FIRST AMENDMENT LAW REVIEW

Volume 19
Issue 2 *Symposium*

Article 2

2021

A House Built on Sand: The Constitutional Infirmity of Espionage Act Prosecutions for Leaking to the Press

Heidi Kitrosser

David Schulz

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

Heidi Kitrosser & David Schulz*

INTRODUCTION

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

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

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

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

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

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

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

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

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[4] *See, e,g,* WHISTLEBLOWING NATION, THE HISTORY OF NATIONAL SECURITY DISCLOSURES AND THE CULT OF STATE SECRECY (Kaeten Mistry & Hannah Gurman eds., 2020); Mailyn Fidler, *First Amendment Sentence Mitigation: Beyond a Public Accountability Defense for Whistleblowers*, 11 HARV. NAT'L SEC. L. J. 214 (2020); Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers,* 56 WM. & MARY L. REV. 1221 (2015) [hereinafter Kitrosser, *Leak Prosecutions and the First Amendment*]; Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281, 283–84, 303–04 (2014); Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment,* 94 B.U. L. REV. 449 (2014); Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SECURITY L. & POL'Y 409 (2013) [hereinafter Kitrosser, *Free Speech Aboard the Leaky Ship of State*]; Pamela Takefman, Note, *Curbing Overzealous Prosecution of the Espionage Act: Thomas Andrews Drake and the Case for Judicial Intervention at Sentencing*, 35 CARDOZO L. REV. 897 (2013); *see also* David Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information,* 127 HARV. L. REV. 512, 516, 626 (2013).

[5] *See infra* Part III.

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

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

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

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

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

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

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

[8] *See infra* Part III.

[9] *See infra* Part III.

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

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

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

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

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

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

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

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

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

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

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

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

[15] *Id.* at 270.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. The 1917 Act

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

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

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

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

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

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

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

[61] *Id.* at 1006–09.

[62] *Id.* at 1008.

[63] *Id.* at 1001.

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

b. The 1950 Act

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

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

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[64] *Id.*

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

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

[67] *Id.* at 1021–22.

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

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

[70] *Id.* at 1031.

construed to empower the executive to criminalize the communication of designated information to the press or the public.[71] Yet, just as in 1917, the legislative history from 1950 indicates that Congress did not intend or expect any such result.[72] For example, when Senator Kilgore expressed worry that the bill could "theoretically . . . make practically every newspaper in the United States . . . into criminals without their doing any wrongful act," Senator McCarren, the bill's sponsor, replied that the suggestion "naturally concerns me greatly."[73] McCarren solicited letters on the matter from Attorney General Clark, from the Library of Congress, and from "eminent private lawyer" Elisha Hanson.[74] Both Clark and the Library of Congress responded with letters that McCarren entered into the congressional record.[75] The letters were reassuring in their tone, even as their literal language did not explicitly rule out the possibility raised by Kilgore.[76] Clark wrote, for instance, that the Act's "language [and] history," and "the integrity of the three branches of the Government . . . would indicate that nobody other than a spy, saboteur, or other person who would weaken the internal security of the Nation need have any fear of prosecution."[77]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[101] *Id.* at 9.

[102] *Id.* at 2.

[103] *Id.* at 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[148] *See* 28 C.F.R. § 50.10 (2019).

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

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

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

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

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

2. A Brave New World?

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

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

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

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

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

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

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

[155] *See* Matt Apuzzo, *Times Reporter Will Not Be Called To Testify in Leak Case*, N.Y. TIMES (Jan. 12, 2015), https://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html. The Department of Justice abandoned its demand that Risen testify only after obtaining a damaging Fourth Circuit ruling denying the existence of any reporter's privilege in the federal courts. *See* United States v. Sterling, 724 F.3d 482, 492 (4th Cir. 2013). So, the Risen case marked the demise of First Amendment friction in two ways: It illuminated the vastly diminished need for prosecutors to rely on the testimony of journalists, and it denied the existence of any legal protection for journalists when prosecutors do seek their testimony.

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

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

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

[159] *Id.* ¶ 18.

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

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

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

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

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

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

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

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

A. United States v. Morison

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

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

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

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

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

1. Classified Speech as Theft / Conduct

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

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

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

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

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

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

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

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

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

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

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

2. Vagueness

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

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

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

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

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

[192] *Snepp*, 444 U.S. at 515–16.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. First Amendment Overbreadth

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

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

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

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

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

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

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

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

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

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

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

B. Subsequent Cases

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[258] *Kim*, 808 F. Supp. 2d at 56 (citing *Frohwerk*, 249 U.S. at 205-06). An additional aspect of *Kim* also is worth a mention because it too demonstrates how even carefully limited doctrinal reasoning can be turned into a one-way ratchet toward speech suppression. The *Kim* Court cited the D.C. Circuit's decision in Boehner v. McDermott to the effect that "'those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information.'" *Kim*,

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

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

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

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

[260] *Id.* at 505–10.

[261] *Id.* at 514.

[262] *Id.*

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

[264] *Id.* at 630–31.

[265] *Id.* at 629–30.

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

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

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

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

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

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

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

2. Vagueness and Overbreadth

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

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

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

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

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

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

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

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

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

[282] *Id.* at 911–12.

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

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

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

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

IV. ALIGNING THE ESPIONAGE ACT WITH THE FIRST AMENDMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[303] *Id.* at 1174–78.

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

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

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

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

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[304] *Id.* at 1178.

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

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

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

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

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

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

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

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

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311 *Id.*

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

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

314 *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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