A Tale of Seditious Libel in the Twenty-First Century

CHARLES L. BABCOCK AND AMANDA L. BUSH

What follows is a work of fiction, but, hey, it could happen.

A Reporter's Notebook: How I Got into This Mess

BY TOM GILBERT,
INQUIRER STAFF WRITER

It was a dark and stormy night.

I've always wanted to use that as a lead, but until now, I've never had the chance. But it truly was a dark and stormy night when this whole mess began.

Most of you don't know me. I've been a journalist for twenty years, longer if you count journalism school at the University of Florida. I'm forty-two years old. Divorced. No kids. Smoker (but only after I jog). I drink (but moderately for a reporter). No girlfriends at the moment and no news sources that might turn into girlfriends. Does anybody really believe the Pelican Brief could happen to a reporter? At least not the Julia Roberts part.

I've been working at the *Washington Inquirer* for twelve years, most recently covering the Justice Department. I'm no Bob Woodward, but I've got pretty decent sources and have had some success (we posted the NSA story on our website five minutes before the *Post* and the *Times*). My dad got me this job. He knew somebody who knew somebody, and I got an interview and it stuck. You should know that my dad is a loser—the only thing he ever did for me was get me this job, which, by the way, is probably going to land me in jail. Anyway. . .

It was a dark and stormy night, and I was about to go home when a source calls me. Sorry, I can't reveal his identity, even though, as you have no doubt read, I was ordered to by a U.S. district judge. He (the source) sounds very distressed and asks if we can meet right away. I suggest Old Ebbitt Grill. He says, "No way. Too public." And then he tells me to meet him at the Little Fountain Café, which I learn is "a quiet, dimly lit, intimate dining room hiding in plain view" below the "frantic nightlife scene on Adams Morgan's main drag." Don't you love the Internet?

I ask him, "What's this about?"

"I don't want to talk on the phone, but you'll be interested."

"Can you give me a hint?"

"Not on the phone."

He hangs up. So I head for the subway and take the Red Line to the Woodley Park-Zoo exit and walk across the bridge into Adams Morgan. Did I mention it was raining? I arrive. Soaked. My source is at a table in the way back, and dimly lit does not begin to describe how dark it is in this place. I find him, and he's been drinking. Great.

"So, Rudy (not his real name), how are you doing?"

He looks up at me, and his eyes are bloodshot. Drinking a lot, I'm thinking. His hand shakes, just a little, as he offers it to me without standing. I figure you can tell a lot about people by how they shake hands. If I had kids, I would make them practice handshaking until they got it right. Firm. Confident. Look the other guy straight in the eye. This guy isn't any of that. Feeble. Soft. Averted eyes. I'm thinking that this guy is certainly in a position to know a lot. He's in a sensitive government position. I've been cultivating him for about three years. Not too hard, but I haven't been ignoring him either. He's provided me some stuff I've used in the past—stuff that checked out and was reliable. I suspect he was the source for some of the best stuff in Woodward's last book, but I would, of course, never ask.

"So, Rudy, what's up?"

"Why are you here?"

"Because you invited me just about twenty minutes ago, as I recall."

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DEFENDANTS' BRIEF

UNITED STATES OF AMERICA,)
Plaintiff)
)
v.)
)
TOM GILBERT)
)
and)
)
WASHINGTON INQUIRER CO., INC.,)
Defendants)

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I. INTRODUCTION

The indictment in this case should be dismissed for two primary reasons: first, the Espionage Act does not prohibit the conduct complained of by the government, and second, even if it did, the Espionage Act would be unconstitutional under the First Amendment as applied here because this prosecution is, in effect, an effort by the government to punish speech highly critical of it, also known as "seditious libel." And it is generally accepted that prosecutions of seditious libel violate the First Amendment.

Prosecutions under the Espionage Act against the media are unprecedented. Indeed, in the recent prosecution of two former lobbyists of the American Israel Public Affairs Committee (AIPAC) for conspiring to violate the Espionage Act, the government conceded:

> [W]e recognize that a prosecution under the espionage laws of an actual member of the press for publishing classified information leaked to it by a government source would raise legitimate and serious issues and would not be undertaken lightly, indeed, the fact that there has never been such a prosecution speaks for itself.[1]

In that case, pending in this court, two former lobbyists of the AIPAC were indicted for conspiring to violate the Espionage Act.[2] The indictment alleged that the defendants conspired with a Pentagon official to communicate information about national defense to people not authorized to receive it, including a reporter for the *Washington Post*.[3]

This is a case of first impression and has been brought, we believe, because the government is embarrassed about the disclosure of its illegal wiretapping program, not because of a concern for national security. It is, in essence, a prosecution for seditious libel and therefore unconstitutional under the First Amendment.

II. HISTORICAL UNDERPINNINGS OF THE SEDITION AND ESPIONAGE ACTS

The historical context surrounding the Sedition Act and Espionage Act and the Supreme Court's and Fourth Circuit's treatment of prosecutions thereunder provide the cornerstone for establishing that Tom Gilbert's and the *Inquirer*'s actions are protected by the First Amendment and may not be prosecuted.

A. *Early Origins of Seditious Libel*

Seditious libel, as we now understand it, first appeared in the Elizabethan era as the "notion of inciting by words or writings disaffection toward the state or constituted authority."[4] In 1606, the Star Chamber, the administrative tribunal established by the Tudors in the 1500s, deemed seditious libel "a crime because it tended to undermine respect for public authority."[5] The "Star Chamber was dissolved in 1641, but seditious libel, like blasphemy, [continued] as a common law offense." Over 100 years later, the existence of this offense would influence the development and interpretation of law in America.[6]

Seven years after the Bill of Rights was signed into law, the U.S. Congress passed the Sedition Act of 1798, essentially criminalizing the publication of "unfounded" criticism toward the U.S.

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He sighs, "Yes."

So I figure we're going to play this Washington game where he pretends that he has information that will change the course of human history but doesn't want to reveal it because it would violate his code of honor or some such crap, and I'm supposed to pull it out of him any way I can. I wait and just look at him. A waitress comes. I order a Rusty Nail. "With Chivas please." My drink comes. We still haven't said anything. I haven't inquired about his kids because I don't know if he has kids. He hasn't asked about mine, which is fine, because I don't have any (that I know about).

We order dinner. It comes. We eat. Still nothing, and I'm wondering if I haven't just blown an entire evening over some nutty bureaucrat with a conscience that is not quite guilty enough. At least I'm on an expense account, although not on overtime. We're a Guild paper, and you have to have it approved ahead of time, which I have neglected to do (quite often).

"I've got some documents," he finally says.

"What sort of documents?"

"Documents that are very secret. Highly classified. Espionage Act secret."

"What does that mean, Espionage Act secret?"

"It means so secret that if they knew I had taken them out of the building, I would lose my job and probably be prosecuted."

There's nobody near us, but I look around anyway. "So why did you remove these highly classified Espionage Act secret documents that could get you fired and prosecuted?"

"To give them to you."

"And why would you do that?" (Sometimes you have to play hard to get.)

"Our government is, shall we say, doing something that is very wrong."

"So why don't you report it?"

He looks at me with that pitying look that says, "You just don't understand life inside the Beltway, do you?" Which is, of course, b.s. I understand it plenty well; I just haven't figured out this guy's angle. Inside the Beltway, everybody has an angle.

"Okay," I say. "Will you let me have the documents? Did you bring them with you?"

"If I give them to you, it might cause you some problems."

"What sort of problems?"

"I assume if you think these are genuine, and they are, that you will write something. If you write something, they will know that you have classified documents, and they will want to know where you got them. . . ."

"You know that's not a problem."

"And they may want to prosecute you and your paper for publishing this information."

"Why don't you let me worry about all that."

A thin smile from Rudy. He orders another drink. Me, too. If we're going to bring down the government, we might as well have that warm feeling in our tummies.

Well, to cut a long story a little short, he gives me the documents (about 100 or so). They're in an envelope. He passes the envelope to me under the table.

We finish dinner and say goodbye. He wants to leave first. "Wait ten min-

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utes and then you can leave," he says. So I have another drink, although I switch to scotch and water. More than two Rusty Nails, and my judgment about women becomes impaired . . . although, to be honest, it's not real good when I'm sober.

I take the train to my one-bedroom apartment in North Bethesda, but I don't open the envelope until I get home. I start reading. Pure dynamite. Oh, my God! If these documents are legitimate, the government is doing some bad stuff: illegal wiretaps on opposing political leaders, including presidential candidates; wiretaps of the Senate majority leader ("because we don't think he's a Patriot," according to an e-mail); surveillance of government critics, including Ralph Nader. There's a memo about "How to Take over the Government in Times of National Emergency," authored by a former secretary of defense.

The real issue was not national security but the public's right to express discontent with government policy.

There are e-mails, memos, position papers, authorizations to the FBI. It goes all the way to the top of the Justice Department and pretty high up in the White House, although the president himself doesn't get tagged with any paper.

I call my editor, James T. Olson. We call him Jimmy—to his face, not just behind his back. He's okay with that, thinks it's funny. He never calls me Superman.

"Jimmy, it's Tom and, uh, I may have the beginnings of a pretty big story that is perhaps best not discussed over the phone," I say.

"So then why did you call me at 11:30 at night?"

"Uh, just to alert you and maybe set up a meeting tomorrow. I'm a little paranoid about this thing, and maybe we should meet in a park or something."

"Tom, it's the middle of winter and raining like hell outside. Why not at the office tomorrow?"

"Tomorrow is fine, but not the office. I'll explain, okay?"

Jimmy is used to me. He's indulged me before, so he says fine, and we arrange to meet at a Howard Johnson's (I didn't think there were any of these left) the next morning before work. I forget to ask for overtime authorization. Shit.

I find out later, and this is unbelievable, that the FBI listened to this conversation between me and Jimmy. Amazing.

Anyway, not to bore you with the details, but, as you've probably heard, we check out the documents, and they are legit. Way legit. We run a series of stories accusing the government of secret wiretapping, and all hell breaks loose, as you would imagine. The administration tries to get a prior restraint. No dice (see *United States v. New York Times*). All the cable guys want me to go on their shows, and I am thinking that this is a great thing for my, so far, modest career. But Jimmy and the other editors think this will be a bad thing because there are rumors we are under investigation. Can you imagine that? We expose this major violation of the law, and we're under investigation?

At first I thought it was just a competitive thing—you know, my paper wants the story for itself—but it didn't take long to see they were right. The Department of Justice announces that a special prosecutor has been appointed to look into "the matter," and it turns out that "the matter" is me and Rudy.

Well, for starters, I'm never going to give up a source unless he tells me face-to-face that it's okay, and my read on Rudy is that he is trying to dive as deep as he possibly can on this, although there is a report that the Justice Department is giving people polygraphs to see if they talked to me. Anyway, the really bad thing is that the SP (Special Prosecutor) indicts me for publishing state secrets, saying that I stole the documents. The SP claims that because I won't reveal my source, I must not have a source, which means I didn't get the documents from anyone but somehow broke in and stole them.

Ridiculous. As my friend Max Frankel (okay, I met him once) wrote, "practically everything that our government does, plans, thinks, hears and contemplates in the realm of foreign policy is stamped and treated as secret—and then unraveled by that same government, by the Congress and by the press in one continuing round of professional and social contacts and cooperative exchanges of information."

Unquestionably true, but it hasn't, as you know, stopped the SP. The *Inquirer* and I were indicted in the U.S. District Court for the Eastern District of Virginia, the same place where they try terrorists. We were charged with violations of the Espionage Act. There were 100 counts, one for each document I allegedly "stole and used for our series: *Secret Government Wiretapping Program Exposed: Every Step You Take, Someone's Watching You*.

The paper hired a separate lawyer for me, a wonderful guy from Denver who specializes in this sort of thing, although he candidly told me up front that there was no precedent for this case. Great. So what was our argument? As he outlined it to me, it made sense. I may get some of the legalese wrong, but here goes: We fought every step of the way distinguishing our case from criminal prosecutions under the Espionage Act and using an argument called "First Amendment Due Process"[1] to rebut what we considered a prosecution of seditious libel. At some point, we moved to dismiss the indictment. Our brief is in the sidebar.

Well, it didn't work. The jury found us guilty. The judge gave our argument careful consideration, but, in the end, I think it was just too novel for her. So we'll see what the Fourth Circuit and the Supreme Court say about this whole shenanigan affair. We did get one break. I was only sentenced to 100 hours of community service and fined $1,000. The newspaper was fined $5,000. The judge said from the bench that she didn't care what the sentencing guidelines said, that we had done a public service even if we technically had violated the law. So that was nice.

It also has been great to see the support from fellow journalists. Just about every news organization has filed amicus briefs in our favor except the one jerk at a big New York paper who said this case would make bad precedent and shouldn't be appealed. Let him see how it feels when he has a prosecutor cross-examining his happy ass. Sorry. I'm really not bitter about this whole thing. The Pulitzer prize keeps me warm at night.

It's been a long time since the sun was out, but I can see some rays shining through the clouds. I think we're going

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to win this appeal, but it will take several years and the Supreme Court is going to have to do it. My lawyer is optimistic, too. He told me that the legal theory he used was developed with a couple of lawyer friends at their cottage in Canada over some scotch. His friend's favorite drink is a Rusty Nail, too. How perfect is that? Like just about all of the leaking that goes on in Washington, as Max says, "that's how it's done, barroom style: an official playing bureaucratic tennis . . . a reporter preying on the knowingness of his source."

Well here's to the First Amendment. And Rusty Nails. . . .[2]

Endnotes

1. *See* Charles L. Babcock, *Allegedly Criminal Newsgathering and First Amendment Due Process*, 2 LDRC BULL. 63 (2002).

2. The quotations from Max Frankel first appeared in his article entitled "The Washington Back Channel" in the *New York Times* (March 25, 2007).

Defendants' Brief

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government.[7] Interestingly, "both true and false criticism of the government was considered libel."[8] In fact, "legal thought of the pre-revolutionary era proclaimed that 'the greater the truth, the greater the libel.'"[9] The Sedition Act did not last long, expiring in 1801 after the election of Thomas Jefferson to the presidency.[10] "Though the Sedition Act was not an enduring piece of legislation, the very existence of the Act stands as a reminder of the power of dissenting voices in the press and the urge of those in power to control them."[11]

Although the constitutionality of the Sedition Act itself was never tested in court, the Supreme Court subsequently recognized that First Amendment protections extend to "seditious libel."[12] In *New York Times v. Sullivan*, the Supreme Court surveyed the previous controversy surrounding the enactment and enforcement of the Sedition Act and concluded that the debate

> first crystallized a national awareness of the central meaning of the First Amendment. . . . Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . [That history] reflect[s] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.[13]

The Court went on to quote James Madison in saying that in a republican government, "the censorial power is in the people over the Government, and not in the Government over the people."[14] It then concluded that "[t]he right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."[15]

B. *The Espionage Act of 1917—Seditious Libel Part II*

Seditious libel next emerged in the form of the Espionage Act of 1917 just prior to the United States' entry into World War I.[16] As the likelihood of American participation in the war increased, the Department of Justice became concerned that the nation's existing laws would be inadequate to "regulate the conduct of the individual during war time."[17] Congress debated the Espionage Act bill at length, and much of the debate concerned the history and meaning of the First Amendment.[18] For instance, a provision of the bill that would have allowed the president to censor the press dominated congressional discussion but was eventually eliminated in conference. The Espionage Act passed without it, making it a crime to convey information relating to the national defense with the intent to harm the U.S. government or to promote the success of its enemies.[19]

The first challenge to the Espionage Act came in 1919 in *Schenck v. United States*.[20] In that case, the defendants, including a prominent socialist leader, were indicted and convicted for urging resistance to the draft.[21] A unanimous Supreme Court upheld the conviction, and Justice Oliver Wendell Holmes, in writing the opinion, did not steer very far from the older, British notion that free speech and press meant little more than limiting prior restraints.[22] His test for constitutionality would last more than fifty years: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[23]

Eight months after *Schenck*, the Supreme Court confronted *Abrams v. United States*,[24] a case that involved a prosecution under the Espionage Act of 1918. In that case, five Russian immigrants were convicted for publishing and distributing pamphlets that criticized the Wilson administration and protested U.S. policy against the emerging Bolshevik regime.[25] Seven members of the Supreme Court applied Justice Holmes's "clear and present danger" test to sustain the convictions, holding that the prohibited words created a clear and present danger of obstructing the war effort.[26] Justice Holmes, joined by Justice Brandeis, dissented, recognizing that the real issue was not one of national security but the public's right to express discontent with government policy.[27]

Justice Holmes's dissent in *Abrams* is widely considered the starting point for this country's move away from the British notion of seditious libel and toward a modern, American view that free and uninhibited speech, no matter how critical of the government, should be the rule.[28] Justice Holmes observed thus:

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . I think that we should be vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against that notion.[29]

In the shadow of World War I, *Schenck* and *Adams* defined the boundaries of prosecutions under the Espionage Act. Faced with cases stemming from the "Red Scare," courts stretched the bound-

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aries of permissible prosecutions using an approach that has since been revisited.

C. *The Espionage Act Today*

After the Great War ended, the Court did not revisit Espionage Act prosecutions until the country was faced with another global challenge: World War II. By then, the language defining the scope of a violation read, for the most part, as it does today. "Over the years, numerous commentators have criticized [the Espionage Act] as" vague, overbroad, "excessively complex, confusing, and . . . impenetrable."[30] "Yet, despite repeated calls for reform" of the statutes, they have remained unchanged since 1950 and have "weathered several constitutional challenges on both vagueness and First Amendment grounds."[31] Nevertheless, the facts underlying these challenges and their outcomes are in stark contrast to our case involving a reporter and a newspaper and therefore highlight the reasons that a prosecution under the Espionage Act in this instance would violate the First Amendment.

1. "Constitutional Vagueness" Challenges and the Development of a Scienter Requirement

On its face, the Espionage Act, 18 U.S.C. § 793, purports to prohibit the gathering, retention, or communication of information "relating to the national defense."[32] Specifically, section 793(a) prohibits the gathering of information from places[33] connected to national defense if done "for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation. . . ."[34] Section 793(b) prohibits the copying, taking, making, or obtaining of any "sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense" or any attempt to do so "for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation. . . ."[35]

Section 793(d) prohibits anyone lawfully having possession of a "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note relating to the national defense" from "willfully" communicating or transmitting it to anyone not entitled to receive it.[36] Similarly, section 793(e) prohibits anyone having unauthorized possession of a "document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note relating to the national defense" from "willfully" communicating or transmitting it to anyone not entitled to receive it or retaining it and failing to deliver it to an officer or employee of the United States entitled to receive it.[37]

In 1941, the Supreme Court first considered a constitutional vagueness challenge to the phrase *information relating to the national defense* as used in sections 793(a) and (b) of the Espionage Act.[38] In *Gorin v. United States*, one defendant, a citizen of the Soviet Union, had obtained for substantial pay from his co-defendant, a U.S. naval intelligence officer, the contents of over fifty reports and photographs relating to Japanese activities in the United States, which the two defendants conspired to transmit to the Soviet Union.[39] The Supreme Court rejected the defendants' argument that the phrase *information relating to the national defense* in sections 793(a) and (b) was limited to the places listed in section 793(a), holding instead that the term *national defense* was "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."[40] The Court explained that "[w]hether a document or report is covered by sections [later codified as 793(a) and (b)] depends on their relation to the national defense, as so defined, not upon their connection with places specified in section [793(a)]."[41] Importantly, the Court in *Gorin* also read into the statute a scienter requirement.[42] As the Court explained,

> [t]he obvious delimiting words in the statute are those requiring "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." This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established.[43]

Decades later, the Fourth Circuit in *United States v. Truong Dinh Hung*[44] went further, holding that the phrase *related to the national defense* encompasses more than military matters and includes, for instance, the U.S. diplomatic cables and other classified papers relating to the 1977 Paris peace negotiations with the North Vietnamese, American POWs in Indochina, and the names of U.S. sources for intelligence about the Vietnamese government.[45]

Although the court acknowledged the scienter requirement of section 793(a), calling it "critically important because the Supreme Court relied upon it . . . to rebut a claim that the espionage statutes were unconstitutionally overbroad," the Fourth Circuit did not extend the same logic to section 793(e).[46] In upholding the defendants' convictions under section 793(e), the court said that the section does not contain the same strong scienter language of section 793(a) but rather only "requires that the accused 'willfully' transmit the information."[47] As for any ambiguity relating to the term *unauthorized possession* of national defense information, the court said it was cured in this case because the trial court adequately instructed the jury that "a person would have authorized possession if he had an appropriate security clearance and if he gained access to the document because it was necessary to the performance of his official duties."[48]

In 1988, the Fourth Circuit in *United States v. Morison* further limited the possibility of a constitutional vagueness challenge to the Espionage Act.[49] It also for the first time faced the potential conflict between the Espionage Act and the First Amendment.[50] In *Morison*, the defendant, a part-time civilian analyst at the Naval Intelligence Support Center and part-time editor of a publication, stole three classified photos of a Soviet nuclear-powered aircraft carrier after construction and provided them to his publication, *Jane's Defence Weekly*, and the *Washington Post*.[51] The court of appeals rejected the defendant's argument that because he did not transmit the information to a foreign government but instead leaked it to the press, his actions did not fall under the Espionage Act.[52] The Fourth Circuit held that the phrase *those not entitled to receive it* was not limited to "spies or to 'an agent of a foreign government,' either as to the trans-

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mitter or the transmittee of the information."[53] The two statutes "declare no exemption in favor of one who leaks to the press. It covers 'anyone.' It is difficult to conceive of any language more definite and clear."[54] The court observed that "courts have recognized the legitimacy of looking to the classification system for fleshing out" this phrase.[55] Given the defendant's naval intelligence training, the court indicated that he was certainly familiar with the government's classification system and had, in fact, agreed in writing to abide by it.[56]

The Fourth Circuit court also held that the phrase *related to the national defense* included "all matters that directly or may reasonably be connected with the defense of the United States against any of its enemies . . . [including] the military and naval establishments and the related activities of national preparedness."[57] Acknowledging the Supreme Court's analysis in *Gorin* that the phrase requires the information to be closely held by the government, the court in *Morison* affirmed the district court's jury instruction that "the government must prove that the documents or the photographs are closely held in that they have not been made public and are not available to the general public."[58] The court further acknowledged that sections 793(d) and (e) prescribe that prohibited activity be "willful," which the court defined as an act "done voluntarily and intentionally and with the specific intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law."[59]

Finally, with respect to the defendant's First Amendment defenses to the government's prosecution of him under the Espionage Act, each of the three judges wrote separately. Judge Russell, who wrote the majority opinion, concluded that there were no "First Amendment rights to be implicated here" because the legislative history was "silent on any Congressional intent in enacting sections 793(d) and (e) to exempt from its application the transmittal of secret military information by a defendant to the press or a representative of the press."[60]

Judge Russell relied on *Branzburg v. Hayes*, quoting the following passage from Justice White's opinion:

> It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.[61]

A government employee, Judge Russell said, was not entitled to invoke the First Amendment to immunize his conduct merely because he leaked the information to the press.[62]

Judge Wilkinson, with whom Judge Phillips concurred, disagreed, stating, "Morison as a source would raise newsgathering rights on behalf of press organizations that are not being, and probably could not be, prosecuted under the espionage statute."[63]

More recently, in *United States v. Squillacote*, the Fourth Circuit made it clear that information that is closely held by the government, even if it has been "leaked," will continue to be information "relating to the national defense," as that phrase is used in the Espionage Act. [64] The court explained thus: "[A] document containing official government information relating to the national defense will not be considered available to the public (and therefore no longer national defense information) until the official information in that document is lawfully available."[65] Thus, "mere leaks of classified information are insufficient to prevent prosecution for the transmission of a classified document that is the official source of the leaked information."[66] Which brings us to today. . .

2. The AIPAC Case: Seditious Libel in the Twenty-first Century?

Last year, Steven Rosen and Keith Weissman, two former AIPAC lobbyists who were indicted on charges of conspiring to violate the Espionage Act statutes, moved to dismiss the charges against them, arguing that sections 793(d) and (e), as applied to them, are unconstitutionally vague and violate their First Amendment rights of free speech and to petition the government.[67] On August 9, 2006, Judge T. S. Ellis III denied the motion, holding that the Espionage Act was constitutional as applied to them, particularly in light of its scienter requirements.

Judge Ellis first rejected the defendants' argument that the phrase *information relating to the national defense* was insufficiently clear as applied to them because the information was transmitted orally.[68] The phrase, he said, has "consistently been construed broadly to include information dealing with military matters and more generally with matters relating to U.S. foreign policy and intelligence capabilities."[69] Rather than limiting information to tangible information, the court recognized that the scope of the phrase *information relating to the national defense* is limited only in two ways: (1) the information must be closely held by the government, and (2) the disclosure must be potentially damaging to the United States or useful to an enemy of the United States.[70] With respect to the defendants' argument that the phrase *entitled to receive* is vague, the court cited *Morison* in noting that the government's uniform classification system for national security information clearly restricts access of classified information to those with a corresponding security clearance.[71]

The court also rejected the defendants' contention that it was difficult to know whether the information they received was classified because they received it orally.[72] Although acknowledging the potential merit of such an argument from a factual standpoint, the court ultimately found it unpersuasive as a reason for declaring the statute unconstitutionally vague.[73] Instead, the court relied on the statute's scienter requirements, explaining that the government must prove the defendants willfully committed the prohibited conduct, which "eliminates any genuine risk of holding a person criminally responsible for conduct which he could not reasonably understand to be proscribed."[74] According to the court, "the government must prove beyond a reasonable doubt that the defendants knew the information . . . was closely held by the United States," "that disclosure of [the] information [would] potentially harm the United States," "that the persons to whom the defendants communicated the information were not entitled under the classification regulations to receive [it]," and "that the defendants communicated the information . . . with 'a bad purpose either to disobey or to disregard law.'"[75] It follows, the court said, that

> if the defendants, or either of them, were truly unaware that the informa-

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> tion they are alleged to have received and disclosed was classified, or if they were truly ignorant of the classification scheme governing who is entitled to receive the information, they cannot be held to have violated the statute.[76]

Finally, with respect to the defendants' First Amendment challenge, the court acknowledged the "inherent tension between the government transparency so essential to a democratic society and the government's equally compelling need to protect from disclosure information that which could be used by those who wish this nation harm."[77] The court rejected the government's "proposed categorical rule that the espionage statutes cannot implicate the First Amendment" and said that *Morison* could not be taken to stand for that proposition.[78] Recognizing that authority on the issue is sparse, the court nevertheless opined that "the government can punish those outside of the government for the unauthorized receipt and deliberate retransmission of information relating to the national defense."[79]

III. CRIMINAL PROSECUTIONS OF THE PRESS UNDER THE ESPIONAGE ACT

Throughout the history of the United States, a member of the news media has never been criminally prosecuted under the Espionage Act for gathering, publishing, or retaining classified information, although numerous opportunities have presented themselves.

A. Chicago Tribune *Article: "Navy Had Word of Jap Plan to Strike at Sea"*

The first instance in which a prosecution of the press under the Espionage Act was considered involved a *Chicago Tribune* article entitled "Navy Had Word of Jap Plan to Strike at Sea," published on June 7, 1942, immediately following the American victory in the Battle of Midway in World War II.[80] The article was written by a correspondent who had seen intelligence reports left in an officer's cabin that disclosed that the strength and disposition of the Japanese fleet had been well known in American naval circles days before the attack.[81] Although the article said nothing about the United States' code-breaking activities, it cited "reliable sources in naval intelligence" and contained a detailed breakdown of the Japanese force and its movements, leading readers to conclude that the United States had broken Japanese codes and was reading the enemy's encrypted communications.[82] The Justice Department went so far as to appoint an outside prosecutor and convene a grand jury to consider whether to indict the *Tribune* and its owner, editor, and publisher, Robert McCormick, for violating the Espionage Act of 1917.[83] Ultimately, no charges were brought, in part because military officials were unwilling to share additional classified information about intelligence gathering.[84]

B. *The Pentagon Papers Case:* New York Times Co. v. United States

The closest the Supreme Court has ever come to considering a government prosecution of the press for publishing confidential information concerning national security secrets was in *New York Times Co. v. United States.*[85] In 1967, Secretary of State Robert McNamara ordered a full-scale evaluation of the United States' involvement in the Vietnam War, which was documented in a forty-seven volume report.[86] Daniel Ellsberg, a former Defense Department economist who was disillusioned with the war, copied portions of the report and sent them to the newspapers.[87] On June 13, 1971, the *New York Times* began publishing excerpts of what became known as the "Pentagon Papers."[88] The Nixon administration immediately sought to restrain further publication, and within a month, the Supreme Court handed down a per curiam decision.[89] Six justices held that the government had not met its "heavy burden of showing justification" for a prior restraint on the press and that the *Times* therefore was free to continue to publish the Pentagon Papers.[90] Although Justice Stewart, with whom Justice White joined, was convinced the executive branch was correct that some of the documents should not be published in the national interest, Stewart commented that he could not "say that disclosure of any of them will surely result in the direct, immediate, and irreparable damage to our Nation or its people."[91]

Although the Court did not specifically decide "whether the First Amendment immunizes the press from criminal prosecution for publishing national defense information," five members of the Court—Justices White, Stewart, Blackmun, and Marshall and Chief Justice Burger—seemed to suggest that the statutes could impose criminal liability on newspapers for retaining or publishing national security secrets. Justice White, joined by Justice Stewart, stated,

> [F]rom the face of subsection (e) and from the context of the Act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793(e) if they communicate or withhold the materials covered by that section.[92]

Justice Marshall commented that it was plausible that subsection 793(e) applied to press publications.[93] Chief Justice Burger and Justice Blackmun, in dissent, respectively registered "general agreement" and "substantial accord" with Justice White's views on the issue.[94]

Only Justices Black and Douglas disagreed. Justice Black stated that "only a free and unrestrained press can effectively expose deception in government."[95] Justice Douglas similarly observed that "open debate and discussion of public issues are vital to our national health."[96] Justice Douglas further concluded that section 793(e) does not apply to the press because the statute prohibits unlawful "communication," not "publication" of protected national defense information.[97]

However, because *New York Times* involved a prior restraint, a type of speech that bears a particularly "heavy presumption against its Constitutional validity," the issue of whether section 793(e) can be used to prosecute the press for gathering, publishing, or retaining confidential national security information remains an open question. Indeed, "in the thirty-five years since the Pentagon Papers case, the Supreme Court has not *once* upheld a content-based criminal prosecution of truthful speech relating to the activities of government that did not involve some special circumstances, such as public employment."[98]

Prompted by the Court's per curiam decision in *New York Times*, Harold Edgar and Benno Schmidt Jr. in 1973 analyzed with painstaking detail the legislative history of the Espionage Act and the potential consequences of prosecuting the press under it.[99] Edgar and Schmidt opined that sections 793(d) and (e) were sweepingly broad and were not intended to be applied to the "publica-

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tion of defense information that is motivated by the routine desires to initiate public debate or sell newspapers."[100] They also argued that the term *willfully* in both sections 793(d) and (e) must be construed to exclude conduct undertaken by the press for purposes of stimulating public debate; otherwise, the statutes would be vague and unconstitutional under the First Amendment.[101]

The scholars relied on two key historical points in coming to the conclusion that sections 793(d) and (e) do not apply to the press:

(1) In considering the Espionage Act of 1917 and the predecessor statutes to sections 793(d) and (e), Congress rejected a provision that would have allowed the President to prohibit newspapers from publishing information concerning the national defense;[102] and

(2) When the Espionage Act was amended in 1950 (creating the sections now known as 793(d) and (e)), both the Legislative Reference Service and the Attorney General opined that section 793 would not in their view apply to conduct ordinarily engaged in by newspapers.[103] The same legislative history was previously cited by Justice Black in *New York Times* for his conclusion that section 793(e) does not apply to the press.[104]

C. Bartnicki v. Vopper

In a case not concerning a prosecution under the Espionage Act, the Supreme Court recently held in *Bartnicki v. Vopper*[105] that where a journalist receives information "from a source who has obtained it unlawfully," the journalist may not be punished for receipt or publication of the information "absent a need of the highest order."[106] In that case, "a radio commentator[] received in the mail from an anonymous source a tape recording of an unlawfully intercepted telephone conversation, which [he] played on the air" during his radio show.[107] The Court rejected the government's argument that it should be able to punish journalists to deter those who unlawfully intercept conversations, stating that "[i]t would be quite remarkable to hold" that a law-abiding journalist can be punished merely for receiving and publishing information merely "to deter conduct by a non-law abiding third party."[108] Although Vopper admittedly received "stolen" property, the Court held that he was nevertheless protected by the First Amendment because Vopper played no role in the illegal interception, he had obtained the information lawfully, and the information received involved a matter of public concern.[109] Thus, the Court observed, "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."[110]

IV. APPLICATION TO THIS CASE

"To date, there has been no case in which a working journalist in passive receipt of classified information has been prosecuted under the [Espionage Act]" for gathering, retaining, or publishing the information.[111] Moreover, the little existing precedent in Espionage Act cases differs significantly from our case. In *Gorin*, *Morison*, *Truong Dinh Hung*, and *Squillacote*, the defendants had either given direct assistance to a foreign government or actively misappropriated classified information. Here, on the other hand, the defendant reporter Gilbert passively received the classified information, which was unsolicited and voluntarily given to him for his use in a news report. Likewise, Gilbert had no intention of harming the U.S. government or assisting a foreign government. Further, with the exception of *Gorin*, the defendants in previous Espionage Act cases were government employees who had access to classified information by virtue of their employment and transmitted that information in violation of an agreement with the government. Here, of course, Gilbert and the *Inquirer* are members of the news media who received information, unsolicited, from a government employee. They neither sought out nor misappropriated the classified information.

Further, in analyzing the statutory language of section 793 and Supreme Court and Fourth Circuit precedent, it is evident that Gilbert and the *Inquirer*'s actions fall outside the scope of the Espionage Act.

A. *Sections 793(a) and (b)*

Sections 793(a) and (b) of the Espionage Act concern obtaining and copying information related to the national defense and do not mention communicating such information to others, much less publishing that information. As such, these two sections on their face do not apply to the actions of Gilbert or the *Inquirer*.

Moreover, even if sections 793(a) and (b) applied to press publications in general, they do not apply to Gilbert and the *Inquirer* here because the information is not "relating to the national defense," as that phrase has been defined by the U.S. Supreme Court and the Fourth Circuit. The information given to Gilbert concerned the fact that the government was secretly wiretapping opposing political leaders, including 2008 presidential election front-runners, members of Congress, and the press who were critical of the government. In contrast, in *Gorin*, the Supreme Court defined *relating to the national defense* as "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."[112] In *Truong Dinh Hung*, the Fourth Circuit expanded the phrase to include more than military matters, such as U.S. diplomatic cables and classified documents pertaining to the 1977 Paris peace negotiations and names of sources of intelligence.[113] But neither court has gone so far as to include within that definition information that is unflattering of the government, such as a policy to illegally wiretap political opponents.

Setting aside issues relating to the nature of the material, Gilbert and the *Inquirer* nevertheless fall outside the scope of the Espionage Act given the strict scienter requirements imposed by *Gorin.* Under *Gorin*, proof of bad faith, i.e., "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," is required to sustain a conviction under section 793(a) or (b).[114] Gilbert and the *Inquirer* obtained the information to inform the public on a matter of public concern, not to injure the United States or advantage a foreign nation. Accordingly, they cannot be liable under sections 793(a) and (b).

B. *Sections 793(d) and (e)*

The two sections of the Espionage Act that create the most difficulty in a case involving a criminal prosecution of a member of the news media are sections 793(d) and (e). Section 793(d), however, cannot and does not apply to Gilbert and the *Inquirer* because the statute prohibits anyone lawfully having possession of a document, writing, photograph, etc., "relating to the national

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defense" from "willfully" communicating or transmitting it to anyone not entitled to receive it.[115] Because the classified documents were leaked to Gilbert and the *Inquirer*, they did not have "lawful" possession of the documents, as that term is defined in the statute.

Section 793(e), on the other hand, addresses the situation presented here and provides, in pertinent part, that

> (e) whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.[116]

Gilbert and the *Inquirer* had unauthorized possession of the documents; therefore, an analysis under this section is appropriate. Nevertheless, in considering the scope of the scienter requirements, Gilbert and the *Inquirer* are shielded from prosecution under this statute as well.

First, as mentioned above in the discussion pertaining to sections 793(a) and (b), the information given to Gilbert cannot be characterized as relating to the national defense. As Judge Wilkinson stated in *Morison*, "The espionage statute has no applicability to the multitude of leaks that pose no conceivable threat to national security but threaten only to embarrass one or another high government official."[117]

In addition to requiring proof that Gilbert and the *Inquirer* committed the prohibited acts willfully, the statute imposes an additional scienter requirement 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."[118] As the court in *Rosen* stated,

> requiring the government to prove that "the possessor has reason to believe [the information relating to the national defense] could be used to the injury of the United States or to the advantage of any foreign nation" is not duplicative of the requirement that the government prove the defendant willfully disclosed information that is potentially damaging to the United States because the latter concerns only the quality of the information, whereas the former related to the intended (or recklessly disregarded) effect of the disclosure.[119]

Gilbert and the *Inquirer* obtained the information to engage the public in a matter of public concern, not to injure the United States or advantage a foreign nation. Thus, section 793(e) does not apply to Gilbert or the *Inquirer* in this instance.

Finally, section 793(e) does not apply to the defendants because the phrase *not entitled to receive it* does not prohibit the transfer of classified information from one citizen to another but only from a government employee to a citizen. In *Morison*, the Fourth Circuit determined that the phrase *entitled to receive* is regulated by the government's uniform classification system for national security information,[120] which classifies information into three categories—Top Secret, Secret, and Classified—depending on the degree of harm to the United States that would result from the information's disclosure.[121] The 1951 executive order that created the classification system did not regulate the transfer of information from citizen to citizen but merely requested government employees to observe the standards and join the federal government to prevent disclosure.[122] Thus, *Morison*'s interpretation of *entitled to receive* does not apply to Gilbert and the *Inquirer* in this case.

In addition, the information leaked to Gilbert and the *Inquirer* pertaining to the government's secret wiretapping of its political opponents should not have been classified and therefore does not fall within the scope of any of the Espionage Act statutes. The danger in wrongful classification of documents is obvious. As Justice Stewart observed in the Pentagon Papers case, "[w]hen everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection and self-promotion."[123]

As Gilbert's and the *Inquirer*'s actions do not fall within the scope of the Espionage Act, their prosecution can be characterized as one of seditious libel, which is unconstitutional under the First Amendment. It is axiomatic that political speech and newsgathering are protected by the First Amendment.[124] Moreover, as the Supreme Court observed in *Bartnicki*, the dissemination of truthful information about matters of public concern is protected from liability under the First Amendment as long as the secondary transmitter of the information was not involved in the initial illegality.[125] Although arising under Title III, the Supreme Court's analysis in *Bartnicki* applies equally here. As the Court stated in *Bartnicki*, "it would be quite remarkable to hold" that a law-abiding journalist can be punished merely for receiving and publishing information "to deter conduct by a non-law-abiding third party."[126] The source's conduct in unlawfully obtaining and disclosing classified information to Gilbert and the *Inquirer* does not remove their First Amendment protection for speech about a matter of public concern.[127]

Endnotes

1. Government's Consolidated Responses to Defendants' Pretrial Motions at 16, United States v. Rosen, No. 1:05CR225 (E.D. Va. Aug 9, 2006).
2. United States v. Rosen, 445 F. Supp. 2d 602, 607 (E.D. Va. 2006).
3. *Id.* at 607–10.
4. *See* James H. Landman, *Trying Beliefs: The Law of Cultural Orthodoxy and Dissent*, INSIGHTS ON L. & SOC'Y 2.2 (Winter 2002).
5. *Id.* (discussing De Libellis Famosis, (1606) 77 Eng. Rep. 250).
6. *Id.*
7. Sean Michael McGuire, *Media Influence and the Modern American Democracy: Why the First Amendment Compels Regulation of Media Ownership*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 689, 691–92 (2006).
8. CHARLES N. DAVIS, SEDITIOUS LIBEL (Nat'l Newspaper Ass'n ed., 2006), www.nna.org/AboutNNA/Current%20Press%20Releases/Seditious%20Libel.htm.
9. *Id.*
10. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

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11. McGuire, *supra* note 7, at 691–92.
12. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329–30 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).
13. *Sullivan*, 376 U.S. at 273–76.
14. *Id.* at 275.
15. *Id.*
16. Davis, *supra* note 8.
17. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 249 (1997).
18. *Id.* at 250.
19. *Id.* at 250–51 (citing H.R. 291, 65th Cong., 1st Sess. § 2(c) (1917)).
20. 249 U.S. 47 (1919).
21. *Id.* at 48–49.
22. *Id.* at 51–52.
23. *Id.* at 52.
24. 250 U.S. 616 (1919).
25. *Id.* at 617–18.
26. *Id.* at 619, 623.
27. *Id.*
28. James L. Swanson, *Judicial Elections and the First Amendment: Freeing Political Speech*, *in* CATO SUPREME COURT REVIEW 85, 94 (James L. Swanson ed., 2001–02).
29. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
30. United States v. Rosen, 445 F. Supp. 2d 602, 613 & n.7 (E.D. Va. 2006) (citing N.Y. Times Co. v. United States, 403 U.S. 713, 754 (1971)); *see also* United States v. Morison, 844 F.2d 1057, 1086 (4th Cir. 1988); Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. L. REV. 349, 393 & n.159 (1986); Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 998 (1973).
31. Rosen, 445 F. Supp. 2d at 613.
32. 18 U.S.C. § 793 (2006).
33. Such places, include, for example, "any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense. . . ." 18 U.S.C. § 793(a).
34. 18 U.S.C. § 793(a).
35. 18 U.S.C. § 793(b).
36. 18 U.S.C. § 793(d).
37. 18 U.S.C. § 793(e).
38. 312 U.S. 19, 23 (1941).
39. *Id.* at 22–23.
40. *Id.* at 28.
41. *Id.*
42. *Id.* at 27–28.
43. *Id.*
44. 629 F.2d 908 (4th Cir. 1980).
45. *Id.* at 917–18.
46. *Id.* at 918.
47. *Id.* at 919.
48. *Id.* at 919 n.10.
49. United States v. Morison, 844 F.2d 1057, 1068–70 (4th Cir. 1988).
50. *Id.*
51. *Id.* at 1060–62.
52. *Id.* at 1063.
53. *Id.*
54. *Id.*
55. *Id.* at 1074.
56. *Id.*
57. *Id.* at 1071.
58. *Id.* at 1071–72.
59. *Id.* at 1071.
60. *Id.* at 1067.
61. *Id.* at 1068 (quoting Branzburg v. Hayes, 408 U.S. 665, 691 (1972)).
62. *Id.* at 1070.
63. *Id.* at 1081 (Wilkinson, J., concurring).
64. 221 F.3d 542, 578 (4th Cir. 2000).
65. *Id.*
66. *Id.*
67. United States v. Rosen, 445 F. Supp. 2d 602, 607 (E.D. Va. 2006).
68. *Id.* at 618–20.
69. *Id.* at 620.
70. *Id.*
71. *Id.* at 622–23.
72. *Id.* at 623–25.
73. *Id.* at 624–25.
74. *Id.* at 625.
75. *Id.* (quoting United States v. Morison, 844 F.2d 1057, 1071 (4th Cir. 1988)).
76. *Id.*
77. *Id.* at 630.
78. *Id.* at 630–31.
79. *Id.* at 637.
80. Douglas McCollam, *The End of Ambiguity*, COLUM. J. REV., July/Aug. 2006.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. N.Y. Times Co. v. United States, 403 U.S. 713, 718 (1971).
86. Geoffrey R. Stone, *Government Secrecy v. Freedom of the Press*, MLRC BULL. NO. 1, at 14 (2007).
87. *Id.*
88. *Id.*
89. *N.Y. Times Co.*, 403 U.S. at 714.
90. *Id.*
91. *Id.* at 730.
92. *Id.* at 740.
93. *Id.* at 745 (Marshall, J., concurring).
94. *Id.* at 752, 759.
95. *Id.* at 717.
96. *Id.* at 724.
97. *Id.* at 721 (Douglas, J., concurring).
98. Stone, *supra* note 86, at 19.
99. Edgar & Schmidt, *Espionage Statutes*, *supra* note 30.
100. *Id.* at 1033.
101. *Id.* at 1038–46, 1057–58.
102. *Id.* at 946–65.
103. *Id.* at 1025–26, 1030–31.
104. N.Y. Times Co. v. United States, 403 U.S. 713, 721 (1971).
105. 532 U.S. 514 (2001).
106. *Id.* at 527–28.
107. Stone, *supra* note 86; *see also Bartnicki*, 532 U.S. at 519–20.
108. *Bartnicki*, 532 U.S. at 529–30.
109. *Id.* at 525.
110. *Id.* at 535.
111. McCollam, *supra* note 80.
112. Gorin v. United States, 312 U.S. 19, 28 (1941).
113. United States v. Truong Dinh Hung, 629 F.2d 908, 917–18 (4th Cir. 1980).
114. *Gorin*, 312 U.S. at 27–28.
115. 18 U.S.C. § 793(d) (2006).
116. 18 U.S.C. § 793(d).
117. United States v. Morison, 844 F.2d 1057, 1085 (4th Cir. 1988) (Wikinson, J., concurring).
118. 18 U.S.C. § 793(d), (e).
119. United States v. Rosen, 445 F. Supp. 2d 602, 626 (E.D. Va. 2006).
120. *Morison*, 844 F.2d at 1073–74.
121. The designation "Top Secret" applies to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the country's national security. The designation "Secret" applies to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the country's national security. The designation "Confidential" applies to information, the unauthorized disclosure of which could reasonably be expected to cause damage to the country's national security. Exec. Order No. 13,292, 68 Fed. Reg. 15,326 (Mar. 25, 2003).
122. Edgar & Schmidt, *supra* note 30.
123. N.Y. Times Co. v. United States, 403 U.S. 713, 729 (1971).
124. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 324 (2004).
125. Bartnicki v. Vopper, 532 U.S. 514, 529–35 (2001).
126. *Id.* at 529–30.
127. *Id.* at 535.

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