

NATIONAL SECURITY AND THE PRESS: THE GOVERNMENT'S ABILITY TO PROSECUTE JOURNALISTS FOR THE POSSESSION OR PUBLICATION OF NATIONAL SECURITY INFORMATION

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In 2006, then Attorney General Alberto R. Gonzales raised the possibility that journalists could be prosecuted for publishing national security information. In addition, the federal government's prosecution of two former lobbyists for the American Israel Public Affairs Committee (AIPAC) for possessing and disseminating national security information has been called an attempt by the government to prosecute individuals who behave like journalists. This article identifies existing laws under which the press could be criminally prosecuted for the possession and/or publication of national security information and describes how the courts have addressed those laws. The article concludes that while there is support for Constitutional protection for journalists in these cases, the Supreme Court of the United States is unlikely to interpret the First Amendment as protecting journalists from prosecution for possessing and/or publishing national security information. Therefore, the article contends that Congress should amend the statutes outlined herein to limit prosecution to instances when there is evidence of intent to harm the United States.

On May 21, 2006, while appearing on ABC's *This Week*, then Attorney General Alberto R. Gonzales raised the possibility that *New York Times* journalists could be prosecuted for publishing classified information about the National Security Agency's surveillance of terrorist-related calls between the United States and abroad.¹ When asked if the prosecution of journalists for publishing classified information was

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¹See Walter Pincus, *Prosecution of Journalists Possible in NSA Leaks*, WASH. POST, May 22, 2006, at A04.

legal, the attorney general responded, “There are some statutes on the book which, if you read the language carefully, would seem to indicate that that is a possibility.”² Gonzales went on to say:

I understand very much the role that the press plays in our society, the protection under the First Amendment we want to promote and respect. . . but it can’t be the case that that right trumps over the right that Americans would like to see, the ability of the federal government to go after criminal activity.³

While Gonzales did not refer to any specific statutes, when Matthew W. Friedrich, the principal deputy assistant attorney general, testified about the attorney general’s comments before the Senate Judiciary Committee on June 6, 2006, he made it clear that Gonzales was referring at least in part to the 1917 Espionage Act,⁴ which makes it a crime for an unauthorized person to receive national defense information or transmit it to others.⁵ Friedrich testified:

The Department of Justice is committed to investigating and prosecuting leaks of classified information, and Congress has given the Department the statutory tools to do so. Several statutes prohibit the unauthorized disclosure of certain categories of classified information, the broadest of which is Section 793 of Title 18, which prohibits the disclosure of information “relating to national defense.” Also, Section 798 of Title 18 prohibits the unauthorized disclosure of information relating to communications intelligence activities.⁶

Although the justice department never prosecuted the journalists, some commentators called the federal government’s prosecution of two former lobbyists for the American Israel Public Affairs Committee (AIPAC) for violating the Espionage Act⁷ a dangerous attempt by the government to prosecute individuals who behave much like journalists do.⁸ As Fred Kaplan noted, the individuals were charged with

²*Id.*

³*Id.*

⁴18 U.S.C. §§793 (2005).

⁵See *Examining the DOJ’s Investigation of Journalists Who Publish Classified Information: Lessons from the Jack Anderson Case: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Matthew Friedrich, Principal Deputy Assistant Attorney General) (hereinafter *Examining the DOJ’s Investigation of Journalists*), available at http://judiciary.senate.gov/testimony.cfm?id=1928&wit_id=5386.

⁶*Id.* at 1.

⁷See *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006).

⁸See, e.g., Jonathon H. Adler & Michael Berry, *A Troubling Prosecution*, NAT’L REV. ONLINE, Aug. 21, 2006, <http://article.nationalreview.com/?q=NjkyM2E5ZGE0>

distributing information “*not to foreign governments or spies but rather ‘to persons not entitled to receive it’*” and “this is what journalists do routinely.”⁹

While Gonzales’ statement was alarming, and the prosecution of the AIPAC lobbyists raised troubling concerns, the conflict between national security, government secrecy and freedom of expression is, of course, nothing new.¹⁰ Despite this fact, it is important to note that in the years following September 11, 2001, the U.S. government has taken a number of extraordinary steps to increase secrecy, all in the name of promoting national security. Although some authors assert that the administration of President George W. Bush was notably secretive even before the terrorist attacks,¹¹ in the last few years the government has created secret military tribunals,¹² ordered court proceedings closed to the public,¹³ claimed executive privilege in a wide variety of situations,¹⁴ increased the use of the state secrets privilege to prevent the disclosure

ODdmNGViZjhhMDBiNWRIMWJmZTUxYTQ = ; Fred Kaplan, *You’re a Spy*, SLATE, Feb. 15, 2006, at <http://www.slate.com/id/2136324>.

⁹Kaplan, *supra* note 8 (emphasis in original).

¹⁰*See generally* MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA* (1992); JEFFERY A. SMITH, *WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* (1999); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004).

¹¹*See, e.g.*, Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration’s Assault on Freedom of Information*, 11 COMM. L. & POL’Y 479, 484–89 (2006) (arguing that “[a]lthough the events of 9/11 certainly accelerated the tight-lipped nature of the Bush administration, the first nine months of the Bush presidency were notably more secretive than [President] Clinton’s”); Peter M. Shane, *Social Theory Meets Social Policy: Culture, Identity and Public Information Policy After September 11*, 2 ISJLP i, iv (2006) (contending that it has “widely been observed, [that] the Bush administration’s pursuit of increased secrecy was very much in evidence prior to the September 11 attacks and is rooted in its expansive view of plenary executive authority”); Adam Clymer, *Government Openness at Issue as Bush Holds on to Records*, N.Y. TIMES, Jan. 3, 2003, at A1 (cataloging instances of increased government secrecy before and after Sept. 11, 2001).

¹²Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833–57836, Nov. 13, 2001.

¹³Michael Creppy, Chief Immigration Judge of the United States, Memorandum: Cases Requiring Special Procedures, Sept. 21, 2001, *available at* <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf>.

¹⁴*See, e.g.*, *Cheney v. United States District Court*, 542 U.S. 367 (2004); George W. Bush, Memorandum: Disclosures to Congress, Oct. 5, 2001 (limiting disclosure of information to Congress), *available at* <http://www.fas.org/sgp/news/2001/10/gwb100501.html>; George W. Bush, Memorandum for the Attorney General: Congressional Subpoena for Executive Branch Documents, Dec. 12, 2001 (arguing for an expansive application of the executive privilege doctrine), *available at* <http://www.whitehouse.gov/news/releases/2001/12/20011213-1.html>; PFIAB PLAYS SECRECY GAMES, SECRECY NEWS (Federation of American Scientists), Aug. 15, 2002 (describing the Bush administration’s refusal to reveal members of the Presidential Foreign Intelligence Board, even though board membership is public information), at <http://ftp.fas.org/sgp/news/secrecy/2002/08/081502.html>.

of national security information in court proceedings,¹⁵ blocked access to the records of former presidents,¹⁶ refused to provide documents in response to congressional inquiries,¹⁷ kept secret the National Security Agency's (NSA) surveillance of citizens,¹⁸ reclassified previously unclassified documents,¹⁹ created additional exemptions to the federal Freedom of Information Act (FOIA) for critical infrastructure information,²⁰ and banned media coverage of the arrival of the bodies of military personnel killed in the Iraq War.²¹ In the year following the attacks of September 11, the government classified 11.3 million documents and 14.2 million the next year.²² In 2004, the federal government created 15.6 million classified documents, or 81% more than in 2000, the year before the terrorist attacks of September 11.²³

In addition, public opinion polls suggest that many Americans see terror as a justifiable reason to increase national security.²⁴ Law professor Cass Sunstein posited that the intense emotions of September 11 caused people to focus on adverse outcomes rather than on their likelihood.²⁵ This focus, which Sunstein called "probability neglect," allows political actors to promote attention to problems that may not deserve public concern and enact laws and promote policies that may not be

¹⁵William G. Weaver & Robert M. Pallito, *State Secrets and Executive Power*, 120 POLI. SCI. Q. 85, 86 (2005). The state secrets privilege, a judicial creation, is most often used by executive branch officials in civil court cases to protect against subpoenas, discovery motions and other judicial requests for information. See *United States v. Reynolds* 345 U.S. 1 (1953) for the genesis of the privilege.

¹⁶Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 1, 2001).

¹⁷See, e.g., *The FBI's Handling of Confidential Informants in Boston: Will the Justice Department Comply with Congressional Subpoenas?* Hearing Before the Committee on Oversight and Government Reform, 107th Cong. (2001) (statement of Rep. Henry Waxman, Chairman, House Comm. on Oversight and Government Reform) (noting that Justice Department had recently indicated it would no longer be complying with congressional request for documents pertaining to criminal investigations, whether open or closed).

¹⁸See James Risen & Walter Lichblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A01.

¹⁹See Kirtley, *supra* note 11, at 495. See also Scott Shane, *U.S. Reclassifies Many Documents in Secret Review*, N.Y. TIMES, Feb. 21, 2006, at A1.

²⁰6 U.S.C. §214(a)(1)(A) & (E) (2005).

²¹See Dana Milbank, *Curtains Ordered for Media Coverage of Returning Coffins*, WASH. POST, Oct. 21, 2003, at A23.

²²See David Nather, *Classified: A Rise in "State Secrets,"* 63 C.Q. WEEKLY 1958, 1960 (2005).

²³See Kenneth Jost, *Government Secrecy*, 15 C.Q. RESEARCHER 1007, 1008 (2006).

²⁴See, e.g., Pew Internet & American Life Project, *One Year Later: September 11 and the Internet*, Sept. 5, 2002, at 10, available at <http://www.pewinternet.org/reports/toc.asp?Rep=69>.

²⁵Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L. J. 61, 61 (2002) (writing that after 9/11 Americans entered "a new and frightening geography where the continents of safety and danger were forever shifted").

in the best interests of the public.²⁶ Sunstein is supported by research which suggests that the public is likely to react irrationally, change its voting behavior, and increase in-group identification and consequent hostility toward perceived outsiders, all as responses to the unusual salience of the September 11 attacks.²⁷ All of these factors would also seem likely to increase the public's support for government secrecy. Indeed, when the *New York Times* and *Washington Post* published anti-terrorism techniques, the public and even other members of the media expressed disapproval.²⁸

Gonzales' statement, taken with the prosecution of the AIPAC lobbyists, recent increases in government secrecy, and the public's response to the September 11 attacks, demonstrates that the ability of the government to silence the press remains an important issue in a democracy. This article focuses specifically on the government's ability to punish journalists for the possession or publication of national security information, rather than on the larger issue of the government's ability to prevent leaks. In addition, it focuses on illegally obtained national security information, rather than on all illegally obtained information. It provides an update on the state of the law, reviews how courts have dealt with the issue, and analyzes the prospects for successful prosecution of recipients and publishers of leaked government information.

Because scholars have largely been divided on the topic, the second part of the article provides a review of previous research on the ability of the government to punish the possession or publication of national security information. Next, the article analyzes existing federal statutes that could be used to prosecute journalists for the possession or publication of national security information and cases that have applied those statutes. Third, the article discusses the findings of this research, analyzing the likelihood of prosecution under the identified statutes. Finally, the article concludes by exploring First Amendment issues related to prosecuting journalists and suggesting that the Supreme Court is unlikely to interpret the First Amendment as protecting journalists from prosecution in cases involving the possession or publication of national security information. Based on this conclusion, the article posits that Congress should add a scienter clause to the statutes identified by

²⁶*Id.*

²⁷See Paul Gowder, *Secrecy as Mystification of Power: Meaning and Ethics in the Security State*, 2 ISJLP 1, 4 (2006).

²⁸See, e.g., *Examining the DOJ's Investigation of Journalists*, *supra* note 5, at 1 (statement of Gabriel Schoenfeld, Senior Editor, *Commentary*); Editorial, *Stop the Leaks*, NAT'L REV. ONLINE, June 26, 2006, <http://article.nationalreview.com/?q=ND-VhYWQzMmQ3YWRINzFkYjRmZmY4ZTQzZmUwZjJhZjI=>; Scott Sherman, Editorial, *Chilling the Press*, THE NATION, July 17, 2006, available at <http://www.thenation.com/doc/20060717/sherman>.

this research that do not already contain one.²⁹ While no mainstream journalist has yet been prosecuted under any of the statutes identified herein, there remains a chill in the air in that will not dissipate until journalists are protected when disseminating important information to the public.

NATIONAL SECURITY AND THE PRESS

Although the issue of government secrecy has taken on higher resonance since September 11, 2001, the debate surrounding how to strike a proper balance between security and open government long predates the terrorist attacks. However, as Benjamin S. DuVal Jr. noted, while debates over secrecy have been common since the founding fathers, there was little discussion of the First Amendment aspects of secrecy until late in the twentieth century, and the Supreme Court of the United States has yet to address the issue fully.³⁰ It was not until 1971 that the high Court ruled on the press's ability to publish classified government documents in the famous Pentagon Papers case, *New York Times Co. v. United States*.³¹ In that case, the Court, by a 6-3 vote, set a very high standard for preventing the press from publishing classified information. In a per curiam opinion accompanied by six concurring and three dissenting opinions, the Court refused to grant the government's request for an injunction to prevent the *New York Times*, the *Washington Post* and other newspapers from publishing a series of articles based on a classified study of U.S. involvement in Vietnam. The Court held that any government attempt to prevent publication came to the Court with a heavy presumption of unconstitutionality.³²

However, the justices left open the question of whether the two newspapers could be prosecuted after the fact of possession or publication. In *dicta*, some of the justices indicated that the newspapers could or

²⁹"Scienter" is defined as "a mental state consisting in an intent to deceive, manipulate, or defraud." BLACK'S LAW DICTIONARY 1373 (8th ed. 2004). In the context of the statutes outlined in this article, a scienter clause would require that a defendant acted with intent to harm the United States before he or she could be prosecuted for the possession and/or publication of national security information.

³⁰Benjamin S. DuVal Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 581-82 (1986).

³¹403 U.S. 713 (1971) (per curiam).

³²*Id.* at 713 (per curiam) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' District Court for the Southern District of New York in the *New York Times* case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the *Washington Post* case held that the Government had not met that burden. We agree." (citations omitted)).

should be prosecuted under the Espionage Act, even if the government could not prevent publication.³³ More than thirty years after the Pentagon Papers case, there is still a great deal of uncertainty over how the judiciary should deal with attempts to punish the possession or publication of national secrets. Duval wrote, “Despite a rapidly growing body of case law, . . . the Court’s decisions fail to deal in any comprehensive fashion with the issue. More seriously, the Court has failed to come to grips with the distinctive character of the secrecy issue.”³⁴ While the Supreme Court has yet to deal with the issue, many commentators have analyzed statutes and case law to determine to what extent the government can prosecute journalists.

In 1973, just two years after the Pentagon Papers case, law professors Harold Edgar and Benno C. Schmidt Jr. undertook a lengthy discussion of the legislative history of the Espionage Act.³⁵ They argued that a close examination of the legislative history revealed conclusively that Congress only intended it to punish those who had intent to injure the United States.³⁶ However, they also found that while the legislative history of section 793 — which punishes the communication, reception or retention of defense information — demonstrated Congress did not intend for it to apply to the press, the language of the statute did not support such an interpretation.³⁷ In addition, after examining section 798, which punishes the communication or publication of certain classified information, Edgar and Schmidt concluded that it is violated when the government can show knowing and willful communication regardless of intent.³⁸ Furthermore, they concluded that the inclusion of the term “publishes” implies that the section is meant to operate as a ban on

³³*Id.* at 735 (White, J., concurring) (“The Criminal Code contains numerous provisions potentially relevant to these cases.”); *id.* at 743 (Marshall, J., concurring) (Congress has given the executive branch the power to punish the receipt, disclosure, communication and publication of “certain documents, photographs, instruments, appliances, and information” related to state secrets.); *id.* at 752 (Burger, C.J., dissenting) (“I am in general agreement with much of what Mr. Justice White has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.”); *id.* at 754 (Harlan, J., dissenting) (It was left undecided whether “[T]he newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government’s possession and that the newspapers received with knowledge that they had been feloniously acquired.”); *id.* at 759 (Blackmun, J., dissenting) (“I also am in substantial accord with much that Mr. Justice White says, by way of admonition, in the latter part of his opinion.”).

³⁴DuVal, *supra* note 30, at 582.

³⁵Harold Edgar & Benno C. Schmidt Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973).

³⁶*Id.* at 997–98.

³⁷*Id.* at 1059.

³⁸*Id.* at 1000.

any form of public speech.³⁹ Similarly, DuVal found that the Espionage Act, “while arguably not so intended, can be read to cover a reporter who knowingly publishes a classified document.”⁴⁰ DuVal concluded, however, that the Espionage Act “is of uncertain applicability against disclosures made for the purpose of public debate.”⁴¹

David H. Topol examined the press’ ability to publish national security information, focusing on the ruling of the U.S. Court of Appeals for the Fourth Circuit in *United States v. Morison*,⁴² a case involving the retention and transmittal of national security information by a government employee to British magazine *Jane’s Defence Weekly*.⁴³ Topol concluded that “once classified information has reached the media, the government has statutory authorization to prosecute the media.”⁴⁴ He noted that in *New York Times v. United States*⁴⁵ six of the nine justices suggested that the government could prosecute newspapers for publishing classified information even if the government could not enjoin the publication of the Pentagon Papers.⁴⁶ Furthermore, DuVal argued that both the Atomic Energy Act⁴⁷ and the Intelligence Identities Protection Act of 1982⁴⁸ could be read as prohibiting the dissemination of information by “anyone at all,”⁴⁹ while Lawrence P. Gottesman reached a similar conclusion about the Intelligence Identities Protection Act.⁵⁰

Unlike these commentators, Judge Richard A. Posner argued that no federal statute constituted an effective prohibition of leaks of properly classified material.⁵¹ Posner wrote that because the Espionage Act of 1917⁵² requires that an individual have reason to believe information being passed on could be used to injure the United States or advantage a foreign nation, it could not be used to punish the press for disseminating

³⁹*Id.*

⁴⁰DuVal, *supra* note 30, at 671.

⁴¹*Id.* at 673.

⁴²844 F.2d 1057 (4th Cir. 1988).

⁴³David H. Topol, Note, *United States v. Morison: A Threat to the First Amendment Right to Publish National Security Information*, 43 S.C. L. REV. 581 (1988).

⁴⁴*Id.* at 586.

⁴⁵403 U.S. 713 (1971).

⁴⁶Topol, *supra* note 43, at 586–87.

⁴⁷42 U.S.C. §2271–2281 (2005).

⁴⁸50 U.S.C. §421 (2005).

⁴⁹DuVal, *supra* note 30, at 671–72.

⁵⁰Lawrence P. Gottesman, Note, *The Intelligence Identities Protection Act of 1982: An Assessment of the Constitutionality of Section 601(c)*, 49 BROOK. L. REV. 479, 486 (1983) (arguing that despite a legislative history indicating it was “not intended to apply to news reporting of intelligence failures or abuses,” the act could be “applied to all, including the mainstream press”).

⁵¹RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 108 (2006).

⁵²18 U.S.C. §793–798 (2005).

information.⁵³ In addition, Posner concluded that no other statutes explicitly authorize punishing journalists for the publication of illegally leaked classified information.⁵⁴

In 1985, Eric E. Ballou and Kyle E. McSarrow analyzed the case for creating a new, comprehensive statute to protect national security information that could be used to criminally punish the press for the publication of classified information.⁵⁵ Although the authors concluded that the Supreme Court's decision in *Haig v. Agee*⁵⁶ suggested that with the proper statutory tools the government *could* impose sanctions on the press for the possession or publication of national security information without offending the First Amendment,⁵⁷ like Posner, they concluded that current laws do not provide adequate means to stop the leaking of national security information.⁵⁸ While Edward L. Xanders focused on government employees, he also reviewed Supreme Court cases to examine the press's ability to publish national security information.⁵⁹ Xanders reasoned that those who hold that the media have a constitutional right to publish national security information either expressly contend or implicitly imply that the Press Clause must be construed independently of the Speech Clause.⁶⁰ Xanders' own analysis concluded that while the Supreme Court's view on the matter needed clarification, it was clear that "media restrictions are viewed with particular disdain and will be upheld only in the narrowest of circumstances."⁶¹ However, Xanders left the door open to prosecuting the press, making the point

⁵³Posner, *supra* note 51, at 108.

⁵⁴*Id.*

⁵⁵Eric E. Ballou & Kyle E. McSarrow, Note, *Plugging the Leak: The Case For A Legislative Resolution of the Conflict Between the Demands of Secrecy and the Need for an Open Government*, 71 VA. L. REV. 801, 823–34 (1985).

⁵⁶453 U.S. 280 (1981).

⁵⁷Ballou & McSarrow, *supra* note 55, at 845–47. Ballou & McSarrow argue, "Where a prior restraint of disclosure of national security information is sought, the Pentagon Papers decision imposes on the government a burden of harm that is unlikely to be met. Yet, the Court has consistently implied that it would. . . favorably treat a regime of subsequent punishment." *Id.* at 847.

⁵⁸*Id.* at 804.

⁵⁹Edward L. Xanders, *A Handyman's Guide to Fixing National Security Leaks: An Analytical Framework for Evaluating Proposals to Curb Unauthorized Publication of Classified Information*, 5 J.L. & POL. 759 (1989).

⁶⁰*Id.* at 804. For a discussion of an independent construction of the Press Clause, see David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); David Lange, *The Speech and the Press Clause*, 23 UCLA L. REV. 77 (1975); Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

⁶¹Xanders, *supra* note 59, at 805.

that the government's ability to impose criminal sanctions on the press is much broader than its ability to prevent publication.⁶²

Other authors have linked publication to possession, noting the government's ability to punish the press may be different when the media have knowledge that documents in their possession are stolen. William E. Lee explored the link between the manner in which journalists obtain information and the First Amendment's protection of the information's publication.⁶³ He concluded that courts usually regard information-gathering techniques as irrelevant when analyzing the constitutionality of prior restraints, but that courts do consider how information was obtained when considering post-publication punishments.⁶⁴ In analyzing the proposed Classified Information Protection Act of 2001,⁶⁵ which would have amended sections of the Espionage Act to criminalize the dissemination of all classified government information to anyone regardless of intent, Mitchell J. Michalec argued that the government has the ability under existing law to punish the dissemination of government leaks if the journalists are aware the documents in question were stolen.⁶⁶

In contrast, Richard D. Shoop wrote that the Supreme Court's decision in *Bartnicki v. Vopper*,⁶⁷ a civil case involving the broadcasting of an illegally recorded telephone conversation by a radio commentator, provided protection for publishers who knowingly publish illegally intercepted communication so long as they had no part in the interception of the communication and the information in question was of a public concern.⁶⁸ However, Shoop greatly qualified his conclusion by noting that *Bartnicki* was of limited value. He wrote: "The *Bartnicki* holding is vague and difficult to apply since the critical tests for 'information of public concern' and 'publication' are undefined. . . . *Bartnicki's* ultimate

⁶²*Id.* at 807 n.172 (citing *Southeastern Promotion's Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (There is less constitutional protection against criminal penalties than against prior restraints.); *New York Times v. United States*, 403 U.S. 713, 733 (1971) (White, J., concurring) ("Prior restraints require an unusually heavy justification under the First Amendment; but failure by the government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication."); *Near v. Minnesota*, 283 U.S. 697, 713 (1930) (Subsequent punishment is the appropriate remedy for "malicious, scandalous and defamatory" publication, not prior restraint.)).

⁶³William E. Lee, *The Unusual Suspects: Journalists as Thieves*, 8 WM. & MARY BILL RTS. J. 53 (2000).

⁶⁴*Id.* at 58.

⁶⁵H.R. 2943, 107th Cong. (2001).

⁶⁶Mitchell J. Michalec, Note, *The Classified Information Protection Act: Killing the Messenger or Killing the Message?*, 50 CLEV. ST. L. REV. 455, 459 (2003). For a discussion of the Classified Information Protection Act, see *id.* at 461–62.

⁶⁷53 U.S. 514 (2001).

⁶⁸Richard D. Shoop, *Constitutional Law: First Amendment: Bartnicki v. Vopper*, 17 BERKELY TECH. L.J. 449, 464 (2002).

usefulness is limited because the vagueness of the holding invites future challenges likely to result in an even more restricted holding.”⁶⁹

Also focusing on *Bartnicki*, Posner concluded there were no First Amendment hurdles to punishing the press for publishing national security information when original documents were obtained illegally by a third party.⁷⁰ According to Posner, although the *Bartnicki* Court held that speech by a law-abiding journalist who possessed illegally obtained information could not be punished because of the illegal conduct of the individual who provided the information to the journalist, *Bartnicki* was not applicable when considering prosecution of a journalist for communicating stolen national security information. Posner argued that because journalists would be in violation of the law for merely *possessing* classified information, they would not be protected by *Bartnicki* because such journalists would not be law-abiding.⁷¹ In addition, Topol’s analysis of *Morison* led him to conclude that members of the press could be prosecuted for possessing classified information.⁷²

Commentator Mark Feldstein noted that although courts have increasingly opened the door to the possibility of journalists being criminally charged by the federal government for possessing or publishing information obtained from stolen documents, the Supreme Court has never definitively addressed whether the press can be prosecuted for receiving or publishing information from stolen documents.⁷³ Like Shoop, Feldstein concluded that *Bartnicki* was a fragile and extremely narrow holding. He wrote that the justices “deliberately avoided enlarging the decision in ways that would definitively clarify journalistic liability for playing a more active role in soliciting and disseminating stolen information.”⁷⁴ In addition, both Feldstein and Lee concluded that lower courts have yet to definitively answer whether the government can prosecute journalists for the receipt, possession or publication of stolen information.⁷⁵

In sum, while most authors agree that the government is unlikely to meet the high burden required to impose a prior restraint on the press in most cases, there is a good deal of conflicting commentary on the ability

⁶⁹*Id.*

⁷⁰POSNER, *supra* note 51, at 108–09.

⁷¹*Id.* at 108.

⁷²Topol, *supra* note 43, at 590.

⁷³Mark Feldstein, *The Jailing of a Journalist: Prosecuting the Press for Receiving Stolen Documents*, 10 COMM. L. & POL’Y 137 (2005).

⁷⁴*Id.* at 174.

⁷⁵*Id.* at 176–77 (arguing that no lower court cases have definitively answered “whether a journalist can be punished for receiving stolen government documents”); Lee, *supra* note 63, at 132 (concluding courts have left “too many unanswered questions about newsgathering” to draw links between the way information is gathered and protection for journalists).

of the government to punish the press for the possession or publication of classified information. While some authors have concluded publication can be punished after the fact, others remain skeptical, and it appears the government's ability to punish the press for the mere possession of national security information remains unsettled as well.

STATUTES THAT COULD BE USED TO PROSECUTE JOURNALISTS

According to a report by the Congressional Research Service,⁷⁶ prepared in June 2006 after "recent cases involving alleged disclosures of classified information to the news media"⁷⁷ renewed Congress's interest in providing criminal punishments for leaks of classified information, there was developed a large body of laws that protects national security information.⁷⁸ Four of the statutes could be used to penalize the press for the unauthorized possession or disclosure of national security information. They are 18 U.S.C. §641, which deals with the theft of public money, property or records; sections of the Espionage Act of 1917;⁷⁹ the Atomic Energy Act of 1954;⁸⁰ and the Intelligence Identities Protection Act of 1982.⁸¹

Section 641 was not designed specifically to protect national security information. In addition, while some statutes identified herein deal with both possession and publication, section 641, a criminal statute dealing with the theft of government property, could only be used to prosecute a journalist for the possession of national security information. The statute punishes stealing, embezzling and the "knowing conversion" of "any record, voucher, money, or thing of value of the United States or of any department or agency thereof," as well as the "knowing receipt" of the same by a person "with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted."⁸² In *Morrisette v. United States*,⁸³ the Supreme Court defined section

⁷⁶Jennifer K. Elsea, *Protection of National Security Information: Congressional Research Service Report for Congress*, June 30, 2006, available at <http://fpc.state.gov/documents/organization/68797.pdf>.

⁷⁷*Id.* at 1.

⁷⁸In addition to statutes that can be utilized to punish the press, there are a number of statutes that can be used to prosecute government employees who leak classified information. For a discussion of the application of these statutes see Ballou & McSlarrow, *supra* note 55; Michael L. Charlson, *The Constitutionality of Expanding Prepublication Review of Government Employees' Speech*, 72 CAL. L. REV. 962 (1984); Elsea, *supra* note 76; Michalec, *supra* note 66; Xanders, *supra* note 59.

⁷⁹18 U.S.C. §793 (2005).

⁸⁰42 U.S.C. §2271 (2005).

⁸¹50 U.S.C. §421 (2005).

⁸²18 U.S.C. §641 (2005).

⁸³342 U.S. 246, 271 (1952).

641 broadly, stating that it was designed to contain many overlapping terms. According to the Court, section 641 was enacted in 1948, as “a consolidation of four former sections of Title 18” designed to collect all “larceny-type” sections into one statute in order to seal the “gaps and cervixes” that exist in larceny laws.⁸⁴ The Court wrote: “The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another’s property. The codifiers wanted to reach all such instances.”⁸⁵

The case most germane to the discussion of the applicability of section 641 to a journalist is the 1988 conviction of former U.S. Navy analyst Samuel Morison.⁸⁶ Although Morison was a government employee rather than a journalist when he was prosecuted, on appeal he raised numerous First Amendment issues related to the press. While an employee at the Naval Intelligence Support Center, Morrison did off-duty work for *Jane’s Fighting Ships*, a British annual specializing in reporting on current developments in international naval operations.⁸⁷ The arrangement with *Jane’s* had been submitted to and approved by the Navy, subject to Morison’s agreement that he would not supply any classified information on the U.S. Navy or extract unclassified data on any subject and forward the data to *Jane’s*.⁸⁸ Morison’s troubles began when he sought employment with a new publication, *Jane’s Defence Weekly*. In violation of his agreement with the Navy, Morrison provided the publication’s editor-in-chief with three pages of background material from a classified report about a Soviet base where an explosion had occurred, information about previous explosions at the base, and a classified satellite photograph of a Soviet carrier under construction at the base.⁸⁹

On appeal, Morison argued that his conviction under section 641 violated his First Amendment rights because he did not steal the documents “‘for private, covert use in illegal enterprises’ but in order to give it to the press for public dissemination and information.”⁹⁰ The court, however, did not agree with Morison’s argument. Citing the Supreme Court’s ruling in *Morissette* and one of its own rulings involving section 641, the circuit court interpreted the statute broadly and held that it was not intended to only cover classic examples of larceny,

⁸⁴*Id.* at 261–71 for an extended discussion of the Supreme Court’s interpretation of the legislative intent behind section 641.

⁸⁵*Id.* at 271.

⁸⁶*United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

⁸⁷*Id.* at 1060.

⁸⁸*Id.*

⁸⁹*Id.* at 1061.

⁹⁰*Id.* at 1077.

embezzlement or “the technical definition of the tort of conversion.”⁹¹ The court concluded:

The mere fact that one has stolen a document in order that he may deliver it to the press, whether for money or for other personal gain, will not immunize him from responsibility for his criminal act. To use the first amendment for such a purpose would be to convert the first amendment into a warrant for thievery.⁹²

Despite this seemingly strong statement that the First Amendment cannot be read to protect an individual from prosecution under 641, there are two reasons the statute’s applicability to a journalist in possession of national security information remain unclear.

First, Morison cited two cases that might be useful to journalists even if they did not protect Morison. Based on the decision of the Circuit Court of Appeals for the District of Columbia in *Pearson v. Dodd*⁹³ and the Supreme Court’s decision in *Dowling v. United States*,⁹⁴ the Fourth Circuit suggested that in some situations a journalist might be protected from laws designed to punish the possession of another’s property when in possession of copies of original material for the purpose of dissemination.⁹⁵ In *Pearson*, a case involving the publication of information contained in documents that were taken from Senator Thomas Dodd’s office, copied and returned, the D.C. Circuit ruled the journalists who published the information could not be prosecuted for conversion, because they took no part in the theft of the material, “no conversion of the physical contents” of Dodd’s files took place, and the information copied was not the type of “property” subject to protection by a conversion suit.⁹⁶ In *Dowling*, a case involving a prosecution under the National Stolen Property Act,⁹⁷ the Supreme Court ruled that unauthorized copies of unreleased performances of famous entertainers were not “stolen property” as defined by the act.⁹⁸ The Court ruled that the language of the statute seemed “clearly to contemplate a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods.”⁹⁹

⁹¹*Id.* (citing *Morissette*, 342 U.S. 246, 269 (1952); *United States v. Truong Dinh Hung*, 629 F.2d 908, 924 (4th Cir. 1980)).

⁹²*Id.*

⁹³410 F.2d 701 (D.C. Cir. 1969).

⁹⁴473 U.S. 207 (1985).

⁹⁵*Morison*, 844 F.2d at 1077.

⁹⁶410 F.2d at 708.

⁹⁷28 U.S.C. §2314 (1985).

⁹⁸473 U.S. at 216.

⁹⁹*Id.*

Thus based on *Pearson* and *Dowling*, it is possible that journalists could claim immunity from section 641 if they took no part in the theft of the material and were in possession of copies rather than originals. However, because Morison's case involved "the actual theft and deprivation of the government of its own tangible property" and the court did not apply *Pearson* and *Dowling* to section 641,¹⁰⁰ it remains unclear how the court would have applied the reasoning of the two cases.

Second, although the court used strong language to assert that the First Amendment did not protect someone who steals government documents for delivery to journalists, the court's opinion was silent about the First Amendment protections available to a journalist receiving the documents. In fact, in a concurring opinion, Circuit Judge James H. Wilkinson III took great pain to make several points related to prosecuting the press. First, Wilkinson pointed out that Morison was not a journalist. "No member of the press is being searched, subpoenaed, or excluded, as in a typical right of access case,"¹⁰¹ he wrote. In addition, Wilkinson made it clear that the case was about stealing information, not about receiving it: "[I]t is important to emphasize what is *not* before us today. This prosecution was not an attempt to apply the espionage statute to the press for either the receipt or publication of classified materials."¹⁰² Therefore, although Morison's case provides some insights into applying section 641 to journalists, those insights are limited because of the unique set of facts of the case. Similarly, Morison's prosecution also provides some insights into the second set of statutes identified by this research, the espionage statutes.

Enacted in the midst of World War I, the Espionage Act of 1917 was intended to "enable the United States to carry out its duties as a neutral power, to protect the rights and property of United States Citizens, and to punish crimes that endangered the peace, welfare, and honor of the United States."¹⁰³ It has been amended twice, once in 1950 in response to the perceived threat to the security of the country by the Communist movement, and again in 1986.¹⁰⁴ The 1950 amendment expanded its scope by making the retention of defense information and the publication of "communications information" a crime.¹⁰⁵ In 1986 it was amended again to provide that any property derived from or used in

¹⁰⁰*Morison*, 844 F.2d at 1077.

¹⁰¹*Id.* at 1081 (Wilkinson, J., concurring).

¹⁰²*Id.* at 1085 (Wilkinson, J., concurring).

¹⁰³Jereen Trudell, Note, *The Constitutionality of Section 793 of the Espionage Act and its Application to Press Leaks*, 33 WAYNE L. REV. 205, 205 (1986). See *id.* at 205–06 for an extended discussion of the legislative history of the statutes. See Edgar & Schmidt, *supra* note 35, for a discussion of the legislative intent of the act.

¹⁰⁴See Trudell, *supra* note 103, at 205–06.

¹⁰⁵*Id.* at 206–07.

the commission of an offense would become the property of the United States.¹⁰⁶

Under section 793, actions undertaken “for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States” are punishable. Subsection (a) prohibits an individual from entering upon, flying over, or otherwise obtaining information;¹⁰⁷ subsection (b) applies to individuals who take, make, or obtain copies of anything connected to national defense;¹⁰⁸ and subsection (c) punishes the receipt of documents with knowledge that they have been obtained in violation of other espionage provisions.¹⁰⁹ Subsection (d) punishes the communication of “information related to national defense” by individuals who are authorized to have the information to individuals who are not so authorized.¹¹⁰ Subsection (e) punishes the communication or retention of such information by an individual not authorized to have it.¹¹¹

Section 794 provides for the imprisonment “for any term,” or, under certain circumstances, the death penalty for the transmittal of defense information to a foreign government or entity with the intent or reason to believe it will be used against the United States, or to the advantage of a foreign nation.¹¹² The unauthorized publication of photographs or sketches of vital defense installations or equipment as designated by the President is also prohibited by sections 795¹¹³ and 797.¹¹⁴ Finally, the knowing and willful disclosure of classified “communication intelligence” that is prejudicial to the safety or interests of the United States or for the benefit of any foreign government is punishable under 18 U.S.C. §798.¹¹⁵ This provision applies to cryptography systems and information related to communication intelligences activities and specifically makes it a crime to publish classified information. “Communication intelligences activities” are defined by the statute as “all procedures and methods used in the interception of communications and the obtaining

¹⁰⁶ See Anthony R. Klein, Comment, *National Security Information: Its Proper Role and Scope in a Representative Democracy*, 42 FED. COMM. L.J. 433, 437 (1990).

¹⁰⁷ 18 U.S.C. §793(a) (2005).

¹⁰⁸ 18 U.S.C. §793(b) (2005).

¹⁰⁹ 18 U.S.C. §793(c) (2005).

¹¹⁰ 18 U.S.C. §793(d) (2005).

¹¹¹ 18 U.S.C. §793(e) (2005).

¹¹² 18 U.S.C. §794 (2005).

¹¹³ 18 U.S.C. §795(a) (2005).

¹¹⁴ 18 U.S.C. §797 (2005).

¹¹⁵ 18 U.S.C. §798 (a) (2005).

of information from such communications by other than the intended recipients.”¹¹⁶

There are a number of cases in which courts have interpreted sections of the Espionage Act. In *Gorin v. United States*,¹¹⁷ the Supreme Court defined “national defense information” as a “generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.”¹¹⁸ Courts have continued to use this definition in cases involving disclosures to foreign agents and the press¹¹⁹ and typically give deference to the executive in determining what constitutes “defense information.”¹²⁰ The Court also determined in *Gorin* that information that is made available by the government to the public is not covered under the prohibition because public availability of the information negates the intent requirement of the statute.¹²¹ However, lower courts have held that information contained in classified documents remains within the ambit of the statute even if some of the information is publicly available.¹²²

Although the government has never attempted to prosecute a journalist for the possession or publication of classified information under the Espionage Act, as noted above, six of the nine justices addressed the possibility in the Pentagon Papers case. For example, Justice Byron White, joined by Justice Potter Stewart, wrote in a concurring opinion that he “would have no difficulty in sustaining convictions under [the Espionage Act] on facts that would not justify” prior restraint.¹²³ In their numerous opinions, however, the justices came to different conclusions regarding punishments for possession and publication. Considering punishment for publication under section 793, Justice William O. Douglas, in a concurring opinion joined by Justice Hugo Black, indicated that he did not believe that “publication” was covered by that section. Douglas contended that because subsection (e) provides for the

¹¹⁶18 U.S.C. §798(b) (2005).

¹¹⁷312 U.S. 19 (1941).

¹¹⁸*Id.* at 28.

¹¹⁹*See, e.g.*, *New York Times v. United States*, 403 U.S. 713 (1971) (per curiam); *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

¹²⁰*See, e.g.*, *United States v. Morison*, 844 F.2d 1057, 1071–72 (4th Cir. 1988).

¹²¹*Gorin*, 312 U.S. at 27–28 (“Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government.”).

¹²²*See, e.g.*, *United States v. Squillacote*, 221 F.3d 542, 578 (4th Cir. 2000) (holding that to prevent prosecution based on information being publicly available would require the government to prove in some instances that “no person anywhere in the world had ever publicly speculated about the information contained in the [classified] document”).

¹²³403 U.S. at 737 (White, J., concurring).

punishment of anyone who “communicates” information related to national defense it did not cover the newspapers’ act of publishing:

The Government suggests that the word “communicates” is broad enough to encompass publication. There are eight sections in the chapter on espionage and censorship. . . . In three of those eight ‘publish’ is specifically mentioned. . . . Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.¹²⁴

Douglas also noted that an earlier version of section 793 specifically contained the words “publish” and was rejected based on the First Amendment.¹²⁵

However, in the same case, Justice White, joined by Justice Stewart, indicated his belief that subsection 793(e)’s prohibition on the retention of documents was applicable to the press.¹²⁶ White wrote, “[I]t seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under §793(e) if they. . . withhold the materials covered by that section.”¹²⁷ These conflicting interpretations present some difficult questions. The various opinions in the Pentagon Papers case, along with *Pearson* and *Dowling*, could suggest that if subsection 793(e) does not apply to publication itself — as Douglas contended — but does apply to the retention of documents — as White argued — then a journalist could not be punished for publishing classified documents if the original documents were in possession of the government. In addition, 793(c) indicates that a journalist could only be held criminally liable for the receipt of documents if he had knowledge that they had been obtained in violation of other espionage provisions.

Justice White also contended that sections 797 and 798 were potentially relevant,¹²⁸ depending on the contents of the Pentagon Papers. Section 797 punishes the publication of photographs, sketches, pictures, drawings, maps and graphical representations of vital military or naval installations or equipment. Section 798 punishes the publication of cryptography systems and information related to communication intelligences activities. White wrote that “if any of the material here at issue is of this nature, the newspapers are presumably now on full notice

¹²⁴*Id.* at 721 (Douglas, J., concurring).

¹²⁵*Id.* at 721–22 (Douglas, J., concurring).

¹²⁶*Id.* at 737 (White, J., concurring). In separate opinions both Chief Justice Warren Burger and Justice Harry Blackmun indicated that they were “in general agreement” with much of White’s opinion. *Id.* at 752 (Burger, J., dissenting); *id.* at 759 (Blackmun, J., dissenting).

¹²⁷*Id.* at 740 (White, J., concurring).

¹²⁸*Id.* at 735 (White, J., concurring).

of the position of the United States and must face the consequences if they publish.”¹²⁹ White’s statement was important because sections 797 and 798, unlike section 793, specifically include the term “publish.” Perhaps, this is one reason why Principal Deputy Assistant Attorney General Matthew W. Friedrich mentioned section 798 in his testimony before Congress.¹³⁰

Based on the Court’s opinion in the Pentagon Papers case, the key to understanding the applicability of section 798 is also likely related to the culpability requirements of the sections. Subsections (a) through (e) of section 793 specifically carry the requirement that an individual must have reason to believe information will be used to the injury of the United States. Section 798, in contrast, is violated merely on the showing of knowing and willful action without any reference to injury to the United States or advantage to a foreign nation. Thus, although section 793 protects a broader range of information, it requires that the information be communicated with the “intent or reason to believe that the information is to be used to the injury of the United States,”¹³¹ while section 798 punishes anyone who “knowingly and willfully” communicates or publishes the more narrow class of information protected by the statute.¹³² Comparing section 793 to section 798 indicates that one possible reading is that the press can be punished for knowingly publishing national defense information without the additional requirement that its motivation be anti-American if that information falls under the subcategory of communications intelligence.

As noted, although the government has never applied the Espionage Act to a journalist, it has twice prosecuted someone for leaking information to the press under the Espionage Act. The first, dismissed for governmental misconduct, involved the failed prosecution of Daniel Ellsberg and Anthony Russo for their role in disclosing the Pentagon Papers to the *New York Times* and the *Washington Post*.¹³³ The second involved the conviction of Samuel Morison for violation of sections 793(d) and (e).¹³⁴ In addition, a preliminary ruling in the AIPAC case, *United States v. Rosen*,¹³⁵ contained an extended discussion of the Espionage Act and the First Amendment. Although the Supreme Court has not resolved

¹²⁹*Id.* at 736–37 (White, J., concurring).

¹³⁰*Examining the DOJ’s Investigation of Journalists*, *supra* note 5, at 1.

¹³¹18 U.S.C. §793 (2005).

¹³²18 U.S.C. §798 (2005).

¹³³*United States v. Russo*, No. 9373-(WMB)-(1)-(filed Dec. 29, 1971), *dismissed* (C.D. Cal. May 11, 1973). For a discussion of the case, see Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974).

¹³⁴*United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

¹³⁵445 F. Supp. 2d 602 (E.D. Va. 2006).

questions concerning the uncertain scope of the “intent” requirement of the statute, both concurring opinions in *Morison* stated in *dicta*¹³⁶ and the *Rosen* court ruled that any attempt to prosecute journalists under section 793 would require the prosecutors show that disclosure was done to intentionally harm the national interests of the United States.¹³⁷

As he did with his prosecution under section 641, *Morison* raised a number of First Amendment claims related to his prosecution under the Espionage Act. One of *Morrison*’s arguments was that his conviction under the Espionage Act was improper because subsections (d) and (e) were intended to only apply to “classic spying and espionage activity” by persons who, in the course of that activity had transmitted “national security secrets to agents of foreign governments with intent to injure the United States.”¹³⁸ The Fourth Circuit rejected his argument, holding that the statutes contained no limitations that would suggest an exemption for leaking information to the press for dissemination.¹³⁹ *Morison* also argued that unless an exemption for leaking information to the press was read into the Espionage Act, the sections were unconstitutional violations of the First Amendment.¹⁴⁰ The Fourth Circuit rejected this argument as well:

It 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. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.¹⁴¹

¹³⁶844 F.2d at 1083–84 (Wilkinson, J., concurring) (discussing the need for a scienter requirement to cure vagueness problems with sections 793 (d) and (e) and limit potential application of the statutes to the press); *id.* at 1086 (Phillips, J., concurring) (contending that without the intent requirements the statutes were unconstitutional).

¹³⁷445 F. Supp 2d at 624–25 (discussing the intent requirements of the espionage statutes and the government’s burden of proof).

¹³⁸*Morison*, 844 F.2d at 1063.

¹³⁹*Id.* (“The language of the two statutes includes no limitation to spies or to ‘an agent of a foreign government,’ either as to the transmitter or the transmittee of the information, and they declare no exemption in favor of one who leaks to the press. It covers ‘anyone.’ It is difficult to conceive of any language more definite and clear.”).

¹⁴⁰*Id.*

¹⁴¹*Id.* at 1068.

Despite this strong statement, however, the court's opinion and the two concurring opinions greatly qualified the reach of the ruling. Although the Fourth Circuit discussed rights afforded to the press, it did so in the context of newsgathering from a source.¹⁴² The court clearly stated that the issue at question was "the rights of an informer who had clearly violated a valid criminal law" and not the rights of a "newsman."¹⁴³ In addition to being critical of applying criminal sanctions to journalists for the possession of national security information, Wilkinson's concurring opinion suggested that journalists could not be prosecuted under the Espionage Act for publishing information. Wilkinson wrote he was only supporting the prosecution of a source who had agreed not to divulge national security information. He went so far as to write that journalists "probably could not" be prosecuted under any section of the Espionage Act.¹⁴⁴ Additionally, Circuit Judge James Phillips' concurring opinion discussed the First Amendment implications of the case at great length. Calling the Espionage Act "unwieldy and imprecise," Phillips was concerned the act made it difficult to differentiate between individuals leaking information to the press for public debate and "government moles" passing along information to other countries.¹⁴⁵ He wrote that the term "relating to the national defense" opened the act to overbreadth challenges and threatened to turn it into an "Official Secrets Act."¹⁴⁶ Phillips' solution was for Congress to enact more carefully drawn legislation focusing on limiting prosecutions to situations in which there was a real danger to the United States.¹⁴⁷

More recently, in the AIPAC case, *United States v. Rosen*,¹⁴⁸ Judge T.S. Ellis III of the U.S. District Court for the Eastern District of Virginia wrote that sections 793(d) and (e) could be applied to non-governmental employees even when the facts of a case did not fit a classic espionage situation of dissemination of information to an agent of a foreign government.¹⁴⁹ While employed by AIPAC, Steven Rosen and Keith Weissman obtained information from various government officials and transmitted this information to various members of the media, officials of foreign

¹⁴²*Id.* at 1068–69 (discussing the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972) and its applicability to government employees leaking information to the press).

¹⁴³*Id.* at 1069 n.18.

¹⁴⁴*Id.* at 1081 (Wilkinson, J., concurring) ("Morison as a source would raise newsgathering rights on behalf of press organizations that are not being, and probably could not be, prosecuted under the espionage statute.")

¹⁴⁵*Id.* at 1085 (Phillips, J., concurring).

¹⁴⁶*Id.* at 1085–86 (Phillips, J., concurring).

¹⁴⁷*Id.* at 1086 (Phillips, J., concurring).

¹⁴⁸445 F. Supp. 2d 602 (E.D. Va. 2006).

¹⁴⁹See *id.* at 628–29 for a discussion of applying the statutes to "leakers" as opposed to "spies."

governments, and others.¹⁵⁰ Rosen and Weissman were charged with conspiring to transmit information relating to the national defense to those not entitled to receive it and Rosen was additionally charged with “aiding and abetting the transmission of information relating to the national defense” in violation of section 793.¹⁵¹ Rosen and Weissman filed a pretrial motion to dismiss the charges, arguing that the government’s application of section 793(e) violated their Fifth Amendment’s Due Process Clause rights under the vagueness doctrine and the guarantees of the First Amendment.¹⁵² In a memorandum opinion released August 9, 2006, Judge Ellis denied the motion to dismiss the charges based on the defendants Fifth¹⁵³ and First Amendment claims.

Rosen and Weismann challenged the statute on First Amendment grounds both as applied to them and under the overbreadth doctrine as applied to third parties not currently before the court who might be prosecuted under the Espionage Act in the future.¹⁵⁴ Ellis began his analysis by holding that, contrary to the government’s argument that the First Amendment did not apply, prosecution under the espionage statutes inherently implicated the First Amendment: “In the broadest terms, the conduct at issue — collecting information about United States’ foreign policy and discussing that information with government officials (both United States and foreign), journalists, and other participants in the foreign policy establishment — is at the core of the First Amendments guarantees.”¹⁵⁵ However, although the opinion held the “mere invocation of ‘national security’ or ‘government secrecy’ does not foreclose a First Amendment inquiry,”¹⁵⁶ Ellis also wrote that it was equally well established that the invocation of the First Amendment did not automatically provide the defendants with immunity.¹⁵⁷

Ellis’ opinion also explored the issue of how to reach a balance between the competing interests of national security and free expression. Ellis wrote that central to this analysis was the relationship between the government and the person whose First Amendment rights were implicated.¹⁵⁸ Ellis noted that while there was little controversy over

¹⁵⁰*Id.* at 608–10.

¹⁵¹*Id.* at 607.

¹⁵²*Id.* at 610.

¹⁵³*Id.* at 617–29. For a discussion of Ellis’ analysis of the defendants Fifth Amendment claims, see *Recent Case: Constitutional Law-Due Process and Free Speech-District Court Holds That Recipients of Government Leaks Who Disclose Information “Related to the National Defense” May Be Prosecuted Under the Espionage Act*, 120 HARV. L. REV. 821 (2007).

¹⁵⁴*Id.* at 629.

¹⁵⁵*Id.*

¹⁵⁶*Id.* at 630.

¹⁵⁷*Id.* a 632.

¹⁵⁸*Id.* at 635.

the proposition that the Constitution permitted the government to prosecute government employees for the disclosure of sensitive information, prosecution of those not employed by the government must be treated differently.¹⁵⁹ However, relying on common sense and the Pentagon Papers case, Ellis concluded that there was no categorical First Amendment bar to prosecuting non-governmental employees.¹⁶⁰ He also held that in those situations where the government is seeking to prosecute non-governmental employees under the espionage statutes, section 793 prosecutions must be limited to situations “in which national security is genuinely at risk.”¹⁶¹

In addition, the AIPAC case addressed the issue of the intent requirements of the Espionage Act. On November 16, 2006, the federal government filed a motion asking to clarify the intent elements of 18 U.S.C. §793 and to hold that the government did not have to prove that a defendant actually knew the disclosure of information was potentially harmful to the United States.¹⁶² However, in a ruling from the bench Judge Ellis declined to do so.¹⁶³

In addition to the Espionage Act, the Atomic Energy Protection Act contains provisions that could be used to punish the press for the possession and/or publication of certain types of information. The act was designed to prevent the unauthorized disclosure of data concerning the design, manufacture, or utilization of atomic weapons, and the production or use of special nuclear material. Under 42 U.S.C. §22749(a), the communication by anyone of “Restricted Data,”¹⁶⁴ or any attempt to communicate such data, with intent to injure the United States or with intent to secure an advantage to a foreign nation, is punishable by a fine of not more than \$100,000, a maximum sentence of life in prison, or both.¹⁶⁵ However, the portion of the statute more relevant to the prosecution of the press is subsection (b).¹⁶⁶ While subsection (a) requires the intent to injure the United States or secure an advantage to a foreign

¹⁵⁹*Id.* at 635–36.

¹⁶⁰*Id.* at 637

¹⁶¹*Id.* at 639.

¹⁶²Government’s Motion for Clarification at 1, *United States v. Steven J. Rosen & Keith Weissman*, No. 1:05CR225 (E.D. Vir. Aug. 18, 2006) *available at* <http://www.fas.org/sgp/jud/rosen081806.pdf>.

¹⁶³Hearing on Motions at 10, *United States v. Steven J. Rosen and Keith Weissman*, No. 1:05CR225 (E.D. Vir. Nov. 16, 2006) *available at* <http://www.fas.org/sgp/jud/rosen111606.pdf>.

¹⁶⁴42 U.S.C. §2014(y) (2005). The term “Restricted Data” is defined by the Atomic Energy Act of 1954 to include “all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy.” *Id.*

¹⁶⁵42 U.S.C. §2274 (2005).

¹⁶⁶42 U.S.C. §2274(b) (2005).

nation, subsection (b) makes the communication of “Restricted Data” with “reason to believe such data will be utilized to injure the United States or to advantage any foreign nation”¹⁶⁷ punishable by a fine of not more than \$50,000, a maximum sentence of ten years, or both.

Unlike the Espionage Act, the Atomic Energy Protection Act has been used to prevent publication of a news story. In *United States v. Progressive*¹⁶⁸ the government successfully used the Atomic Energy Act to enjoin a newspaper from printing information about the design of an atomic bomb, even though the information did not originate from classified material and the author’s purpose was not subversive. However, because the publication was stopped and the information was not obtained from the government, the case does not answer many questions about the government’s ability to prosecute the press for the possession or publication of national security information.

In 1979, *The Progressive*, a political magazine founded in 1909 by Wisconsin Senator Robert La Follette, assigned Howard Morland to write an article titled “The H-Bomb Secret: How We Got It-Why We’re Telling It” that detailed how to build a hydrogen bomb.¹⁶⁹ Much of the information in the article was prepared using environmental impact statements, books, articles, personal interviews, and private speculation, rather than classified information.¹⁷⁰ The magazine argued that the publication would “provide the people with needed information to make informed decisions on an urgent issue of public concern.”¹⁷¹ On March 9, 1979, after a hearing from both parties, a federal district court judge issued a temporary restraining order enjoining defendants, their employees, and agents from publishing or otherwise communicating or disclosing in any manner any restricted data contained in the article.¹⁷² On March 26, the court held a temporary injunction hearing, after which the court prohibited *The Progressive* from publishing the article.¹⁷³

While the case might have made for an important Supreme Court precedent, it never made it to the high Court. After the district court’s decision, the U.S. Court of Appeals for the Seventh Circuit scheduled oral arguments for September 13, 1979.¹⁷⁴ Before the Seventh Circuit’s

¹⁶⁷*Id.*

¹⁶⁸467 F. Supp. 990, 994 (W.D. Wis. 1979), *reconsideration denied*, 486 F. Supp. 15 (W.D. Wisc. 1979), *dismissed*, 610 F.2d 819 (7th Cir. 1979).

¹⁶⁹For a detailed discussion of the case, see Ian M. Dumain, *Seminal Issues as Viewed Through the Lens of the Progressive Case: No Secret, No Defense*: *United States v. Progressive*, 26 CARDOZO L. REV. 1323 (2005).

¹⁷⁰*Id.* at 1326.

¹⁷¹*Id.*

¹⁷²*Progressive*, 467 F. Supp. at 990.

¹⁷³*Id.*

¹⁷⁴*Morland v. Sprecher*, 443 U.S. 709, 709 (1979). When *The Progressive’s* motion for an expedited hearing was denied, the magazine petitioned the Supreme Court for a *writ of*

opinion was announced, *The Madison Press Connection* published a letter detailing the contents at issue in *The Progressive* case.¹⁷⁵ The government, conceding that the secret was out, announced it was abandoning the case.¹⁷⁶

The final statute which could be used to prosecute the press for the possession or publication of national security information, the Intelligence Identities Protection Act of 1982,¹⁷⁷ was enacted into law as an amendment to the National Security Act of 1947.¹⁷⁸ The legislative history indicates it was a response to disclosure of the names of covert intelligence agents by former government employees,¹⁷⁹ specifically Philip Agee, Lewis Wolf and other former government employees who were writing tell-all books.¹⁸⁰ Individuals who have or have had authorized access to classified information can be prosecuted for disclosing any information identifying covert agents to individuals not authorized to receive such information and can be fined and/or imprisoned for ten years if they know the United States is taking measures to conceal the agent's identity.¹⁸¹ In addition, subsection (c) provides that a person who learns the identity of a covert agent through a "pattern of activities intended to identify and expose covert agents" and discloses the identity of the covert agent is subject to a fine and/or imprisonment for a term of not more than three years.¹⁸²

The act prompted considerable debate over the constitutionality of subsection (c), but the conference committee concluded that the language in the act that identified who the act could affect did not include the press. The committee concluded:

[T]he harm this bill seeks to prevent is most likely to result from disclosure of covert agents' identities in such a course designed, first, to make an effort at identifying covert agents, and, second, to expose such agent publicly. The gratuitous listing of agents' names in certain publications goes far beyond information that might contribute to informed public debate on foreign policy or foreign intelligence activities. . . . The standard adopted in [subsection (c)] applies criminal penalties only in very limited circumstances to deter those who make it their business to ferret out and

mandamus ordering the Seventh Circuit to expedite the appeal. In a per curiam opinion the Court denied the motion. *Id.*

¹⁷⁵Dumain, *supra* note 169, at 1331–32.

¹⁷⁶*Id.* at 1332.

¹⁷⁷50 U.S.C. §421 (2005).

¹⁷⁸Pub. L. No. 235, 80 Cong., 61 Stat. 496 (July 26, 1947).

¹⁷⁹S. REP. 97–201 (1981), *reprinted in* 1982 U.S.C.C.A.N. 145.

¹⁸⁰*Id.* at 151–54.

¹⁸¹50 U.S.C. §421(a) (2005).

¹⁸²50 U.S.C. §421(c) (2005).

publish the identities of agents. At the same time, it does not affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs.¹⁸³

While at least one author has concluded that subsection (c) “suffers major constitutional problems,”¹⁸⁴ it is difficult to know how a court would rule on the statute’s applicability to the press. No cases involving the prosecuting of an individual under this act were identified and congressional researchers have noted there are no published accounts of a case of any kind involving a prosecution under this act.¹⁸⁵

DISCUSSION

There are a number of statutes which, if read certain ways, would seem to suggest that the government can prosecute the press for the possession and/or publication of some types of national security information. They are section 641 of Title 18 of the U.S. Code, which punishes the theft of government property; section 793 of the Espionage Act, which prohibits the communication or retention of national defense information; sections 795 and 797 of the Espionage Act, which punish the unauthorized publication of photographs or sketches of vital defense installations; section 798 of the Espionage Act, which punishes the disclosure of classified “communication intelligence”; the Atomic Energy Protection Act, which prevents the disclosure of data concerning atomic weapons; and the Intelligence Identities Protection Act, which protects the identities of covert agents. The key to understanding when journalists might be in danger of prosecution lies in the details of and differences among the statutes identified herein.

While the Supreme Court has yet to officially close the door on prosecuting the press under section 793, 795 or 797 of the Espionage Act, there are a number of reasons why prosecution would be problematic. The intent provisions of sections 793, 795 and 797 make it highly unlikely that the press could be prosecuted under these provisions for publishing national security information. Although the Supreme Court has never settled the issue, it is hard to believe the press’s role in furthering

¹⁸³H. CONF. REP. 97–580 (1982), reprinted in 1982 U.S.C.C.A.N. 170, 171–72.

¹⁸⁴Gottesman, *supra* note 50, at 515.

¹⁸⁵See Elizabeth B. Bazan, *Intelligence Identities Protection Act: Congressional Research Service Report for Congress*, Oct. 2, 2003, at 169, available at <http://www.fas.org/irp/crs/RS21636.pdf> (concluding that “there does not appear to be any published cases involving prosecutions under this Act.”)

public debate over matters of public importance could be considered intent that the information be used to the injury of the United States or to the advantage of any foreign nation. Publication of information pertaining to the national defense sheds light on the inner workings of government, promotes self-governance, and provides an important check on government malfeasance and abuse. While it could be argued that under some circumstances publication was not aimed at furthering debate, but rather at embarrassing a particular politician or political party, this would still not be injury to the United States. The Constitution protects the public right to express truthful information regarding the function of government even when that information may be hurtful, harmful, or embarrassing to a public official.¹⁸⁶ As Circuit Judge Phillips noted in *Morison*, the intent provisions ensure “leaks of information which, though undoubtedly ‘related to defense’ in some marginal way, threaten only embarrassment to the official guardians of government ‘defense’ secrets,” cannot lead to criminal convictions.¹⁸⁷

In addition, courts have yet to indicate if the consistent use of the term “communicates” in much of the Espionage Act applies to the media when they “publish” information. As Justice Douglas noted in the Pentagon Papers case, Congress was fully capable of including the term publish in section 793 — as it did in sections 794, 797 and 798 — if that was what Congress intended to prevent.¹⁸⁸ However, because there is so little case law dealing with section 793, it is difficult to know how courts would interpret the word “communicates” and Douglas’ take is not definitive. For example, although the case dealt with a prior restraint, in *United States v. Progressive* the district court was very willing to construe the terms “communicates, transmits or discloses” as including publishing.¹⁸⁹

Although they have received less attention in the media, more troubling than section 793’s publication related subsections, are the other publication-related statutes discussed above. Under section 798 of the Espionage Act, which punishes the publication of a subcategory of national defense information, the Atomic Energy Act, and the Intelligence Identities Protection Act, the government may be free to prosecute the press for publishing several narrowly defined categories of information. While the Atomic Energy Act and the Intelligence Identities Protection Acts are of less concern because of the narrow categories of information

¹⁸⁶See *New York Times v. United States*, 403 U.S. 713 (1971) (per curiam). See also *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979) (“State action to punish the publication of truthful information seldom can satisfy constitutional standards.”).

¹⁸⁷*United States v. Morison*, 844 F.2d 1057, 1086 (4th Cir. 1988) (Phillips, J., concurring).

¹⁸⁸See *Times v. United States*, 403 U.S. at 720–21 (1971) (Douglas, J., concurring). See the quotation at *supra* note 124.

¹⁸⁹467 F. Supp. 990, 995 (W.D. Wisc. 1979).

they protect, perhaps the statute concerning publication that is the most dangerous to journalists is section 798. Because the section specifically includes the term “publish” in addition to the word “communicates” and protects a category of information that journalists would most likely be interested in, section 798 could be used to prosecute journalists for a great deal of information that is routinely published. Under this statute it is quite possible the press could be punished for publishing any and all “procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients.”¹⁹⁰ Indeed, this section has been used to coerce the press not to publish information in the past.

In 1986, section 798 was used by then CIA director William Casey to threaten *Washington Post* Editor Ben Bradlee when the newspaper was about to publish a scoop about an American eavesdropping program code-named Ivy Bells.¹⁹¹ The *Post* was set to publish a story about an accused Soviet spy, Robert Pelton, working in the National Security Agency. Despite the fact that the Soviets already knew about the program, Casey warned Bradlee that he could be prosecuted under section 798 and President Ronald Reagan reiterated the warning in a phone call with Katharine Graham, chairwoman of the *Post*. The *Post* held the story, only publishing it after NBC News correspondent James Polk mentioned Ivy Bells in a broadcast about Pelton’s trial. In the end, although Casey formally requested the Justice Department consider bringing charges against Polk, no one was ever charged in the matter.¹⁹²

Also problematic for journalists is the question of prosecution for the possession of classified documents. While the language of 793 (c) indicates that a journalist could only be punished for receiving or obtaining national defense information if the purpose was to injure the United States, section 641 punishes the receipt or retention of records that were known to be stolen and 793 (e) only requires the “willful” retention of information relating to national defense. Thus, if a journalist received or retained documents he knew were stolen from the government or “willfully” retained national security information, he might be prosecuted under 641 or 793 (e). However, because there are so few cases dealing with the possession of national security information, it remains to be seen how courts will interpret these provision as they might be applied to journalists.

For example, as noted above, a lingering question remains concerning prosecution for the possession of “information” or “copies” as opposed to

¹⁹⁰ 18 U.S.C. §798(b) (2005).

¹⁹¹ See Rani Gupta, *Intelligent Communication*, 30 NEWS MEDIA AND THE L. 8 (2006).

¹⁹² *Id.*

original documents. In addition to *Pearson* and *Dowling*, the cases raised by Morison in his appeal of his conviction under section 641, the Seventh Circuit Court of Appeals has ruled that a media organization may not be liable for conversion if it is not in possession of original documents or if it agrees to return those documents once copies have been made. In *FMC Corp. v. Capital Cities/ABC*,¹⁹³ the Seventh Circuit held that ABC News could be sued for conversion after the network obtained the internal company documents of a private Pentagon contractor, although it ordered ABC to return the papers because the lawful owner of the documents was deprived of their use. The court held:

ABC is free to retain copies of any of FMC's documents in its possession (and to disseminate any information contained in them) in the name of the First Amendment. Moreover, ABC is in no way being punished for the dissemination of FMC's information. It is merely being required to make copies of documents it refuses to return.¹⁹⁴

Furthermore, although it is important to note that in *FMC Corp.* the court was considering if ABC was guilty under common law conversion, not a statutory provision, and, as in *Pearson* and *Dowling*, national security was not an issue, Edgar and Schmidt made a similar argument based on the wording of subsection 793 (e).¹⁹⁵ They argued that because subsection 793(b) makes express reference to copies while (d) and (e) are silent about copies, it is unclear if an individual could be punished under (d) and (e) unless he or she were in possession of original word-for-word "documents" rather than copies or "information."¹⁹⁶ A similar argument could be made about section 641, which specifically uses the term "records," instead of a more general term such as "information." Thus, while there is evidence that courts would be unwilling to prosecute journalists for the possession of stolen information, none of it is conclusive.

Looking past statutory interpretations and legislative intent, however, the larger issue is the need to balance national security and the role the press plays in a democracy. Scholarship has noted that notwithstanding the Court's strong language condemning prior restraints in the Pentagon Papers case, national security concerns often outweigh any arguments in favor of transparency or free expression. Frederick Schauer wrote:

¹⁹³915 F.2d 300 (7th Cir. 1990).

¹⁹⁴*Id.* at 305.

¹⁹⁵Edgar & Schmidt, *supra* note 35, at 1049.

¹⁹⁶*Id.*

The interest in the security of the nation is often thought to be a trump card in free speech disputes. Whatever the strength of the Free Speech Principle, a threat to national security is commonly held to be a danger of sufficient magnitude that the interest in freedom of speech must be subordinated.¹⁹⁷

Professor of public policy Alasdair Roberts stated, “Arguments for more open government that are powerful in other circumstances seem insubstantial, or even reckless in matters of national security.”¹⁹⁸ Roberts wrote that the tendency to defer to secrecy and national security was especially strong in times of fear and uncertainty:

Many well-established democratic states, facing uncertain but potentially fundamental threats to their security, resort to the use of extraordinary police powers and an assertion of executive authority. . . . In moments of crisis, when the severity of the threat remains uncertain, it is difficult for citizens to resist these calls for stronger state powers.¹⁹⁹

However, while the ability of government to keep some issues secret may seem or be extremely important or necessary to national security, numerous scholars have put forward a number of reasons why excessive government secrecy is incompatible with democratic self-governance.

Perhaps the most famous modern First Amendment theorist to argue that freedom of expression was essential to self-governance was Professor Alexander Meiklejohn. Meiklejohn’s theory would extend absolute protection to speech related to self-government. He argued the First Amendment was best understood in relation to the overall function of the Constitution as a means to establish self-government²⁰⁰ and the primary purpose of the First Amendment was to ensure that all political speech relevant to democratic debate be heard.²⁰¹ Addressing the question of whether the clear and present danger doctrine, or any

¹⁹⁷FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 197 (1982).

¹⁹⁸Alasdair Roberts, *National Security and Open Government*, 9 *GEO. PUB. POL’Y REV.* 69, 70 (2004).

¹⁹⁹*Id.* at 80.

²⁰⁰ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 15 (1948) (arguing the sentence “We, the People of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America” should be viewed as the controlling words of the Constitution, and that all other provisions of the document should find their “legitimate scope and meaning only as they conform to the one basic purpose that the citizens of this nation shall make and shall obey their own laws”).

²⁰¹*Id.* at 21–27.

other test, could constitutionally sustain legislation punishing political speech on the grounds of national security concerns, he concluded that the First Amendment “established an absolute, unqualified prohibition of the abridgement of the freedom of speech.”²⁰²

As opposed to Meiklejohn’s call for narrow yet absolute protection, most First Amendment theorists have advocated protecting a broader range of information, while taking more nuanced approaches to national security and transparency. Vincent Blasi, for example, advocated a great deal of protection for the press, but limited this protection when national security was involved.²⁰³ Blasi argued that the “inevitable size and complexity” of modern government called for “well-organized, well-financed, professional critics to serve as a counterforce to government.”²⁰⁴ He wrote that the First Amendment should be given preferential treatment when evidence of government misconduct was presented by the press, but it was also important to balance government secrecy with a free press.²⁰⁵

Blasi wrote there were situations in which the checking function must give way to government secrecy. He wrote that although classification systems can have the effect of covering up government wrongdoing, they can also serve legitimate government interests.²⁰⁶ While it was difficult to imagine sufficient justification for any order that would prohibit a source under government control from having contact with the press, he also contended that not all restrictions on communication between sources under government control and reporters were inconsistent with the First Amendment.²⁰⁷ Blasi ultimately reasoned that because punishment of “leakers” should be thought to raise serious First Amendment concerns under the checking value, punishment would be consistent with the checking value only if the disclosure of information could “be shown to create a serious risk of harm to the implementation of government policy.”²⁰⁸

Like Meiklejohn, First Amendment scholar Thomas Emerson wrote that a system of free expression is necessary as a method of securing participation by the members of a democratic society in political

²⁰²ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 20 (1948). See also MEIKLEJOHN, *supra* note 200, at 28–56 for further discussion of the clear and present danger test.

²⁰³Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

²⁰⁴*Id.* at 541.

²⁰⁵*Id.* at 609–11.

²⁰⁶*Id.* at 608.

²⁰⁷*Id.*

²⁰⁸*Id.* at 609.

decision making.²⁰⁹ According to Emerson, to meet this core objective of democratic government, individuals — or their representatives in the press — need access to information. As law professor Lillian R. BeVier noted, “It is a truism that we cannot responsibly exercise our franchise unless we have sufficient knowledge about governmental affairs, operations, and policies to make informed choices.”²¹⁰ Therefore, in addition to advocating a broad First Amendment theory, Emerson wrote specifically about the relationship between democracy, government secrecy and access to information in his work on the public’s right to know.²¹¹ Although Emerson appeared to be a vocal advocate of the right to know, there were a number of contradictions in his writings, and he greatly limited the amount of information that should be available to the public.

Early in his article on the right to know, Emerson stated the right should be given near absolute protection. Emerson’s reason for adopting this strict standard — when other First Amendment doctrines called for balancing tests — was “the right to read, listen, or see is so elemental, so close to the source of all freedom, that one can hardly conceive of a system of free expression that does not extend it full protection.”²¹² Emerson also wrote that in a democracy the government should have no power to control the dissemination of information by its employees and former employees through leaks, books, speeches and articles except in the “narrow sense of conveying sensitive national defense information to a foreign country with intent to injure the United States.”²¹³ He was concerned that granting the government the ability to control leaks allowed it to control information, which in turn would allow it to control public debate and cover up questionable government practices.²¹⁴ Despite this strong rhetoric in favor of access to government sources and information, Emerson wrote that “some exceptions would have to be formulated” to any theory of the right to know.²¹⁵ Although he contended that “[i]n theory these exceptions should be scrupulously limited

²⁰⁹Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878 (1963).

²¹⁰Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle* 68 CAL. L. REV. 482, 483 (1980). BeVier noted that while arguing for a right to know does encompass many of the same principles as the right to publish, it is in principle a different type of right. *Id.* at 498 (“The failure of government to take affirmative action to remove the impediment caused by denial access cannot be credibly argued to be the constitutional equivalent of punishment or censorship without ignoring important and traditionally significant differences between what are in fact two very disparate forms of governmental activity.”).

²¹¹Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 3 (1976).

²¹²*Id.* at 7.

²¹³*Id.* at 18.

²¹⁴*Id.*

²¹⁵*Id.* at 16.

to those that are absolutely essential to the effective operation of government institutions,” he listed an extremely wide range of information that could be kept secret by government, including “sensitive national security data.”²¹⁶ Thus, both Blasi and Emerson argued for a balance between national security and the First Amendment.

Although these arguments support a First Amendment right for journalists to possess and/or publish national security information absent intent to harm the United States, case law suggests it is unlikely the Supreme Court will find such a right for several reasons. First, the Supreme Court has been unwilling to answer categorically whether the First Amendment protects the possession or publication of truthful information regardless of its source. In 1978, the Court briefly noted the issue, but refused to rule on it in *Landmark Communications, Inc. v. Virginia*.²¹⁷ The case arose when a newspaper was charged with violating a Virginia statute that made it a crime to divulge information regarding proceedings before a state judicial commission’s investigation of charges against a judge.²¹⁸ The Court, using an *ad hoc* approach to balance Virginia’s interests in protecting judicial reputations and integrity against core First Amendment rights, held that the potential harm caused by publication could not support criminal sanctions against the press.²¹⁹ However, because the newspaper did not break any laws in obtaining the information, the Court specifically stated that the issue before it was the “narrow and limited” question of “whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information.”²²⁰ The Court refused to rule on “the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it.”²²¹

Eleven years later, in 1989, the Court again sidestepped the issue in *Florida Star v. B.J.F.*,²²² a case involving the publication of a rape victim’s name that was obtained from an official report in a police press-room. Citing *Smith v. Daily Mail Publishing Co.*,²²³ the Court noted that the publication of lawfully obtained truthful information could not be

²¹⁶*Id.* at 16–17. Emerson was willing to grant exemptions to information related to tactical military movements, design of weapons, operation of espionage or counterespionage, diplomatic and collective bargaining negotiations, criminal investigations, uncompleted litigation, trade secrets, executive privilege, and individual privacy.

²¹⁷435 U.S. 829 (1978).

²¹⁸*Id.* at 831.

²¹⁹*Id.* at 841–42.

²²⁰*Id.* at 837.

²²¹*Id.*

²²²491 U.S. 524 (1989).

²²³443 U.S. 97 (1979).

prohibited absent a need to further a state interest of the highest order.²²⁴ However, the Court was clear that *Daily Mail* did not answer the question of whether the possession or publication of unlawfully obtained information could be punished.²²⁵ The Court wrote:

The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. This issue was raised in *New York Times v. United States* and reserved in *Landmark Communications*. We have no occasion to address it here.²²⁶

Finally, in what has become the seminal case in this area of law, a 2001 civil suit, the Court was again careful not to answer the question. *Bartnicki v. Vopper*²²⁷ involved the broadcast of an audiotape recording of a cell phone conversation between two officials of a teachers' union in which threats were made against local school board members. The conversation was illegally taped by unknown persons and then distributed to the press.²²⁸ In a 6-3 ruling the Court held that there was no liability in the case for broadcasting the tape. However, the Court was very careful to note that it was doing so only because the broadcasters in the case had played no part in intercepting or obtaining the taped conversation and because of the public significance of the matter.²²⁹ The Court specifically wrote that it was again intentionally leaving open "the question 'whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.'"²³⁰ The Court wrote that its narrow holding in *Bartnicki* was "consistent with this Court's repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment."²³¹ Citing *Florida Star*, the Court wrote, "Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily."²³²

²²⁴*Florida Star*, 491 U.S. at 534.

²²⁵*Id.* at 533–34.

²²⁶*Id.* at 535 n.8 (citations omitted) (emphasis in original).

²²⁷532 U.S. 514 (2001).

²²⁸*Id.* at 518–19.

²²⁹*Id.* at 525.

²³⁰*Id.* at 528 (emphasis in the original).

²³¹*Id.* at 529.

²³²*Id.* at 529 (citing *Florida Star v. B.J.F.*, 491 U.S. 524, 532–33 (1989)).

Furthermore, based on a long history of judicial deference to the executive branch in the area of national security it is unlikely the Supreme Court would finally rule on the issue in a case involving national security. For example, in *Department of Navy v. Egan*,²³³ a case involving the ability of the executive branch to control access to information, Justice Harry Blackmun wrote that the authority to protect national security information flowed directly from the Constitution and fell on the president “as head of the Executive Branch and as Commander in Chief.”²³⁴ Citing a number of Supreme Court precedents, Blackmun concluded, “[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”²³⁵ In his concurring opinion in *Morison*, Wilkinson summed up this idea: “In short, questions of national security and foreign affairs are ‘of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.’”²³⁶

In addition, in a number of First Amendment related cases the Court has consistently ruled that national security is a government interest of the highest order. In *Snepp v. United States*,²³⁷ for example, when considering a prior restraint on government employees the Court wrote, “The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.”²³⁸ Summarizing the conflict between a First Amendment right of association and national security in *United States v. Robel*, Chief Justice Earl Warren wrote, “[W]hile the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests.”²³⁹

Cases such as these suggest it would be unlikely for the Supreme Court to categorically answer whether unlawful possession or truthful publication of information can be punished consistent with the First Amendment in a case involving national security. Therefore, it would

²³³ 484 U.S. 518 (1988).

²³⁴ *Id.* at 527.

²³⁵ *Id.* at 530 (citing *Chappell v. Wallace*, 462 U.S. 296 (1983); *Schlesinger v. Councilman*, 420 U.S. 738, 757–758 (1975); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953); *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953)).

²³⁶ *United States v. Morison*, 844 F.2d 1057, 1083 (4th Cir. 1988) (Wilkinson, J., concurring) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

²³⁷ 444 U.S. 507 (1980).

²³⁸ *Id.* at 509 n.3.

²³⁹ 389 U.S. 258, 267 (1967).

be unwise to rely on the courts to protect journalists in these situations. Instead, in order to protect the press, Congress should act to add a scienter, or “intent” requirement, to the statutes outlined in this article that do not already contain one. Requiring that the government show intent to harm the United States before prosecuting the press for possessing or publishing national security information would both advance discussion of important information and meet Blasi and Emerson’s calls for a balance between freedom of expression and national security. As legal scholar Geoffrey Stone noted: “Some degree of secrecy in the interest of national security is, of course, essential, especially in wartime. But . . . obsessive secrecy effectively constrains oversight by both the press and the public and directly undermines the vitality of democratic governance.”²⁴⁰ This is especially true when journalists are covering potentially illegal surveillance programs or secret prisons run by the government. Thus, the time has come for Congress to revisit these issues in a serious and contemplative way that protects both national security and free expression.

CONCLUSION

Although there has been a dramatic increase in government secrecy in the years following the events of September 11, the conflict between freedom of expression and national security is nothing new. From the Civil War through the Cold War to the war on terror, the government has repeatedly attempted to silence dissent and muzzle the press. Yet, the reasons that government abuse is so serious—the ability to use legitimate violence, the tendency to acquire an inflated sense of self-importance, and the trust American people put in their elected leaders—are even more pronounced in times of war. For these reasons, it is especially important that the necessity of free expression in a democracy during times of war be emphasized. Congress, therefore, should revisit the statutes that could be used to prosecute the press for the possession or publication of national security information. In his concluding statements regarding the application of section 793 to Rosen and Weissman, even Judge Ellis acknowledged that the espionage statutes did not address current issues well. In the last paragraph of his memorandum opinion the judge wrote:

The conclusion that the statute is constitutionally permissible does not reflect a judgment about whether Congress could strike a more appropriate balance between these competing interests, or whether a more carefully

²⁴⁰STONE, *supra* note 10, at 557.

drawn statute could better serve both national security and the value of public debate. . . . [T]he time is ripe for Congress to engage in a thorough review and revision of these provisions to ensure that they reflect both these changes, and contemporary views about the appropriate balance between our nation's security and our citizen's ability to engage in public debate about the United States conduct in the society of nations.²⁴¹

Such a review, including specific provisions designed to prevent the possibility that the broad language of all the identified statutes might be used to prevent the disclosure of information that sheds light on government incompetence or corruption, would allow the press to continue important democratic functions. However, until Congress amends all the statutes outlined herein, limiting prosecution to instances when there is evidence of intent to harm the United States, there are some statutes that can be read to allow for the prosecution of journalists for possessing or publishing national security information. As noted earlier in this article, while no mainstream journalist has yet been prosecuted under any of the statutes identified by this research, there remains a chill in the air.

²⁴¹United States v. Rosen, 445 F. Supp. 2d 602, 646 (E.D. Va. 2006).