it were. But then you get to DNC, and it's very hard to say that the DNC materials, even though hacked, were not of such public interest that you wouldn't write about them. And I think virtually every journalistic organization in the country did so. What I hear most often at *The Times* from editors is that it's very important that we not only make good decisions about what we're publishing—that there is a legitimate news interest in it, a public interest in publishing it—but we also need to tell the story of how it came to be in the public's hands, that the story behind the story is it's the North Koreans because

they're unhappy about a really terrible movie. It's the Russians because they're interfering with the election, and we're going to see more of that. I think the challenge for mainstream news media organizations is to go out and tell that story behind the story, even if they decide to publish some of the information that is received.

Fox: Great, thank you. So, I think we'll just close on one final question that I think ties together really all of our topics for today. There are a lot of concerns these days about the state of our democracy, about trust in our government institutions. How does the rise in leak prosecutions that we've seen in recent years relate to that? And how do all of the topics we've covered today––overclassification, leak prosecutions, national security reporting—fit in with the theory of democratic self-governance behind the First Amendment, the idea that the public needs this information for citizens to be able to govern themselves in a democracy. That's a broad question, but I think we can tackle it here in our last couple of minutes. Whoever wants to take a stab at it first.

Kitrosser: I'll dive in. That is a very good question, but it is a huge question. So, I'll sort of pick off little bits of it. Certainly, the most intuitive way, of course, in which all of this relates to self-governance is the notion that the people need to have some idea of what's going on in order to be able to govern themselves and hold their representatives accountable. This makes me think of how the Roberts Court gets a lot of plaudits, generally, for being very, very pro free speech. And yet, we have seen, I think, the Court issue some very disappointing decisions when it comes to speech that helps to inform us. So, it's the Roberts Court that issued the *Garcetti* decision, *Holder v. Humanitarian Law Project*, which, although it's not directly about leaking classified information, it kind of gives further steam to the national security exceptionalism that underlies these lower court cases. So, it does worry me that what we see from the Court is this very strong embrace of, "you can say whatever you want, however offensive, however upsetting," which I do support as a matter of First Amendment law, but there is much less importance placed on the ability of people to actually be able to gain information so that they can say informed things and inform each other and govern themselves. I do worry, relating that to the bigger question, that may reflect where we're at culturally in some ways that we see a great deal of importance placed and concerns

expressed about whether or not people are sufficiently able to express themselves. We see concerns raised about cancel culture, for example, and political correctness, which often are wielded against people who say "well, I don't feel free to say things that may offend people and may therefore lead me to be criticized," but there is much less concern expressed about whether people are actually able to gain the information they need to govern themselves. So, that's just a couple of tiny pieces I'm biting off of that very large question. We can obviously speak for hours about different ways to answer it, but those are just a couple of thoughts.

Papandrea: Well, I think, Ashley, you answered the question a little bit in the question by saying it's important for people to be informed, and what I worry about is a crackdown on the leakers. I really worry about the disintegrating trust in the press and also just all the problems the press has in doing its job, the financial models for the press to be successful. We're not going to function well unless we have dedicated journalists. I could be an ad for your newspaper, David McCraw. You know, it's not enough to have people on social media sharing their ideas about stuff. They have to get information from people who have the knowledge and the expertise to analyze what is happening and what the government is doing. And, particularly with all of the information that the government is producing, the increase of databases and so on, you have thousands and thousands, millions and millions of documents, [it doesn't help] unless you have dedicated experts going through those materials, helping us to understand what they mean. To me, this is a fundamental part of making sure we have a working democracy. And we've had such a weird system for decades where leakers occasionally would be prosecuted, but not too often. The press, never. They get called traitors, but they rarely actually are prosecuted. But I see this threatened. I'm thrilled that Biden is president now for a lot of reasons, but I think it's likely this administration will be more appreciative of the role of the press. We won't hear President Biden tweeting out fake news and attacking every outlet, throwing garbage on journalists every day, encouraging the supporters to beat up journalists at the rallies. All these attacks, we could have a whole symposium on that. I'm hopeful that, in the next four years, this administration will respect the press. I don't mean to say it will always be rosy. There are always disputes between the executive branch and the press. But remember, this is four years, so we're fighting. We're in it for the

long haul, and the people are turned against the press in a lot of ways. So, I do worry, and I just applaud the work of Heidi, David Schulz, David McCraw and the panelists this morning continuing to research how we can solve this very difficult problem.

Schulz: I would just say amen to all of that. Just to tie it together with the panel this morning, I think it was Justice Black in the Pentagon Papers case who said something like, national security is a broad and vague term,[74] and we need transparency with respect to the national security issues we're talking about, in particular, because, with respect to national security, the only real check on government abuse is the people. And when we keep it in secret, we have all sorts of problems. So, everything that was said about the need for this, for democracy to function, is especially true in oversight of our national security forces.

Fox: Great. Thank you so much. I think we'll end there. I think we could all sit here and talk about these topics all day. I know I could sit here and listen to these topics all day long. Thank you, and thank you to everyone for coming today.

[74] N.Y. Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring).