



# Criminal Prohibitions on the Publication of Classified Defense Information

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October 18, 2010

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

R41404

## Summary

The recent online publication of classified defense documents by the organization WikiLeaks and subsequent reporting by the *New York Times* and other news media have focused attention on whether such publication violates U.S. criminal law. The Attorney General has reportedly stated that the Justice Department and Department of Defense are investigating the circumstances to determine whether any prosecutions will be undertaken in connection with the disclosure.

This report identifies some criminal statutes that may apply, but notes that these have been used almost exclusively to prosecute individuals with access to classified information (and a corresponding obligation to protect it) who make it available to foreign agents, or to foreign agents who obtain classified information unlawfully while present in the United States. Leaks of classified information to the press have only rarely been punished as crimes, and we are aware of no case in which a publisher of information obtained through unauthorized disclosure by a government employee has been prosecuted for publishing it. There may be First Amendment implications that would make such a prosecution difficult, not to mention political ramifications based on concerns about government censorship. To the extent that the investigation implicates any foreign nationals whose conduct occurred entirely overseas, any resulting prosecution may carry foreign policy implications related to the exercise of extraterritorial jurisdiction.

This report will discuss the statutory prohibitions that may be implicated, including the Espionage Act; the extraterritorial application of such statutes; and the First Amendment implications related to such prosecutions against domestic or foreign media organizations and associated individuals.

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The recent online publication of classified defense documents by the organization WikiLeaks and subsequent reporting by the *New York Times*, the *Guardian* (UK), and *Der Spiegel* (Germany) have focused attention on whether such publication violates U.S. criminal law. The Attorney General has reportedly stated that the Justice Department and Department of Defense are investigating the circumstances to determine whether any prosecutions will be undertaken in connection with the disclosure,<sup>1</sup> but has not released sufficient factual findings to permit a full legal analysis. Accordingly, the following discussion will provide a general overview of the relevant law as it may apply to pertinent allegations reported in the media, assuming them to be true. The discussion should not be interpreted to confirm the truth of any allegations or establish that a particular statute has been violated.

## Background

WikiLeaks.org describes itself as a “public service designed to protect whistle-blowers, journalists and activists who have sensitive materials to communicate to the public.”<sup>2</sup> Arguing that “[p]rincipled leaking has changed the course of history for the better,” it states that its purpose is to promote transparency in government and fight corporate fraud by publishing information governments or corporations would prefer to keep secret, obtained from sources in person, by means of postal drops, and by using “cutting-edge cryptographic technologies” to receive material electronically.<sup>3</sup> The organization promises contributors that their anonymity will be protected.

According to press reports, WikiLeaks obtained more than 91,000 secret U.S. military reports related to the war in Afghanistan and posted the majority of them, unredacted, on its website in late July, 2010, after first alerting the *New York Times* and two foreign newspapers, the *Guardian* (London) and *Der Spiegel* (Germany), about the pending disclosure.<sup>4</sup> Military officials have reportedly said they suspect an Army private, Bradley Manning, of having leaked the documents to WikiLeaks.<sup>5</sup> Private Manning, a U.S. citizen, is already in military custody under suspicion of having provided WikiLeaks with video footage of an airstrike that resulted in the deaths of civilians.<sup>6</sup> U.S. officials have condemned the leaks, predicting that the information disclosed could lead to the loss of lives of U.S. soldiers in Afghanistan and Afghan citizens who have

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<sup>1</sup> Mahmoud Kassem, *Attorney General Holder Says U.S. Probing Leaks of Afghanistan Documents*, BLOOMBERG, July 28, 2010, available at <http://www.bloomberg.com/news/2010-07-28/attorney-general-holder-says-u-s-probing-leaks-of-afghanistan-documents.html>.

<sup>2</sup> <http://www.wikileaks.org/wiki/WikiLeaks:About>.

<sup>3</sup> *Id.*

<sup>4</sup> The *New York Times* published a series of articles under the headline “The War Logs,” which is available online at <http://www.nytimes.com/interactive/world/war-logs.html>. The *Times* describes the leaked material as an archive covering six years of incident reports and intelligence documents—“usually spare summaries but sometimes detailed narratives”—that “illustrate[s] in mosaic detail why” the military effort in Afghanistan has not weakened the Taliban. C. J. Chivers *et al.*, *The Afghan Struggle: A Secret Archive*, N.Y. TIMES, July 26, 2010, at 1. The German periodical *Der Spiegel* published a series of articles under the topic “Afghanistan Protocol,” which is available (in English) online at <http://www.spiegel.de/international/world/0,1518,708314,00.html>. The *Guardian* (UK) published a series entitled “Afghanistan: The War Logs,” which is available online at <http://www.guardian.co.uk/world/the-war-logs>.

<sup>5</sup> *Military airstrike video leak suspect in solitary confinement*, CNN.com, Aug. 1, 2010, available at <http://www.cnn.com/2010/POLITICS/07/31/wikileaks.manning/index.html>.

<sup>6</sup> *Id.*

provided them assistance.<sup>7</sup> Defense Secretary Robert M. Gates has informed Members of Congress that a preliminary review of the disclosed information by the Defense Department found that no sensitive information related to intelligence sources or methods was made public, but reiterated that the release of Afghan informants' names could have "potentially dramatic and grievously harmful consequences."<sup>8</sup> In the coming weeks, WikiLeaks is expected to release up to 500,000 documents related to the war in Iraq.<sup>9</sup>

The publication of the leaked Afghanistan documents by WikiLeaks and the subsequent reporting of information contained therein raise questions with respect to the possibility of bringing criminal charges for the dissemination of materials by media organizations following an unauthorized disclosure, in particular when done by non-U.S. nationals overseas. This report will discuss the statutory prohibitions that may be implicated; the extraterritorial application of such statutes; and the First Amendment implications related to such prosecutions against domestic or foreign media organizations and associated individuals.

## Statutory Protection of Classified Information

While there is no one statute that criminalizes the unauthorized disclosure of any classified information, a patchwork of statutes exists to protect information depending upon its nature, the identity of the discloser and of those to whom it was disclosed, and the means by which it was obtained. It seems likely that most of the information disclosed by WikiLeaks falls under the general rubric of information related to the national defense.

### The Espionage Act

National defense information in general is protected by the Espionage Act,<sup>10</sup> 18 U.S.C. §§ 793–798, while other types of relevant information are covered elsewhere. Some provisions apply only to government employees or others who have authorized access to sensitive government information,<sup>11</sup> but the following provisions apply to all persons. 18 U.S.C. § 793 prohibits the gathering, transmitting, or receipt of defense information with the intent or reason to believe the information will be used against the United States or to the benefit of a foreign nation. Violators are subject to a fine or up to 10 years imprisonment, or both,<sup>12</sup> as are those who conspire to

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<sup>7</sup> Admiral Michael Mullen, Chairman of the Joint Chiefs of Staff, on *Meet the Press*, Aug. 1, 2010, transcript available at [http://www.msnbc.msn.com/id/38487969/ns/meet\\_the\\_press-transcripts/](http://www.msnbc.msn.com/id/38487969/ns/meet_the_press-transcripts/).

<sup>8</sup> See Elisabeth Bumiller, *Gates Found Cost of Leaks Was Limited*, NY TIMES, Oct. 17, 2010 (quoting letter to Senator Levin from Secretary Gates).

<sup>9</sup> See Phil Stewart, *Pentagon Expects Release of Iraq Files*, WASH. POST, Oct. 18, 2010, at A14.

<sup>10</sup> Act of October 6, 1917, ch. 106, § 10(i), 40 Stat. 422.

<sup>11</sup> *E.g.*, 18 U.S.C. §§ 952 (prohibiting disclosure of diplomatic codes and correspondence), 1924 (unauthorized removal and retention of classified documents or material); 50 U.S.C. § 783 (unauthorized disclosure of classified information to an agent of a foreign government, unauthorized receipt by foreign government official) This report does not address such prohibitions, nor prohibitions that apply to military personnel under the Uniform Code of Military Justice.

<sup>12</sup> 18 U.S.C. § 793(a)-(c) provides:

(a) Whoever, 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, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, [etc.], or any prohibited place so designated by the

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violate the statute.<sup>13</sup> Persons who possess defense information that they have reason to know could be used to harm the national security, whether the access is authorized or unauthorized, and who disclose that information to any person not entitled to receive it, or who fail to surrender the information to an officer of the United States, are subject to the same penalty.<sup>14</sup> Although it is not necessary that the information be classified by a government agency, the courts seem to give deference to the executive determination of what constitutes “defense information.”<sup>15</sup> Information that is made available by the government to the public is not covered under the prohibition, however, because public availability of such information negates the bad-faith intent requirement.<sup>16</sup> On the other hand, classified documents remain within the ambit of the statute even if information contained therein is made public by an unauthorized leak.<sup>17</sup>

18 U.S.C. § 794 (aiding foreign governments or communicating information to an enemy in time of war) covers “classic spying” cases,<sup>18</sup> providing for imprisonment for any term of years or life,

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President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any [protected thing] connected with the national defense, knowing or having reason to believe ... that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter [18 U.S.C. §§ 792 *et seq.*]....

<sup>13</sup> 18 U.S.C. § 793(g) provides:

If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

<sup>14</sup> 18 U.S.C. § 793(e) provides:

Whoever having unauthorized possession of, access to, or control over any document [or other protected thing], 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 ... 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; ... Shall be fined under this title or imprisoned not more than ten years, or both.

<sup>15</sup> The government must demonstrate that disclosure of the information is at least “potentially damaging” to the United States or advantageous to a foreign government. *See* *United States v. Morison*, 844 F.2d 1057, 1072 (4<sup>th</sup> Cir.), *cert. denied*, 488 U.S. (1988)(upholding conviction under 18 U.S.C. § 793 for delivery of classified photographs to publisher). Whether the information is “related to the national defense” under this meaning is a question of fact for the jury to decide. *Id.* at 1073.

<sup>16</sup> *Gorin v. United States*, 312, U.S. 9, 27-28 (1941) (“Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government.”).

<sup>17</sup> *United States v. Squillacote*, 221 F.3d 542, 578 (4<sup>th</sup> Cir. 2000).

<sup>18</sup> *Morison*, 844 F.2d at 1064-65 (explaining that critical element distinguishing § 794 from § 793 is the requirement that disclosure be made to an agent of a foreign government rather than anyone not entitled to receive it).

or under certain circumstances, the death penalty.<sup>19</sup> The provision penalizes anyone who transmits defense information to a foreign government (or foreign political or military party) with the intent or reason to believe it will be used against the United States. It also prohibits attempts to elicit information related to the public defense “which might be useful to the enemy.”<sup>20</sup> The death penalty is available only upon a finding that the offense resulted in the death of a covert agent or directly concerns nuclear weapons or other particularly sensitive types of information. The death penalty is also available under § 794 for violators who gather, transmit or publish information related to military plans or operations and the like during time of war, with the intent that the information reach the enemy.<sup>21</sup> These penalties are available to punish any person who participates in a conspiracy to violate the statute. Offenders are also subject to forfeiture of any ill-gotten gains and property used to facilitate the offense.<sup>22</sup>

The unauthorized creation, publication, sale or transfer of photographs or sketches of vital defense installations or equipment as designated by the President is prohibited by 18 U.S.C. §§ 795 and 797.<sup>23</sup> Violators are subject to fine or imprisonment for not more than one year, or both.

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<sup>19</sup> § 794. Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits ... to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document [or other protected thing], or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life, except that the sentence of death shall not be imposed unless the jury or ... the court, further finds that the offense resulted in the identification by a foreign power (as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978 [50 U.C.S. § 1801(a)]) of an individual acting as an agent of the United States and consequently in the death of that individual, or directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.

<sup>20</sup> § 794(b) provides:

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life....

<sup>21</sup> During time of war, any individual who communicates intelligence or any other information to the enemy may be prosecuted by the military for aiding the enemy under Article 104 of the Uniform Code of Military Justice (UCMJ), and if convicted, punished by “death or such other punishment as a court-martial or military commission may direct.” 10 U.S.C. § 904.

<sup>22</sup> 18 U.S.C. § 794(d). Proceeds go to the Crime Victims Fund.

<sup>23</sup> § 795. Photographing and sketching defense installations

(a) Whenever, in the interests of national defense, the President defines certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relative thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installations or equipment without first obtaining permission of the commanding officer of the military or naval post, camp, or station, or naval vessels, military and naval aircraft, and any separate military or naval command concerned, or higher authority, and promptly submitting the product obtained to such commanding

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The knowing and willful disclosure of certain classified information is punishable under 18 U.S.C. § 798 by fine and/or imprisonment for not more than 10 years.<sup>24</sup> To incur a penalty, the disclosure must be prejudicial to the safety or interests of the United States or work to the benefit of any foreign government and to the detriment of the United States. The provision applies only to information related to cryptographic systems and information related to communications intelligence specially designated by a U.S. government agency for “limited or restricted dissemination or distribution.”<sup>25</sup>

## Other Statutes

18 U.S.C. § 1030(a)(1) punishes the willful retention, communication, or transmission, etc., of classified information retrieved by means of knowingly accessing a computer without (or in excess of) authorization, with reason to believe that such information “could be used to the injury of the United States, or to the advantage of any foreign nation.” Receipt of information procured in violation of the statute is not addressed, but depending on the specific facts surrounding the unauthorized access, criminal culpability might be asserted against persons who did not themselves access a government computer as conspirators, aiders and abettors, or accessories after the fact.<sup>26</sup> The provision imposes a fine or imprisonment for not more than 10 years, or both, in the case of a first offense or attempted violation. Repeat offenses or attempts can incur a prison sentence of up to 20 years.

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officer or higher authority for censorship or such other action as he may deem necessary....

### § 797. Publication and sale of photographs of defense installations

On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title [18], whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer ... or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military or naval authority, shall be fined under this title or imprisoned not more than one year, or both.

### <sup>24</sup> § 798. Disclosure of classified information

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) concerning the communication intelligence activities of the United States or any foreign government; or

(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined ... or imprisoned not more than ten years, or both.

<sup>25</sup> 18 U.S.C. § 798(b).

<sup>26</sup> For more information about conspiracy law, see CRS Report R41223, *Federal Conspiracy Law: A Brief Overview*, by Charles Doyle.



18 U.S.C. § 641 punishes the theft or conversion of government property or records for one's own use or the use of another. While this section does not explicitly prohibit disclosure of classified information, it has been used to prosecute "leakers."<sup>27</sup> Violators may be fined, imprisoned for not more than 10 years, or both, unless the value of the property does not exceed the sum of \$100, in which case the maximum prison term is one year. The statute also covers knowing receipt or retention of stolen or converted property with the intent to convert it to the recipient's own use. It does not appear to have been used to prosecute any recipients of classified information even where the original discloser was charged under the statute.

50 U.S.C. § 421 provides for the protection of information concerning the identity of covert intelligence agents.<sup>28</sup> It generally covers persons authorized to know the identity of such agents, but can also apply to a person who learns of the identity of a covert agent through a "pattern of activities intended to identify and expose covert agents" and discloses the identity to any individual not authorized access to classified information, with reason to believe that such activities would impair U.S. foreign intelligence efforts. This crime is subject to a fine or imprisonment for a term of not more than three years. To be convicted, a violator must have knowledge that the information identifies a covert agent whose identity the United States is taking affirmative measures to conceal. To date, there have been no reported cases interpreting the statute, but it did result in one conviction pursuant to a guilty plea.<sup>29</sup>

## Analysis

In light of the foregoing, it seems that there is ample statutory authority for prosecuting individuals who elicit or disseminate the types of documents at issue, as long as the intent element can be satisfied and potential damage to national security can be demonstrated.<sup>30</sup> There is

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<sup>27</sup> See *United States v. Morison*, 844 F.2d 1057 (4<sup>th</sup> Cir. 1988)(photographs and reports were tangible property of the government); *United States v. Fowler*, 932 F.2d 306 (4<sup>th</sup> Cir. 1991)("information is a species of property and a thing of value" such that "conversion and conveyance of governmental information can violate § 641," citing *United States v. Jeter*, 775 F.2d 670, 680-82 (6<sup>th</sup> Cir. 1985)); *United States v. Girard*, 601 F.2d 69, 70-71 (2d Cir. 1979). The statute was used to prosecute a DEA official for leaking unclassified but restricted documents pertinent to an agency investigation. See Dan Eggen, *If the Secret's Spilled, Calling Leaker to Account Isn't Easy*, WASH. POST, Oct. 3, 2003, at A5 (reporting prosecution of Jonathan Randel under conversion statute for leaking government documents to journalist).

<sup>28</sup> The Intelligence Identities and Protection Act of 1982, codified at 50 U.S.C. §§ 421-26. For more information, see CRS Report RS21636, *Intelligence Identities Protection Act*, by Elizabeth B. Bazan. The term "covert agent" is defined to include a non-U.S. citizen "whose past or present intelligence relationship to the United States is classified information and who is a present or former agent of, or a present or former informant or source of operational assistance to, an intelligence agency." 50 U.S.C. § 426(4)(c). "Intelligence agency" is defined to include a "foreign intelligence component of the Department of Defense"; informant means "any individual who furnishes information to an intelligence agency in the course of a confidential relationship." 50 U.S.C. § 426(5-6). The definitions suggest that the act is intended to protect the identities of persons who provide intelligence information directly to a military counterintelligence unit, but perhaps they can be read to cover those who provide information to military personnel carrying out other functions who provide situation reports intended to reach an intelligence component. In any event, the extraterritorial application of the statute is limited to U.S. citizens and permanent resident aliens. 50 U.S.C. § 424.

<sup>29</sup> See Richard B. Schmitt, *Rare Statute Figures in Rove Case*, LA TIMES, July 15, 2005, at A15 (reporting 1985 conviction of Sharon Scranage, a clerk for the CIA in Ghana, for disclosing identities of covert agents).

<sup>30</sup> It appears the intent element is satisfied by proof that the material was obtained or disclosed "with intent or reason to believe that the information is to be used [or could be used] to the injury of the United States, or to the advantage of any foreign nation." 18 U.S.C. §§ 793 and 794. This has been interpreted to require the prosecution to demonstrate a "bad purpose." See *United States v. Morison*, 844 F.2d 1057, 1071 ("An act is done willfully if it is 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."). If any of the disclosed material involves communications intelligence as (continued...)

some authority, however, for interpreting 18 U.S.C. § 793, which prohibits the communication, transmission, or delivery of protected information to anyone not entitled to possess it, to exclude the “publication” of material by the media.<sup>31</sup> Publication is not expressly proscribed in 18 U.S.C. § 794(a), either, although it is possible that publishing covered information in the media could be construed as an “indirect” transmission of such information to a foreign party, as long as the intent that the information reach said party can be demonstrated.<sup>32</sup> The death penalty is available under that subsection if the offense results in the identification and subsequent death of “an individual acting as an agent of the United States,”<sup>33</sup> or the disclosure of information relating to certain other broadly defined defense matters. The word “publishes” does appear in 18 U.S.C. § 794(b), which applies to wartime disclosures of information related to the “public defense” that “might be useful to the enemy” and is in fact intended to be communicated to the enemy. The types of information covered seem to be limited to military plans and information about fortifications and the like, which may exclude data related to purely historical matters.

Moreover, the statutes described in the previous section have been used almost exclusively to prosecute individuals with access to classified information (and a corresponding obligation to protect it) who make it available to foreign agents, or to foreign agents who obtain classified information unlawfully while present in the United States. Leaks of classified information to the press have only rarely been punished as crimes, and we are aware of no case in which a publisher of information obtained through unauthorized disclosure by a government employee has been prosecuted for publishing it. There may be First Amendment implications that would make such a prosecution difficult, not to mention political ramifications based on concerns about government censorship. To the extent that the investigation implicates any foreign nationals whose conduct occurred entirely overseas, any resulting prosecution may carry foreign policy implications related to the exercise of extraterritorial jurisdiction.

## Jurisdictional Reach of Relevant Statutes

The Espionage Act gives no express indication that it is intended to apply extraterritorially, but courts have not been reluctant to apply it to overseas conduct of Americans, in particular because Congress in 1961 eliminated a provision restricting the act to apply only “within the admiralty and maritime jurisdiction of the United States and on the high seas, as well as within the United

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described in 18 U.S.C. § 798, the conduct must be undertaken knowingly and willfully to meet the intent threshold.

<sup>31</sup> See *New York Times Co. v. United States*, 403 U.S. 713, 721-22 (1971) (Douglas, J., concurring) (rejecting government argument that term “communicate” should be read to include “publish,” based on conspicuous absence of the term “publish” in that section of the Espionage Act and legislative history demonstrating Congress had rejected an effort to reach publication).

<sup>32</sup> See Harold Edgar and Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 395 (1986) (questioning whether Espionage Act can be construed to except publication).

<sup>33</sup> The data released by WikiLeaks contains some names of Afghans who assisted Coalition Forces, leading to some concern that the Taliban might use the information to seek out those individuals for retaliation. See Eric Schmitt and David E. Sanger, *Gates Cites Peril in Leak of Afghan War Logs*, N.Y. TIMES, Aug. 2, 2010, at 4. *The New York Times*, *The Guardian*, and *Der Spiegel* published excerpts of the database, but did not publish the names of individual Afghans. *Id.* No deaths have yet been tied to the leaks. See Robert Burns, *Pentagon Sees Deadly Risk in Wikileaks Disclosures*, AP NEWSWIRE, Aug. 17, 2010. There appears to be no court precedent interpreting “agent of the United States” in the context of 18 U.S.C. § 794(a).

States.”<sup>34</sup> This does not answer the question whether the act is intended to apply to foreigners outside the United States. Because espionage is recognized as a form of treason,<sup>35</sup> which generally applies only to persons who owe allegiance to the United States, it might be supposed that Congress did not regard it as a crime that could be committed by aliens with no connection to the United States. However, the only court that appears to have addressed the question concluded otherwise.<sup>36</sup> A district court judge held in 1985 that a citizen of East Germany could be prosecuted under §§ 793(b), 794(a) and 794(c) for having (1) unlawfully sought and obtained information regarding the U.S. national defense, (2) delivered that information to his own government, and (3) conspired to do so with the intent that the information be used to the injury of the United States or to the advantage of the German Democratic Republic, all of which offenses were committed within East Germany or in Mexico. The court rejected the defendant’s contention that construing the act to cover him would permit the prosecution of noncitizens “who might merely have reviewed defense documents supplied to them by their respective governments.”<sup>37</sup> The court considered the scenario unlikely, stating:

Under the statutorily defined crimes of espionage in §§ 793 and 794, noncitizens would be subject to prosecution only if they actively sought out and obtained or delivered defense information to a foreign government or conspired to do so.<sup>38</sup>

Under this construction, it is possible that noncitizens involved in publishing materials disclosed to them by another would be subject to prosecution only if it can be demonstrated that they took an active role in obtaining the information. The case was not appealed. The defendant, Dr. Alfred Zehe, pleaded guilty in February, 1985 and was sentenced to eight years in prison, but was traded as part of a “spy swap” with East Germany in June of that year.<sup>39</sup>

Application of the Espionage Act to persons who do not hold a position of trust with the government, outside of the classic espionage scenario (in which an agent of a foreign government delivers damaging information to such hostile government), has been controversial. The only known case of that type involved two pro-Israel lobbyists in Washington, Steven J. Rosen and Keith Weissman, associated with the American Israel Public Affairs Committee (AIPAC), who were indicted in 2005 for conspiracy to disclose national security secrets to unauthorized individuals, including Israeli officials, other AIPAC personnel, and a reporter for the *Washington Post*.<sup>40</sup> Their part in the conspiracy amounted to receiving information from government employees with knowledge that the employees were not authorized to disclose it.<sup>41</sup> The

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<sup>34</sup> See *United States v. Zehe*, 601 F. Supp. 196, 198 (D.C. Mass. 1985)(citing former 18 U.S.C. § 791 repealed by P.L. 87-369, 75 Stat. 795(1961)).

<sup>35</sup> See 70 AM. JUR. 2D Seditio, Subversive Activities and Treason § 15 (2005). Courts have not been persuaded that the Treason Clause of the Constitution requires the safeguards associated with treason apply also to similar crimes such as espionage or levying war against the United States. See *id.*, *United States v. Rosenberg*, 195 F.2d 583 (2d. Cir.), *cert. denied*, 344 U.S. 838 (1952)(espionage); *United States v. Rodriguez*, 803 F.2d 318 (7<sup>th</sup> Cir. ), *cert. denied*, 480 U.S. 908 (1986) (levying war).

<sup>36</sup> *Zehe* at 198 (“Espionage against the United States, because it is a crime that by definition threatens this country’s security, can therefore be punished by Congress even if committed by a noncitizen outside the United States.”).

<sup>37</sup> *Id.* at 199.

<sup>38</sup> *Id.*

<sup>39</sup> Henry Giniger and Milt Freudenheim, *Free to Spy Another Day?*, NY TIMES, Jun 16, 1985, at A.4.

<sup>40</sup> See *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006); Jerry Markon, *U.S. Drops Case Against Ex-Lobbyists*, WASH. POST, May 2, 2009, at A1 (stating the case is the first prosecution under the Espionage Act against civilians not employed by the government).

<sup>41</sup> See William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, (continued...)

prosecution was criticized for effectively “criminalizing the exchange of information,”<sup>42</sup> based in part on the government’s theory that the defendants were guilty of solicitation of classified information because they inquired into matters they knew their government informant was not permitted to discuss, something that many journalists consider to be an ordinary part of their job.<sup>43</sup> Charges were eventually dropped, reportedly due to a judge’s ruling regarding the government’s burden of proving the requisite intent and concerns that classified information would have to be disclosed at trial.<sup>44</sup>

## Constitutional Issues

The publication of information pertaining to the national defense may serve the public interest by providing citizens with information necessary to shed light on the workings of government, but it seems widely accepted that the public release of at least some defense information poses a significant enough threat to the security of the nation that the public interest is better served by keeping it secret. The Constitution protects the public right to access government information and to express opinions regarding the functioning of the government, among other things, but it also charges the government with “providing for the common defense.” Policymakers are faced with the task of balancing these interests.

The First Amendment to the U.S. Constitution provides: “Congress shall make no law ... abridging the freedom of speech, or of the press....”<sup>45</sup> Despite this absolute language, the Supreme Court has held that “[t]he Government may ... regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”<sup>46</sup>

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1519 (2007) (opining that “the conspiracy charge especially threatens reporter-source transactions where the reporter promises not to disclose the identity of the source”).

<sup>42</sup> *Time to Call It Quits*, WASH. POST, March 11, 2009 (editorial urging Attorney General to drop charges).

<sup>43</sup> See William E. Lee, *Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes*, 36 AM. J. CRIM. L. 129, 132-34 (2009). The solicitation theory relied on a 2008 Supreme Court case finding that solicitation of an illegal transaction is not speech deserving of First Amendment protection. *United States v. Williams*, 553 U.S. 285 (2008). See *id.* at 133 (citing Brief of the United States at 43-44, *United States v. Rosen*, 557 F.3d 192 (4<sup>th</sup> Cir. 2008) (No. 08-4358)). *Williams* had to do with solicitation of child pornography, but Justice Scalia posed as a rhetorical question whether Congress could criminalize solicitation of information thought to be covered by the Espionage Act:

Is Congress prohibited from punishing those who attempt to acquire what they believe to be national-security documents, but which are actually fakes? To ask is to answer.

*Williams* at 304.

<sup>44</sup> See Markon, *supra* footnote 40 (quoting Dana J. Boente, the acting U.S. attorney in Alexandria, VA, where the trial was scheduled to take place). The judge found the scienter requirement of 18 U.S.C. § 793 to require that the defendants must have reason to believe the communication of the information at issue “could be used to the injury of the United States or to the advantage of any foreign nation.” 445 F. Supp. 2d at 639. Moreover, the judge limited the definition of “information related to the national defense” to information that is “potentially damaging to the United States or ... useful to an enemy of the United States.” *Id.* (citing *United States v. Morison*, 844 F.2d 1057, 1084 (4<sup>th</sup> Cir. 1988) (Wilkinson, J., concurring)).

<sup>45</sup> For an analysis of exceptions to the First Amendment, see CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Kathleen Ann Ruane.

<sup>46</sup> *Sable Communications of California v. Federal Communications Commission*, 492 U.S. 115, 126 (1989).

Where speech is restricted based on its content, the Supreme Court generally applies “strict scrutiny,” which means that it will uphold a content-based restriction only if it is necessary “to promote a compelling interest,” and is “the least restrictive means to further the articulated interest.”<sup>47</sup> Protection of the national security from external threat is without doubt a compelling government interest.<sup>48</sup> It has long been accepted that the government has a compelling need to suppress certain types of speech, particularly during time of war or heightened risk of hostilities.<sup>49</sup> Speech likely to incite immediate violence, for example, may be suppressed.<sup>50</sup> Speech that would give military advantage to a foreign enemy is also susceptible to government regulation.<sup>51</sup>

Where First Amendment rights are implicated, it is the government’s burden to show that its interest is sufficiently compelling to justify enforcement. Whether the government has a compelling need to punish disclosures of classified information turns on whether the disclosure has the potential of causing damage to the national defense or foreign relations of the United States.<sup>52</sup> Actual damage need not be proved, but potential damage must be more than merely speculative and incidental.<sup>53</sup> On the other hand, the Court has stated that “state action to punish the publication of truthful information seldom can satisfy constitutional standards.”<sup>54</sup> And it has described the constitutional purpose behind the guarantee of press freedom as the protection of “the free discussion of governmental affairs.”<sup>55</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> See *Haig v. Agee*, 453 U.S. 280 (1981) (“It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”)(citing *Aptheker v. Secretary of State*, 378 U.S. 500, 509; *accord* *Cole v. Young*, 351 U.S. 536, 546 (1956)).

<sup>49</sup> See *Schenck v. United States*, 249 U.S. 47 (1919) (formulating “clear and present danger” test).

<sup>50</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>51</sup> *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (“No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”).

<sup>52</sup> “National Security” is defined as national defense and foreign relations. See Exec. Order No. 13526, 75 Fed. Reg. 707 § 6.1(cc) (Jan. 5, 2010).

<sup>53</sup> See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 725 (1971) (Brennan, J., concurring) (rejecting as insufficient government’s assertions that publication of Pentagon Papers “could,” “might,” or “may” prejudice the national interest); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (“The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.”) (citing *Buckley v. Valeo*, 424 U.S. 1, 94(1976); *Williams v. Rhodes*, 393 U.S. 23, 31-33(1968); *NAACP v. Button*, 371 U.S. 38, 45 (1963); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama*, 357 U.S. 449, 464-466 (1958); *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

<sup>54</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979)).

<sup>55</sup> *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Because of the First Amendment purpose to protect the public’s ability to discuss governmental affairs along with court decisions denying that it provides any special rights to journalists, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972), it is not likely a plausible argument to posit that it does not apply to the *foreign* press. See *United States v. 18 Packages of Magazines* 238 F. Supp. 846, 847-848 (D.C. Cal. 1964) (“Even if it be conceded, arguendo, that the ‘foreign press’ is not a direct beneficiary of the Amendment, the concession gains nought for the Government in this case. The First Amendment does protect the public of this country. ... The First Amendment surely was designed to protect the rights of readers and distributors of publications no less than those of writers or printers. Indeed, the essence of the First Amendment right to freedom of the press is not so much the right to print as it is the right to read. The rights of readers are not to be curtailed because of the geographical origin of printed materials.”). Likewise, the fact that WikiLeaks is not a typical newsgathering and publishing organization would likely make little difference under First Amendment analysis. The Supreme Court has not established clear boundaries between the protection of speech and that of the press, nor has it sought to develop criteria for identifying what constitutes “the press” that might qualify its members for privileges not available to anyone else. See *generally* CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, SEN. DOC. NO. 108-17, at 1083-86 (2002), available at <http://crs.gov/conan/default.aspx?mode=topic&doc=> (continued...)

Although information properly classified in accordance with statute or executive order carries by definition, if disclosed to a person not authorized to receive it, the potential of causing at least identifiable harm to the national security of the United States,<sup>56</sup> it does not necessarily follow that government classification by itself will be dispositive of the issue in the context of a criminal trial. However, courts have adopted as an element of the espionage statutes a requirement that the information at issue must be “closely held.”<sup>57</sup> Government classification will likely serve as strong evidence to support that contention, even if the information seems relatively innocuous or does not contain much that is not already publicly known.<sup>58</sup> Typically, courts have been unwilling to review decisions of the executive related to national security, or have made a strong presumption that the material at issue is potentially damaging.<sup>59</sup> Still, judges have recognized that the government must make *some* showing that the release of specific national defense information has the potential of harming U.S. interests, lest the Espionage Act become a means to punish whistle-blowers who reveal information that poses more of a danger of embarrassing public officials than of endangering national security.<sup>60</sup>

The Supreme Court seems satisfied that national security is a vital interest sufficient to justify some intrusion into activities that would otherwise be protected by the First Amendment—at least with respect to federal employees. Although the Court has not held that government classification of material is sufficient to show that its release is damaging to the national security,<sup>61</sup> it has seemed to accept without much discussion the government’s assertion that the material in question is damaging. It is unlikely that a defendant’s bare assertion that information poses no

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<sup>56</sup> Exec. Order No. 13526, 75 Fed. Reg. 707 § 1.2 (Jan. 5, 2010) (“Classified National Security Information”).

Sec. 1.3 defines three levels of classification:

- (1) “Top Secret” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause *exceptionally grave damage* to the national security that the original classification authority is able to identify or describe.
- (2) “Secret” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause *serious damage* to the national security that the original classification authority is able to identify or describe.
- (3) “Confidential” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause *damage* to the national security that the original classification authority is able to identify or describe.

<sup>57</sup> *United States v. Heine*, 151 F.2d 813 (2d Cir.1945) (information must be “closely held” to be considered “related to the national defense” within the meaning of the espionage statutes).

<sup>58</sup> *See, e.g., United States v. Abu-Jihaad* 600 F.Supp.2d 362, 385 -386 (D. Conn. 2009) (although completely inaccurate information might not be covered, information related to the scheduled movements of naval vessels was sufficient to bring materials within the ambit of national defense information).

<sup>59</sup> *See, e.g., Haig v. Agee*, 453 U.S. 280, 291 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”).

<sup>60</sup> *See, e.g., United States v. Morison*, , 844 F.2d 1057, 1086 (4<sup>th</sup> Cir. 1988) (Phillips, J., concurring) (“...I assume we reaffirm today, that notwithstanding information may have been classified, the government must still be required to prove that it was *in fact* ‘potentially damaging ... or useful,’ i.e., that the fact of classification is merely probative, not conclusive, on that issue, though it must be conclusive on the question of authority to possess or receive the information. This must be so to avoid converting the Espionage Act into the simple Government Secrets Act which Congress has refused to enact.”) (emphasis in original).

<sup>61</sup> *See, e.g., Scarbeck v. United States*, 317 F.2d 546 (D.C. Cir. 1962) (holding government did not have to show documents were *properly* classified “as affecting the national defense” to convict employee under 50 U.S.C. § 783, which prohibits government employees from transmitting classified documents to foreign agents or entities).

danger to U.S. national security will be persuasive without some convincing evidence to that effect, or proof that the information is not closely guarded by the government.<sup>62</sup>

A challenge to the Espionage Act has reached the Supreme Court for decision in only one instance. In *Gorin v. United States*,<sup>63</sup> the Court upheld portions of the act now codified as 18 U.S.C. §§ 793 and 794 against assertions of vagueness, but only because jury instructions properly established the elements of the crimes, including the scienter requirement (proof of “guilty knowledge”) and a definition of “national defense” that includes potential damage in case of unauthorized release of protected information and materials. *Gorin* was a “classic case” of espionage, and did not involve a challenge based on the First Amendment right to free speech. The Court agreed with the government that the term “national defense” was not vague; it was satisfied that the term describes “a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.”<sup>64</sup> Whether information was “related to the national defense” was a question for the jury to decide,<sup>65</sup> based on its determination that the information “may relate or pertain to the usefulness, efficiency or availability of any of the above places, instrumentalities or things for the defense of the United States of America. The connection must not be a strained one nor an arbitrary one. The relationship must be reasonable and direct.”<sup>66</sup> As long as the jury was properly instructed that only information likely to cause damage meets the definition of information “related to the national defense” for the purpose of the statute, the term was not unconstitutionally vague.

*United States v. Morison*<sup>67</sup> is significant in that it represents the first case in which a person was convicted for selling classified documents to the media.<sup>68</sup> Samuel Loring Morison, charged with providing classified satellite photographs to the British defense periodical *Jane’s Defence Weekly*, argued that the espionage statutes did not apply to his conduct because he could not have had the requisite intent to commit espionage. The Fourth Circuit rejected his appeal, finding the intent to sell photographs that he clearly knew to be classified sufficient to satisfy the scienter requirement under 18 U.S.C. § 793(d) (disclosure by lawful possessor of defense information to one not entitled to receive it). The definition of “relating to the national defense” was not overbroad because the jury had been instructed that the government had the burden of showing that the information was so related.<sup>69</sup> His assertedly laudable motive in permitting publication of the photographs did not negate the element of intent.<sup>70</sup>

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<sup>62</sup> See *United States v. Dedeyan*, 594 F.2d 36, 39 (4<sup>th</sup> Cir. 1978).

<sup>63</sup> 312 U.S. 19 (1941).

<sup>64</sup> *Id.* at 28.

<sup>65</sup> *Id.* at 32. The information defendant was charged with passing to the Soviet government had to do with U.S. intelligence on the activities of Japanese citizens in the United States.

<sup>66</sup> *Id.* at 31.

<sup>67</sup> 844 F.2d 1057 (4<sup>th</sup> Cir.), *cert. denied*, 488 U.S. 908 (1988).

<sup>68</sup> Efforts to prosecute Daniel Ellsberg and Anthony Russo in connection with the disclosure of the Pentagon Papers were unsuccessful after the judge dismissed them for prosecutorial misconduct. More recently, a Defense Department employee pleaded guilty to charges under the Espionage Act for disclosing classified material to lobbyists and to journalists. *United States v. Franklin*, Cr. No. 05-225 (E.D. Va., 2005). For a description of these and other relevant cases, see Lee, *supra* footnote 41.

<sup>69</sup> *But see* *Scarbeck v. United States*, 317 F.2d 546 (D.C. Cir. 1962) (holding that government did not need to prove proper classification of documents to prove a violation).

<sup>70</sup> 844 F.2d at 1073-74. Morison had stated that he sought the publication of the photos because they would demonstrate to the public the gravity of the threat posed by the Soviet Union, which he hoped would result in an increased defense budget. See P. Weiss, *The Quiet Coup: U.S. v. Morison - A Victory for Secret Government*, (continued...)

The fact that the Morison prosecution involved a leak to the media with no obvious intent to transmit sensitive information to hostile intelligence services did not persuade the jury or the judges involved that he lacked culpability, but the Justice Department did come under some criticism on the basis that such prosecutions are so rare as to amount to a selective prosecution in his case, and that it raised concerns about the chilling effect such prosecutions could have on would-be whistle-blowers who could provide information embarrassing to the government but vital to public discourse.<sup>71</sup> On leaving office, President Clinton pardoned Morison.<sup>72</sup>

As far as the possible prosecution of the publisher of information leaked by a government employee is concerned, the most relevant case is likely to be the *Pentagon Papers* case.<sup>73</sup> To be sure, the case involved an injunction against publication rather than a prosecution for having published information, but the rationale for protecting such disclosure may nevertheless inform any decision involving a conviction. In a *per curiam* opinion accompanied by nine concurring or dissenting opinions, the U.S. Supreme Court refused to grant the government's request for an injunction to prevent the *New York Times* and the *Washington Post* from printing a classified study of the U.S. involvement in Vietnam. The Court explained:

prior restraints are the most serious and least tolerable infringement on First Amendment rights.... A prior restraint, ... by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time. The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.<sup>74</sup>

A majority of the justices suggested in separate *dicta* that the newspapers—along with the former government employee who leaked the documents to the press—could be prosecuted under the Espionage Act.<sup>75</sup> Still, in later cases the Court stressed that any prosecution of a publisher for what has already been printed would have to overcome only slightly less insurmountable hurdles.<sup>76</sup> Moreover, if national security interests were not sufficient to outweigh the First

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HARPER'S, September 1989.

<sup>71</sup> See Jack Nelson, *U.S. Government Secrecy and the Current Crackdown on Leaks* 8, The Joan Shorenstein Center on the Press, Politics and Public Policy, Working Paper Series 2003-1 (2002), available at [http://www.hks.harvard.edu/presspol/publications/papers/working\\_papers/2003\\_01\\_nelson.pdf](http://www.hks.harvard.edu/presspol/publications/papers/working_papers/2003_01_nelson.pdf).

<sup>72</sup> Valerie Strauss, *Navy Analyst Morison Receives a Pardon*, WASH. POST, Jan. 21, 2001, at A17. Senator Daniel Patrick Moynihan wrote a letter in support of Morison's pardon and explaining his view that "An evenhanded prosecution of leakers could imperil an entire administration," and that "[i]f ever there were to be widespread action taken, it would significantly hamper the ability of the press to function." Letter, Sen. Daniel Patrick Moynihan to President Clinton, September 29, 1998, available at <http://www.fas.org/sgp/news/2001/04/moynihan.html>.

<sup>73</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*).

<sup>74</sup> *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976) (striking down a court order restraining the publication or broadcast of accounts of confessions or admissions made by the defendant at a criminal trial).

<sup>75</sup> 403 U.S. at 734-40 (White, J. with Stewart, J. concurring); *id.* at 745-47 (Marshall, J., concurring); *id.* at 752 (Burger, C.J., dissenting); *id.* at 752-59 (Harlan, J., joined by Burger, C.J. and Blackmun, J., dissenting). See David Topol, Note, *United States v. Morison: A Threat to the First Amendment Right to Publish Security Information*, 43 S.C. L. REV. 581, 586 (noting that three concurring justices suggested that the government could convict the newspapers under the Espionage Act even though it could not enjoin them from printing the documents, while the three dissenting justices thought the injunction should issue).

<sup>76</sup> *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102-03 (1979) ("Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity.") The case involved the prosecution of a newspaper for publishing the name of a juvenile defendant without court permission, in violation of state law.



Amendment principles implicated in the prior restraint of pure speech related to the public interest, as in the *Pentagon Papers* case,<sup>77</sup> it is difficult to discern an obvious rationale for finding that punishing that same speech after it has already been disseminated nevertheless tilts the balance in favor of the government's interest in protecting sensitive information.

The publication of truthful information that is lawfully acquired enjoys considerable First Amendment protection.<sup>78</sup> The Court has not resolved the question "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well."<sup>79</sup> (The *Pentagon Papers* Court did not consider whether the newspapers' receipt of the classified document was in itself unlawful, although it appeared to accept that the documents had been unlawfully taken from the government by their source).

The Court has established that "routine newsgathering" is presumptively lawful acquisition, the fruits of which may be published without fear of government retribution.<sup>80</sup> However, what constitutes "routine newsgathering" has not been further elucidated. In the 2001 case *Bartnicki v. Vopper*, the Court cited the *Pentagon Papers* case to hold that media organizations cannot be punished (albeit in the context of civil damages) for divulging information on the basis that it had been obtained unlawfully by a third party.<sup>81</sup> The holding suggests that recipients of unlawfully disclosed information cannot be considered to have obtained such material unlawfully based solely on their knowledge (or "reason to know") that the discloser acted unlawfully. Under such circumstances, disclosure of the information by the innocent recipient would be covered by the First Amendment, although a wrongful disclosure by a person in violation of an obligation of trust would receive no First Amendment protection, regardless of whether the information was obtained lawfully.<sup>82</sup>

*Bartnicki* had to do with the disclosure of illegally intercepted communications in violation of federal and state wiretap laws, which prohibited disclosure of such information by anyone who knew or had reason to know that it was the product of an unlawful interception, but did not prohibit the *receipt* of such information. The Espionage Act, by contrast, does expressly prohibit the receipt of any national defense material with knowledge or reason to believe that it "is to be used to the injury of the United States, or to the advantage of any foreign nation" and that it was disclosed contrary to the provisions of the Espionage Act.<sup>83</sup> This distinction could possibly affect whether a court would view the information as having been lawfully acquired; although the *Bartnicki* opinion seems to establish that knowledge that the information was unlawfully disclosed by the initial leaker cannot by itself make receipt or subsequent publication unlawful, it

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<sup>77</sup> For a list of the types of damage the government argued would ensue if its efforts to enjoin publication failed, see William H. Freivogel, *Publishing National Security Secrets: The Case for "Benign Indeterminacy,"* 3 J. NAT'L SECURITY L. & POL'Y 95, 112-13 (2009).

<sup>78</sup> See, e.g., *Landmark Commc'ns. v. Virginia*, 435 U.S. 829, 837 (1978).

<sup>79</sup> *Florida Star v. B.J.F.* 491 U.S. 524, 535 (1989). The Court also questioned whether the receipt of information can ever constitutionally be proscribed. *Id.* at 536.

<sup>80</sup> *Daily Mail*, 443 U.S. at 103. Here, routine newsgathering consisted of perusing publicly available court records.

<sup>81</sup> 532 U.S. 514 (2001).

<sup>82</sup> See *Boehner v. McDermott*, 484 F.3d 573 (D.C. Cir. 2007) (en banc) (Congressman, bound by Ethics Committee rules not to disclose certain information, had no First Amendment right to disclose to press contents of tape recording illegally made by third party).

<sup>83</sup> 18 U.S.C. § 793(c).

does not directly address whether knowledge of the nature of the information received would bring about a different result.

## **Conclusion**

The Espionage Act on its face applies to the receipt and unauthorized dissemination of national defense information, which has been interpreted broadly to cover closely held government materials related to U.S. military operations, facilities, and personnel. It has been interpreted to cover the activities of foreign nationals overseas, at least when they take an active part in seeking out information. Although cases involving disclosures of classified information to the press have been rare, it seems clear that courts have regarded such disclosures by government employees to be conduct that enjoys no First Amendment protection, regardless of the motives of the divulger or the value the release of such information might impart to public discourse.<sup>84</sup> The Supreme Court has stated, however, that the question remains open whether the publication of unlawfully obtained information by the media can be punished consistent with the First Amendment. Thus, although unlawful acquisition of information might be subject to criminal prosecution with few First Amendment implications, the publication of that information remains protected. Whether the publication of national security information can be punished likely turns on the value of the information to the public weighed against the likelihood of identifiable harm to the national security, arguably a more difficult case for prosecutors to make.

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<sup>84</sup> The courts have permitted government agencies to enjoin their employees and former employees from publishing information they learned on the job, *United States v. Marchetti*, 466 F.2d 1309 (4<sup>th</sup> Cir.), *cert. denied*, 409 U.S. 1063 (1972), and permitted harsh sanctions against employees who publish even unclassified information in violation of an obligation to obtain pre-publication clearance, *Snepp v. United States*, 444 U.S. 507 (1980).