"A SLENDER REED UPON WHICH TO RELY": AMENDING THE ESPIONAGE ACT TO PROTECT WHISTLEBLOWERS

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I. INTRODUCTION

On August 21, 2013, Private First Class Chelsea Manning was sentenced to thirty-five years in a military prison for violating portions of the Espionage Act (the "Act").[1] Manning's sentencing resulted from her decision to leak thousands of classified documents that she had access to as a member of the United States Army.[2] Beginning in February 2010, Manning sent thousands of documents, which contained information on everything from diplomatic cables discussing the execution of Iraqi civilians to a classified video showing an American helicopter firing upon innocent journalists and bystanders, to the website WikiLeaks.[3]

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1. Julie Tate, *Bradley Manning Sentenced to 35 Years in WikiLeaks Case*, WASH. POST (Aug. 21, 2013), http://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html.

2. Eli Lake, *How Bradley Manning Changed the War on Terror*, DAILY BEAST (June 3, 2013), http://www.thedailybeast.com/articles/2013/06/03/how-bradley-manning-changed-the-war-on-terror.html.

3. Ryan Gallagher, *Ten Revelations From Bradley Manning's WikiLeaks Documents*, SLATE (June 4, 2013, 12:55 PM), http://www.slate.com/blogs/future_tense/2013/06/04/bradley_manning_trial_10_revelations_from_wikileaks_documents_on_iraq_afghanistan.html. The revelations from

While some were surprised by the decision to charge Manning under the Act for disclosing information to the media, those who have observed Act prosecutions in recent years understood that using the Act in this manner has become commonplace. Since President Obama took office in January 2009, seven individuals who have disclosed classified information to the media have been charged pursuant to the Act.[4] These individuals include Thomas Drake, who disclosed information regarding waste and abuse at the National Security Agency (NSA),[5] and Edward Snowden, who famously exposed the NSA's overreaching surveillance methods.[6] Prior to 2009, the Act had only been used, in this manner, three times since its inception in 1917.[7]

This Note will examine the events that led to, and the rationale behind, the passage of the original Espionage Act in 1917.[8] It will also explore the 1950 amendments to the Act and how the Act was subsequently used in various prosecutions of individuals who attempted to aid foreign governments.[9] This Note will explain how the decision to

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Manning's documents also included reports of the United States' failure to investigate abuse, torture, and rape by the Iraqi police as well as a spying campaign against United Nations officials. *Id.* While Manning did reveal many instances of misconduct, she was rather indiscriminate in her disclosures and exposed the identities of many undercover agents. *Id.* A new statute to be proposed later in this Note will propose penalties for such behavior. *See infra* Part III.

4. Cora Currier, *Charting Obama's Crackdown on National Security Leaks,* PROPUBLICA (July 30, 2013, 2:40 PM), https://www.propublica.org/special/sealing-loose-lips-charting-obamas-crackdown-on-national-security-leaks.

5. Jane Mayer, *The Secret Sharer*, NEW YORKER (May 23, 2011), http://www.newyorker.com/reporting/2011/05/23/110523fa_fact_mayer. Drake was ultimately sentenced to a year of probation and 240 hours of community service. Tricia Bishop, *NSA Employee Accused of Leaking Information Sentenced to Probation*, BALT. SUN (July 15, 2011), http://articles.baltimoresun.com/2011-07-15/news/bs-md-thomas-drake-sentencing-20110715_1_jesselyn-radack-thomas-andrews-drake-nsa-employee. The District Court judge in Drake's case called the government's actions throughout Mr. Drake's prosecution "unconscionable." *Id.*

6. Glenn Greenwald, *On the Espionage Act Charges Against Edward Snowden*, GUARDIAN (June 22, 2013, 7:18 PM), http://www.theguardian.com/commentisfree/2013/jun/22/snowden-espionage-charges. As of the writing of this Note, Mr. Snowden is a fugitive living in Russia and has not been arraigned. Josh Gerstein, *Eric Holder: If Edward Snowden Were Open to Plea, We'd Talk*, POLITICO (Jan. 24, 2014, 9:13 AM), http://www.politico.com/story/2014/01/eric-holder-edward-snowden-plea-102530.html. However, Attorney General Eric Holder has indicated that while he is not open to a pardon, he would be open to discussing possible plea bargains. *Id.*

7. David Carr, *Blurred Line Between Espionage and Truth*, N.Y. TIMES (Feb. 26, 2012), http://www.nytimes.com/2012/02/27/business/media/white-house-uses-espionage-act-to-pursue-leak-cases-media-equation.html.

8. See *infra* Part II.A.

9. See *infra* Part II.B.

use the Espionage Act to prosecute a leaker in the 1988 case of *United States v. Morison*[10] contravened the legislative intent behind the law and has since led to numerous unjust prosecutions.[11] Finally, this Note will propose amendments to the Act that will end the prosecution of whistleblowers under an act enacted to punish spies, and propose a new statute that properly balances transparency and national security.[12]

II. BACKGROUND

A. 1917 Act

Prior to 1911, there were no federal laws directly relating to the prevention of espionage.[13] While the Sedition Act of 1798 was intended to punish those who "unlawfully combine[d] or conspire[d] . . . with intent to oppose any measure or measures of the government,"[14] the Act was ultimately allowed to expire.[15] From that point forward, the United States was forced to rely on generally applicable laws that did not deal directly with the act of espionage.[16] To punish those who disclosed government secrets, the federal government could only prosecute under laws dealing with the unlawful entry onto military bases and theft of government property.[17]

In order to protect classified information from falling into the wrong hands, Congress passed the Defense Secrets Act of 1911.[18] With language that largely mirrored the text of today's Espionage Act, the 1911 Act stated that an individual who communicated, or even attempted to communicate, a document "connected with the national defense" would face a fine of up to one thousand dollars and imprisonment of not more than one year.[19] However, President Woodrow Wilson did not view the Defense Secrets Act as effective enough to combat the threat of

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

11. *See infra* Part II.C.

12. *See infra* Part III.

13. Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 939 (1973).

14. *Sedition Act*, CONST. SOCIETY, http://www.constitution.org/rf/sedition_1798.htm (last visited June 5, 2015).

15. *Primary Documents in History*, LIBRARY CONG., http://www.loc.gov/rr/program/bib/ourdocs/Alien.html (last visited June 5, 2015).

16. *See* Edgar & Schmidt, *supra* note 13, at 940.

17. *Id.*

18. Defense Secrets Act, ch. 226, 36 Stat. 1084 (1911); *see* Edgar & Schmidt, *supra* note 13, at 940.

19. United States v. Rosen, 445 F. Supp. 2d 602, 612 (E.D. Va. 2006), *aff'd*, 557 F.3d 192 (4th Cir. 2009).

espionage.[20] Wilson called on Congress in 1915 to pass legislation that would create much tougher penalties on those who disclosed classified information.[21] Importantly, Wilson demanded that the legislation be aimed at those who would seek to "destroy . . . industries . . . and to debase . . . politics to the uses of foreign intrigue."[22]

Wilson's address demonstrated that he believed the Espionage Act was necessary to combat those who would seek to aid foreign enemies in the destruction of the United States.[23] To further this goal, Wilson proposed including a provision in the Espionage Act that would give him the power to censor the press when he felt that national security interests were at stake.[24] Motivated by harm that had befallen the Union when a newspaper had published sensitive information during the Civil War,[25] the Wilson administration pushed for the ability to either censor the press before it could publish potentially damaging information or criminally prosecute them after the fact.[26]

Fearing that such a provision would lead to an abuse of presidential power, Congress ultimately voted to remove it from the final bill.[27] Congress anticipated what many Americans still fear today, that during wartime, a President would prohibit the publication of information that could be embarrassing to him and his administration, while using national security as a pretext.[28] Congress's refusal to include a provision that would limit the ability of the press to publish information about the military would seem to run directly opposite to the argument that the Act was intended to prosecute those who provided that information to the press.

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20. DANIEL MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE 89 (Yale University Press 2007).

21. *Id.*

22. *Id.*

23. *Id.* (Wilson implored Congress to pass the Act, stating "I urge you to enact such laws at the earliest possible moment and feel that in doing so I am urging you to do nothing less than save the honor and self-respect of the nation. Such creatures of passion, disloyalty, and anarchy must be crushed out.").

24. Edgar & Schmidt, *supra* note 13, at 940.

25. *Id.* at 941.

26. *Id.*

27. *Id.* (stating that Congress believed that such a provision would allow the President to "impede, or even suppress, informed criticism of his Administration's war effort and foreign policy under the guise of protecting military secrets.").

28. *Id.*

B. 1950 Act

In 1950, section 1(d) of the 1917 Espionage Act was amended and split into two parts.[29] Now codified as 18 U.S.C. § 793(d) and (e), section (d) of the Act mirrored section 1(d) of the 1917 Act, in that it criminalized communicating documents or information to individuals who were not entitled to receive it.[30] However, § 793(d) did go further than section 1(d) of the 1917 Act, in that it included the term "information,"[31] in addition to documents and other tangible items, among the things that could not be communicated to those not entitled to receive it.[32] Section 793(e) of the 1950 Act extended liability beyond just those who had lawful possession of the documents or information.[33]

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29. *Id.* at 1021 ("First, section 1(d) of the 1917 law was split into two parts, the new subsection (e) to cover people not connected with the Government (unauthorized possessors). The purpose of the distinction was to oblige the ordinary citizen to return defense information to the Government without the need for an official demand.").

30. 18 U.S.C.A. § 793(d) (West 2014) ("Whoever, lawfully having possession of, access to, control over, or being entrusted with any document...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 . . . the same to any person not entitled to receive it . . . Shall be fined under this title or imprisoned not more than ten years, or both.").

31. *Id.* The Act contained a higher scienter requirement for information than tangible documents. 793(e) specifically states that when "information" as opposed to documents is communicated, the government must show "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." *Id.* Conversely, those charged with the unauthorized retention of tangible items, like documents, can be convicted without a showing of bad faith. The court in *U.S. v. Drake* ruled that "[i]n cases like this one, involving documents, the defendant need only have acted willfully, as a defendant will more readily recognize a document relating to the national defense based on its content, markings or design than it would intangible or oral 'information' that may not share such attributes." U.S. v. Drake, 818 F. Supp. 2d 909, 917 (D. Md. 2011).

32. Edgar & Schmidt, *supra* note 13, at 1021. Congress added "information" to the list of covered material, which, in contrast to the enumerated tangible items, is subject to the prohibitions on communication and retention only when "the possessor has reason to believe [the information] could be used to the injury of the United States or to the advantage of a foreign nation." *Id.* at 999.

33. 18 U.S.C.A § 793(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

Section (e) largely echoes section (d), but applies to individuals who have "unauthorized possession" of documents relating to the national defense.[34] By imposing criminal liability for simply being in unauthorized possession of classified information, the 1950 amendments greatly expanded the reach of the Act.[35] The term "unauthorized possession" was chosen instead of "unlawful possession" because proving someone had unauthorized access to a document was easier on prosecutors than having to prove that the individual's possession was unlawful.[36] Sections 793(d) and (e) have received scrutiny in recent months because of their use in prosecutions of Private First Class Chelsea Manning and former National Security Agency contractor Edward Snowden.[37]

Despite the Act's potentially broad reach, it was initially used only to prosecute those whose objective was to aid a foreign government.[38] Most notably, in 1941, the government prosecuted Hafis Salich for selling intelligence about the activities of Japanese-Americans to Mihail Gorin of the Soviet Union.[39] Salich was a civilian employee of the United States Naval Intelligence Office in San Pedro, California, while Gorin was an agent of the Soviets.[40] Gorin was in the United States and employed by a tourist agency in order to conceal his true identity.[41] Facing financial difficulties, Salich sold information to Gorin regarding the United States' surveillance of the Japanese Government, defending his actions as necessary because the Japanese were a "common enemy" to both countries.[42] Both men were ultimately convicted under the 1917

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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.").

34. *Id.*

35. Pamela Takefman, *Curbing Overzealous Prosecution of the Espionage Act: Thomas Andrews Drake and the Case for Judicial Intervention at Sentencing*, 35 CARDOZO L. REV. 897, 919 (2013).

36. Edgar & Schmidt, *supra* note 13, at 1024. ("The term 'unauthorized possession' is used deliberately in preference to 'unlawful possession,' so as to preclude the necessity for proof of illegal possession.").

37. Josh Gerstein, *Bradley Manning Fallout Complicates Edward Snowden Saga*, POLITICO (Aug. 2, 2013, 4.28 PM), http://www.politico.com/story/2013/08/bradley-manning-edward-snowden-95138.html.

38. Jereen Trudell, *The Constitutionality of Section 793 of the Espionage Act and Its Application to Press Leaks*, 33 WAYNE L. REV. 205, 208 (1986).

39. Gorin v. United States, 312 U.S. 19 (1941).

40. Gorin v. United States, 111 F.2d 712, 714 (9th Cir. 1940) *aff'd*, 312 U.S. 19 (1941).

41. *Id.* at 715.

42. *Id.*

Act in 1939, and had their convictions upheld by the Supreme Court in 1941.[43]

Perhaps the most famous prosecution under the Espionage Act was that of Julius and Ethel Rosenberg.[44] Mr. and Mrs. Rosenberg were indicted in August 1950 for selling secrets about the United States' nuclear program to the Soviet Union.[45] They were later convicted and executed for their crimes.[46]

C. Prosecution of Leakers

Such prosecutions were the norm until Daniel Ellsberg and Anthony Russo were charged under sections 793(d)–(e) of the Act in 1971.[47] Ellsberg and Russo were responsible for leaking classified documents concerning the United States' involvement in the Vietnam War to the *New York Times* and *Washington Post*.[48] Despite what seemed to be overwhelming evidence against the defendants, the charges were dismissed because of prosecutorial misconduct.[49]

It was not until 1988 that the first successful prosecution of a leaker was brought under the Espionage Act.[50] Samuel Morison was an employee at the Naval Intelligence Support Center who leaked photographs of a Soviet ship to a British newspaper.[51] Morison was charged under sections 793(d) and (e) and was subsequently convicted.[52] In affirming the conviction, the Fourth Circuit held that there was "no basis in the legislative record" that the Espionage Act should only be used to prosecute classic spying and that the statute itself was not unconstitutionally vague or overbroad.[53] The court in *United States v. Morison* found it insignificant that no prior prosecutions under the Espionage Act had related to press leaks, and did not consider the context in which the original Act was passed in 1917.[54]

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43. *Gorin*, 312 U.S. at 33.

44. Rosenberg v. United States, 346 U.S. 273 (1953).

45. *Id.*

46. *Id.*

47. Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974).

48. *Id.*

49. *Id.*

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

51. *Id.* at 1061.

52. *Id.* at 1062.

53. *Id.* at 1070.

54. *Id.* at 1067 ("[T]he rarity of prosecution under the statutes does not indicate that the statutes were not to be enforced as written. We think in any event that the rarity of the use of the statute as a basis for prosecution is at best a questionable basis for nullifying

While ultimately concurring in the disposition of the case, Judge Wilkinson stated that he was concerned about the criminal restraint on an individual's First Amendment rights the court's ruling would impose.[55] Judge Wilkinson opined that such restraints would hinder the press in its duty to disclose and critique government activity.[56] Judge Phillips also concurred in the judgment but argued that the language of the Espionage Act was not conducive for dealing with individuals who simply want to leak classified information to the press.[57] Judge Phillips argued that the language of the Espionage Act was "unwieldy and imprecise" for prosecuting those who leaked information to the media, and it was better suited just for those who gave information to a foreign government.[58]

Judge Phillips also stated that the provision in sections 793(d)–(e) of the Act that criminalized unlawful possession or communication of documents "relating to the national defense" was facially overbroad and vague.[59] However, Judge Phillips was satisfied that giving narrow jury instructions would cure the "facial vice."[60]

The successful conviction of Samuel Morison under the Espionage Act set the stage for further prosecution of individuals who conveyed classified information to the press. In 2006, two members of the American Israel Public Affairs Committee (AIPAC), Steven Rosen and Keith Weissman, were charged under sections 793(d) and (e) of the Act after they leaked classified documents they had received from Lawrence Franklin, an employee of the Department of Defense, to the media.[61] Both defendants challenged the Act's constitutionality, claiming that its vagueness violated the Fifth Amendment and that it was overbroad, in violation of the First Amendment.[62] Citing *Morison*, the court in *Rosen*

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the clear language of the statute, and we think the revision of 1950 and its reenactment of section 793(d) demonstrate that Congress did not consider such statute meaningless or intend that the statute and its prohibitions were to be abandoned.").

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

56. *Id.* at 1082 ("I do not think the First Amendment interests here are insignificant. Criminal restraints on the disclosure of information threaten the ability of the press to scrutinize and report on government activity.").

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

58. *Id.* at 1085 (opining that "Espionage Act statutes as now broadly drawn are unwieldy and imprecise instruments for prosecuting government 'leakers' to the press as opposed to government 'moles' in the service of other countries.").

59. *Id.* at 1086 ("[T]hose statutes can only be constitutionally applied to convict press leakers (acting for whatever purposes) by limiting jury instructions which sufficiently flesh out the statutes' key element of 'relating to the national defense' which, as facially stated, is in my view, both constitutionally overbroad and vague.").

60. *Id.*

61. United States v. Rosen, 445 F. Supp. 2d 602, 610 (E.D. Va. 2006), *aff'd*, 557 F.3d 192 (4th Cir. 2009).

62. *Id.*

conceded that while the language of the statute was imprecise, prior cases dealing with the Espionage Act clarified that the Act incorporated the executive branch's classification regulations, and therefore, any violation of those regulations would be a violation of the Espionage Act.[63]

In 2010, Thomas Drake, a former NSA employee, was charged under section 793(e) of the Act after he leaked classified documents to the press regarding fraud, waste, and abuse at the agency.[64] Like the defendants in *Morison* and *Rosen*, Drake argued that the statute was unconstitutional under the First and Fifth Amendments.[65] Drake challenged the terms "relating to the national defense" and "willfully retains" as being unconstitutionally vague.[66] The court denied Drake's motion to dismiss, stating that issues regarding the Espionage Act's vagueness have been settled since the court in *United States v. Morison* handed down its ruling.[67] The Espionage Act charges against Drake were eventually dropped by prosecutors in exchange for pleading guilty to the unauthorized use of a government computer.[68]

When the Espionage Act was passed into law in 1917, it was seemingly understood by Congress that it was only to be used to prosecute those who would aid a foreign government at the expense of the United States.[69] This understanding[70] was demonstrated in numerous cases including *Gorin*, *Rosenberg*, and many others, until Samuel Morison was prosecuted for disclosing classified information to a news

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63. *Id.* at 623.

64. United States v. Drake, 818 F. Supp. 2d 909, 912 (D. Md. 2011).

65. *Id.*

66. *Id.* at 915.

67. *Id.* at 916 (noting that issues of vagueness "have been well-settled within the Fourth Circuit since the United States Court of Appeals for the Fourth Circuit issued its opinion in *United States v. Morison.*").

68. Ellen Nakashima, *Ex-NSA Official Thomas Drake to Plead Guilty to Misdemeanor*, WASH. POST (June 9, 2011), http://www.washingtonpost.com/national/national-security/ex-nsa-manager-has-reportedly-twice-rejected-plea-bargains-in-espionage-act-case/2011/06/09/AG89ZHNH_story.html.

69. Laura Barandes, *A Helping Hand: Addressing New Implications of the Espionage Act on Freedom of the Press*, 29 CARDOZO L. REV. 371, 384 (2007) ("Taken together, the congressional debates preceding passage of the Acts of 1911, 1917, and 1950 on the issue of publication suggest that the Espionage statutes were not meant to apply generally to the publication of defense information.").

70. *Id.* ("Congress rejected the 1957 recommendation of the Commission on Government Security to criminalize publication of classified information after substantial discussion of the issue. Furthermore, that the executive branch has repeatedly sponsored (failed) legislation with broader restrictions on the press suggests that executive officials have not understood the existing legislation to apply so broadly.").

organization in 1988.[71] The successful prosecution of Morison contravened the intent of Congress to prosecute only those who were looking to aid a foreign government or harm the United States.[72]

Individuals who leak classified information to the media, as a general rule, do not intend to harm the United States or benefit a foreign government. In fact, their aim is often the opposite. The goal of individuals like Edward Snowden and Chelsea Manning was to expose what they believed to be injustices and abuses by the United States in the hopes that such exposure would force the government to alter its practices.[73] These disclosures are not espionage in the traditional sense, and should not be equated as such in the eyes of the law.

III. ANALYSIS

A. Congressional Intent

When Edward Snowden and Chelsea Manning were charged under the Espionage Act, they were charged pursuant to the 1950 Act.[74] Codified at 18 U.S.C. § 793, the Act prohibits, among other things, those who are lawfully in possession of documents relating to national defense from "willfully communicat[ing]" that information to those who are not entitled to receive it.[75] However, this statute was preceded by section 1(d) of the 1917 Act, which contained nearly identical language.[76] The legislative history of the 1917 Act reveals the confusion about who would be criminally liable under the Act.[77]

During the Senate debates over what was to become section 1(d) of the Espionage Act, Senator Blair Lee of Maryland objected to its

71. United States v. Morison, 844 F.2d 1057 (1988).

72. *See* Barandes, *supra* note 69, at 373 ("The Cold War case, *United States v. Morison*, went one step further, finding the Act covered press leaks.").

73. Glenn Greenwald et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, GUARDIAN (June 9, 2013, 9:00 AM), http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance. Snowden stated, "I really want the focus to be on these documents and the debate which I hope this will trigger among citizens around the globe about what kind of world we want to live in." *Id.* Significantly, he emphasized that his "sole motive is to inform the public as to that which is done in their name and that which is done against them." *Id.*

74. Caitlin Dewey, *Manning Was Charged Under the Espionage Act. It Doesn't Have a Proud History*, WASH. POST (July 31, 2013, 4:33 PM), http://www.washingtonpost.com/blogs/the-switch/wp/2013/07/31/manning-was-charged-under-the-espionage-act-it-doesnt-have-a-proud-history/.

75. 18 U.S.C.A. § 793(d) (West 2014).

76. Trudell, *supra* note 38, at 206.

77. *See* Part III.

potentially broad scope.[78] Quoting the proposed text of the Act, Senator Lee was troubled that the law could be interpreted to target newspaper reporters who received classified information and then reported on it.[79] Despite Senator Lee's objections, the bill passed with broad language that could implicate those who had no intent to injure the United States in any way.[80] However, the Senate bill's sponsor, Senator Overman, assured those concerned that the only ones who needed to worry about prosecution were spies and traitors.[81]

While there were certainly conflicting views in Congress over who should be within the scope of the Act, the legislative history shows that there was a large contingent that believed the Act should only apply to those who were engaged in classic spying, done to harm the United States.[82] This was the thrust of the defendant's argument in *United States v. Morison*.[83] The defendant, Samuel Morison, pointed to multiple instances in the 1917 debates that showed Congress only intended for the law to cover saboteurs and traitors, not those who disclosed classified information to the press.[84] Despite these numerous statements in the legislative history, the court in *Morison* rejected this argument, claiming that the legislative history was unclear, and it was therefore impossible to know exactly what Congress intended.[85]

While the court in *Morison* was correct in stating that there were differing viewpoints about the Act's reach during Congressional debates, there was no such conflict after Congress enacted the bill.[86] Later legislation proved that Congress and the Executive believed that section 1(d) of the 1917 Act did not criminalize behavior that was done without

78. Edgar & Schmidt, *supra* note 13, at 1011.

79. *Id.* (Senator Lee feared that the legislation was "aimed at any newspaper reporter who gets any kind of information about military matters in time of peace.").

80. *Id.*

81. *Id.* ("Not a word was said to show that the proposed language had a narrow intendment although Senator Overman said only spies and traitors need fear prosecution.").

82. United States v. Morison, 604 F. Supp. 655, 659 (D. Md. 1985) ("Defendant cites an impressive wealth of legislative history suggesting that § 793 was only meant to apply in the classic espionage setting.").

83. *Id.*

84. *Id.* ("Defendant cites an impressive wealth of legislative history suggesting that §793 was only meant to apply in the classic espionage setting.").

85. *Id.* ("It is, of course, impossible to determine exactly what Congress meant when it passed the statute.").

86. Edgar & Schmidt, *supra* note 13, at 1060. ("[G]iven the confusions of language and history in sections 793 and 794, later statutes that reflect Congress' understanding of the two general sections are valuable aids in interpreting them.").

the intent to injure the United States.[87] For example, 18 U.S.C. § 952, passed in 1933, prohibited the publication of classified diplomatic codes.[88] Congress passed that law after a former State Department official published a memoir that disclosed certain classified information regarding the government's interception and decoding of foreign diplomatic cables.[89] Nowhere in the law or its legislative history did it state that section 1(d) of the 1917 Act was intended to criminalize the publication of classified information by the media or other news sources.[90]

A later statute, 18 U.S.C. § 798,[91] was enacted in 1950 in order to prohibit the communication and publication of information concerning cryptographic operations.[92] The legislative history of that statute specifically stated that all previous legislation concerning the publication of classified information only criminalized the acts of those who published information with the intent to harm the United States.[93] Other statutes, including 18 U.S.C. §§ 795–97,[94] criminalized the taking and publishing of photographs of military installations and other equipment designated by the President.[95] Such legislation implies that section 1(d) of the 1917 Act was not meant to criminalize the mere publication of military information.[96] These statutes, combined with the statements by Senator Lee and Senator Overman during the Senate debates on the 1917 Act, are strong evidence that the Espionage Act was only intended to punish those who engaged in classic spying - those who otherwise intended to harm the United States.

Thirty-three years after the passage of the 1917 Espionage Act, Congress amended the Act for the first and only time.[97] During the Congressional debates that preceded the passage of the 1950 Espionage Act, concerns were once again raised that journalists and others who were expressing their First Amendment rights would be prosecuted under

87. *Id.* at 1020 ("[O]ne point of subsequent history is plain. Congress and the Executive operated for the next thirty-three years on the assumption that 1(d) did not effectively criminalize the non-culpable publication or other revelation of information relating to national security.").

88. 18 U.S.C.A. § 952 (West 2014).

89. Edgar & Schmidt, *supra* note 13, at 1020.

90. *Id.*

91. 18 U.S.C. § 798 (West 2014).

92. Edgar & Schmidt, *supra* note 13, at 1020.

93. *Id.* ("The House Report expressly stated that prior law made such revelations criminal only when done with intent to injure the United States.").

94. 18 U.S.C. §§ 795–97 (West 2014).

95. Edgar & Schmidt, *supra* note 13, at 1020.

96. *Id.*

97. 18 U.S.C.A. § 793 (West 2014).

the statute.[98] There was so much concern about First Amendment rights in the Senate that a provision was initially added into the bill that prohibited the Act from infringing at all on the freedom of the press.[99] While the provision was ultimately removed from the final bill, the individual who proposed the 1950 amendments, Attorney General Tom Clark, stated that the new law would only apply to those who were engaged in classic spying.[100] While the 1917 legislative history was somewhat conflicted, the statement by Attorney General Clark indicates that there was little disagreement in 1950 that the Act only applied to those who conducted classic spying.

B. 18 U.S.C. §§ 793(d)-(e) are unconstitutionally vague and overbroad

While the congressional records from 1917, 1950, and subsequent legislation demonstrate that Congress only intended to prosecute those engaged in classic spying, the text of the Act remains broad and vague enough to allow for prosecution of those who simply leak information to the press.[101] Specifically, the phrase "relating to the national defense"[102]

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98. Edgar & Schmidt, *supra* note 13, at 1025. ("Senator Kilgore, a member of the Judiciary Committee . . . , wrote to Senator McCarran of his concern that 'at least theoretically [S. 595] ... might make practically every newspaper in the United States and all the publishers, editors, and reporters into criminals without their doing any wrongful act.'" (alteration in original)).

99. *Id.* at 1027. The proposed provision stated that:

> Nothing in this Act shall be construed to authorize, require, or 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 and no regulation shall be promulgated hereunder having that effect.

Id.

100. *Id.* at 1026. The Attorney General stated:

> The history and application of the existing espionage statutes which this bill would amend only in part, and the language, history, hearings, and report of the committee relative to this bill, together with the integrity of the three branches of the Government which enact, enforce, and apply the law, 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 under either existing law or the provisions of this bill.

Id.

101. Judge Learned Hand summed up the issues with the phrase "relating to the national defense" in United States v. Heine, 151 F.2d 813, 815 (2d Cir. 1945):

> The amount of iron smelted, of steel forged, of parts fabricated; the number of arable acres, their average yield; engineering schools, scientific schools, medical schools, their staffs, their students, their curriculums, their laboratories; metal deposits; technical publications of all kinds; such non-technical publications as disclose the pacific or belligerent temper of the people, or their discontent with the government: every part in short of the national economy and everything tending to

inevitably implicates those whose sole purpose is to inform the public of government abuses, instead of those who are aiding a foreign nation with an intent to harm the United States.[103]

In regards to the phrase "relating to the national defense," the court in *United States v. Morison* stated that giving the phrase a narrow construction in jury instructions could cure any vagueness or broadness.[104] The court in *Morison* noted that the court in *United States v. Dedeyan* interpreted the phrase "relating to the national defense" to mean any information that is "potentially damaging" to the United States.[105] The district court in *Morison* stated that in order to obtain a conviction under sections 793(d)-(e), the government must prove that the disclosed document or information was potentially damaging to the United States and that it was not supposed to be made available to the general public.[106]

While limiting criminal liability under the Espionage Act to disclosure of information or documents that could "potentially damage" the United States is a step in the right direction, it still exposes those who have no intent to harm the United States.[107] Under the "potentially damaging" standard, any number of press leaks would be considered violations of the Espionage Act. For example, while Edward Snowden's leaks informed Americans that the government was collecting large amounts of their personal information, a prosecutor would argue that the information and documents he disclosed to the media have the potential

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disclose the national mind are important in time of war, and will then "relate to the national defense.

102. 18 U.S.C.A. § 793(d) (West 2014).

103. Edgar & Schmidt, *supra* note 13, at 986. ("In conclusion, the meaning of the phrase 'national defense,' after some sixty years in the statute books, is not much clearer now than it was on the date of its passage. Judicial gloss has not cabined its tendency to encompass nearly all facets of policy-making related to potential use of armed forces.").

104. United States v. Morison, 844 F.2d 1057, 1072 (4th Cir. 1988).

105. *Id.* at 1071–72 (quoting United States v. Dedeyan, 584 F.2d 36, 38 (4th Cir. 1978)).

106. *Id.* ("To prove that the documents or the photographs relate to national defense there are two things that the government must prove. First, it must prove that the disclosure of the photographs would be potentially damaging to the United States or might be useful to an enemy of the United States. Secondly, 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." (alteration in original)).

107. Morison himself objected to the "potentially damaging" jury instruction to no avail. *Id.* at 1072. He argued that although it had been used in previous prosecutions under the Espionage Act, none of those involved press leaks and as such were not entitled to the First Amendment protections that he was claiming. *Id.* Morison unsuccessfully argued for an "actual damage" instruction in cases involving press leaks. *Id.*

to do damage to the United States.[108] In fact, this argument has been made by many in the wake of Mr. Snowden's indictment, including former NSA and CIA director Michael Hayden, who claimed that disclosing intelligence-gathering methods, regardless of their likely illegality, has done great harm to the United States.[109]

Judge Phillips, in his concurring opinion in *Morison*, foresaw that the "potentially damaging" standard, while preferable to "relating to the national defense," still has a very broad reach.[110] Just like the above example of Mr. Snowden, Judge Phillips too realized that any information that related to the national defense could plausibly be argued to do some damage to the United States if disclosed to the public.[111]

Relying on narrow jury instructions when there are First Amendment interests at stake is not a proper solution to the problems that the Espionage Act poses, because both the language of the Act and interpretations by different courts continue to threaten those who try to expose the flaws within the U.S. government.[112] Judge Phillips recognized that relying solely on jury instructions was an untenable solution, calling it "a slender reed upon which to rely for constitutional application of these critical statutes."[113] While ultimately acquiescing to the use of jury instructions in *Morison*, Judge Phillips believed only rewriting the entire statute would be a proper solution.[114]

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108. *See infra* note 109.

109. Michael Hayden, *Ex-CIA Chief: What Edward Snowden Did*, CNN (July 19, 2013, 11:31 AM), http://www.cnn.com/2013/07/19/opinion/hayden-snowden-impact/ ("There is the undeniable operational effect of informing adversaries of American intelligence's tactics, techniques and procedures. Snowden's disclosures go beyond the 'what' of a particular secret or source. He is busily revealing the 'how' of American collection.").

110. *Morison*, 844 F.2d at 1086 (Phillips, J., concurring) ("The requirement that information relating to the national defense merely have the 'potential' for damage or usefulness still sweeps extremely broadly. One may wonder whether any information shown to be related somehow to national defense could fail to have at least some such 'potential.'").

111. *Id.*

112. *See infra* note 113.

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

114. *Id.* (Phillips, J., concurring) ("[T]he instructions we find necessary here surely press to the limit the judiciary's right and obligation to narrow, without 'reconstructing,' statutes whose constitutionality is drawn in question. In the passage quoted by Judge Wilkinson, Justice Stewart observed that 'Congress may provide a resolution . . . through carefully drawn legislation.' That surely would provide the better long-term resolution here.").

Nearly twenty-six years have passed since the Fourth Circuit's ruling in *Morison*, and there have yet to be any changes to the Espionage Act.[115] Instead, the Act has been used to prosecute even more individuals who have leaked information to the press rather than being used solely for the purpose of prosecuting those who harm the United States and aid foreign governments. Within the last four years alone, individuals such as Thomas Drake, Chelsea Manning, and Edward Snowden have been charged or convicted under the Act for disclosing information about government abuse and inefficiency.[116] Until Congress heeds the advice of Judge Phillips, those who leak information to the press in the hopes of exposing the government's wrongdoing can expect to be prosecuted as if they are traitors, incentivizing those parties to remain indifferent, and allowing injustice to abound.

C. Amending the Espionage Act is Good Public Policy

While the legislative history and facial defects of the Espionage Act are sufficient reasons for its amendment, amending the Act for policy reasons may be the most important reason of all. Fundamentally, leakers and those who engage in classic spying have opposite goals. While those who leak information to the press realize that their disclosures will cause some level of embarrassment for their government, their ultimate motivation is to expose wrongdoing in the hopes that the exposure will cause the government to improve and become more transparent. When those types of disclosures are viewed under the law as equal to disclosures that are intended to harm the United States, it removes any incentives for whistleblowers to come forward. Under the Espionage Act as it is currently written, those who leak information to the press are not only subject to decades in prison, but are essentially labeled as disloyal to their country.

Never has the law been more hostile to whistleblowers than during the Obama administration. Prior to President Obama taking office in 2009, the Espionage Act had only been used three times to prosecute those who leaked classified information to the press.[117] Since President Obama's inauguration, seven individuals have been charged under the Espionage Act for disclosing classified information to the media.[118]

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115. Edgar & Schmidt, *supra* note 13, at 1021 ("Congress last amended the Espionage Act in 1950.").

116. Currier, *supra* note 4.

117. Carr, *supra* note 7.

118. Currier, *supra* note 4. In addition to Drake, Manning, and Snowden, the Obama administration has charged leakers Shamai Leibowitz, Stephen Kim, Jeffrey Sterling, and John Kiriakou under the Espionage Act. *Id.* Leibowitz received a twenty-month sentence

Given how aggressively this administration has been using the Espionage Act against leakers, the need to amend the Act is greater now than ever before.[119]

The best way to balance the interests of whistleblowers and government secrecy is to amend the Espionage Act to specifically preclude prosecution for those who leak information to the media. In order to protect the government's right to control how its information is disseminated, a separate statute should be enacted that criminalizes not following the procedures set forth in the Intelligence Community Whistleblower Protection Act (ICWPA).[120] Under the ICWPA, those who want to report violations of the law or abuse by their government agency may speak with the Inspector General of their agency or go directly to Congress.[121] If an intelligence employee completely bypasses the procedures set forth in the ICWPA,[122] they will be charged under this

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for disclosing to a blogger that the FBI had been conducting wiretaps on Israeli diplomats. *Id.* Sterling was charged under the Espionage Act for leaking information to New York Times reporter James Risen regarding the CIA's efforts to stifle the Iranian nuclear program. *Id.* Risen has been ordered to testify in Sterling's trial. *Id.* Kim was indicted in August of 2010 for disclosing classified information about North Korea to a Fox News Reporter. *Id.* The Fox News reporter, James Rosen, has come under investigation for his role in reporting the story and has even been labeled a co-conspirator. *Id.* Finally, Kiriakou pled guilty for disclosing information about the interrogation of an Al-Qaeda leader to ABC News in 2007. *Id.*

119. As was mentioned above, the broad use of the Espionage Act has ensnared not only those who leak information to the press, but members of the press as well. In addition to compelling James Risen to testify in the trial of Jeffrey Sterling and the investigation of James Rosen, Glenn Greenwald has been living abroad out of fear that he will be arrested and charged under the Espionage Act if he returns to the United States. Janet Reitman, *Snowden and Greenwald: The Men Who Leaked the Secrets*, ROLLING STONE (Dec. 4, 2013), http://www.rollingstone.com/politics/news/snowden-and-greenwald-the-men-who-leaked-the-secrets-20131204. While Attorney General Holder has stated that "any journalist who's engaged in true journalistic activities is not going to be prosecuted by this Justice Department," the treatment of Risen and Rosen demonstrate just how much the Espionage Act has been abused. Sari Horwitz, *Justice Is Reviewing Criminal Cases that Used Surveillance Evidence Gathered Under FISA*, WASH. POST (Nov. 15, 2013), http://www.washingtonpost.com/world/national-security/justice-reviewing-criminal-cases-that-used-evidence-gathered-under-fisa-act/2013/11/15/0aea6420-4e0d-11e3-9890-a1e0997fb0c0_story.html.

120. Intelligence Authorization Act For 1999, Pub. L. No. 105-272, 112 Stat. 2396 (1998).

121. *Id.*

122. According to the ICWPA:

> An employee of the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, or the National Security Agency . . . who intends to report to Congress a complaint or information with respect to an urgent concern may report the complaint or information to the Inspector General of the Department of Defense (or designee).

new statute. This statute would contain much lower penalties, with defendants being sentenced to probation or some jail time depending on the nature of their actions. However, intelligence employees who attempted to use the mechanisms contained within the ICWPA to no avail would be allowed to assert their reasonable, good faith effort to comply with the statute.[123] If the trier of fact determines that, under the circumstances, the defendant made a reasonable, good faith effort to comply with the ICWPA and only leaked information to the press when the Inspector General or Congress did not adequately respond, it should acquit the defendant of all charges.

This new law would formally recognize the distinction between traitors and those who expose information in order to improve their country. More importantly, the proposed statute will encourage those who see illegality and abuse within the government to voice their concerns without the risk of being prosecuted under the Espionage Act and spending decades in prison. Amending the Espionage Act would follow the original intent of Congress and create a more transparent government.

IV. CONCLUSION

Use of the Espionage Act to prosecute those who disclose classified information to the media has been described as using a "broad sword where a scalpel would be far preferable."[124] Indeed, those who have attempted to expose wrongdoing within the United States government have been either threatened with, or subjected to, the severe punishment

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Jamie Sasser, *Silenced Citizens: The Post-Garcetti Landscape for Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759, 783 (2007).

123. This new statute would affect past leakers who have been prosecuted under the Espionage Act in different ways. For example, Chelsea Manning seemingly made no good faith attempt to notify her superiors of what she believed to be wrongdoing. She instead went directly to Wikileaks and others on the Internet and released around 750,000 sensitive documents. Paul Courson & Matt Smith, *WikiLeaks source Manning gets 35 years, will seek pardon*, CNN (Aug. 22, 2013), http://www.cnn.com/2013/08/21/us/bradley-manning-sentencing/. Such reckless disclosure should still be punishable, just not under the Espionage Act.

On the other hand, according to reports, Thomas Drake attempted to report abuse at the NSA to his direct superiors, the NSA Inspector General, the NSA general counsel, and even the Pentagon Inspector General before he went to the Baltimore Sun. Mayer, *supra* note 5. Such conduct would not lead to prosecution.

124. Nakashima, *supra* note 68 (quoting Professor Steven Vladeck of American University. Professor Vladeck observed that the Espionage Act "criminalizes to the same degree the wrongful retention of information that probably should never have been classified in the first place and the willful sale of state secrets to foreign intelligence agencies.").

that the Espionage Act carries. Individuals such as Chelsea Manning and Edward Snowden now face the prospect of decades behind bars for committing acts that were intended to improve their country. Even more devastating, use of the Espionage Act in this fashion has created a climate in which whistleblowers that observe misconduct will stay quiet out of fear of unjust prosecution. Amending the Espionage Act and creating an act that will differentiate between traitors and whistleblowers will finally fulfill Congress's original intent and properly balance national security and transparency.