
BALANCING NATIONAL SECURITY AND FREE-SPEECH RIGHTS: WHY CONGRESS SHOULD REVISE THE ESPIONAGE ACT

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I. INTRODUCTION

On April 6, 1917, the United States declared war against Germany, entering into a great European conflict that historians would later refer to as World War I.¹ While at war, the U.S. government sought a measure to punish those who jeopardized America's national defense.² Thus, Congress enacted the Espionage Act ("Act")³ with the declared purpose of protecting the rights and property of American citizens, while punishing crimes "that endangered the peace, welfare, and honor of the United States."⁴

According to the legislative history, "[t]he object [of the Act] is not to restrict an American citizen in any just rights he has under the Constitution and laws of this Nation."⁵ However, contrary to the stated intent, the language of the statute restricts the rights of American citizens, particularly with respect to fundamental liberties under the First Amendment.⁶ Critics

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¹ See ADRIAN O. VAN WYEN, NAVAL AVIATION IN WORLD WAR I 6 (1969), available at <http://www.history.navy.mil/branches/ww1av.htm>.

² See 55 CONG. REC. 1695 (1917).

³ 18 U.S.C. §§ 791–799 (2000).

⁴ Jereen Trudell, *The Constitutionality of Section 793 of the Espionage Act and Its Application to Press Leaks*, 33 WAYNE L. REV. 205, 206 (1986) (citing 55 CONG. REC. 1695 (1917)).

⁵ 55 CONG. REC. 1695.

⁶ See Supplemental Brief in Support of Defendants Steven J. Rosen's and Keith Weissman's Motion to Dismiss the Superseding Indictment, *United States v. Rosen*, No.

of the Espionage Act argue that it is notably vague⁷ and facially overbroad,⁸ and therefore has a “chilling effect”⁹ on free speech. Accordingly, Congress should revise the Espionage Act to more effectively carry out the Act’s purpose: to protect the national defense and security of the United States without undermining the fundamental First Amendment rights of American citizens.

The need for this revision is even more compelling because freedom of the press in this country has drastically eroded in recent years.¹⁰ According to Reporters Without Borders journalistic freedom in the United States now pales in comparison with journalistic freedom in Northern European countries.¹¹ In the first annual Worldwide Press Freedom Index, issued in 2002, the United States ranked seventeenth.¹² Today, the United States ranks fifty-third, having dropped nine places just since last year.¹³ Reporters Without Borders contends that this drastic decline of press freedom in the United States occurred because the Bush administration “use[s] the pretext of ‘national security’ to regard as suspicious any journalist who question[s] the ‘war on terrorism.’”¹⁴ If Congress does not revise the Espionage Act, the Bush administration or a subsequent administration could use this law to prosecute American journalists. In the event such prosecution occurs, the United States would descend further in the Worldwide Press Freedom Index rankings which could jeopardize the country’s reputation as “leader of the free world.”

This Note examines *United States v. Rosen*,¹⁵ a pending and controversial prosecution of two lobbyists under Section 793(e) of the Espionage Act

1:05CR225 (E.D. Va. Filed Mar. 31, 2006) (arguing that 18 U.S.C. § 793(e) is facially overbroad and vague). See *infra* note 93 for text of Section 793(e) of the Espionage Act.

⁷ Editorial, *Espionage Acting*, WALL ST. J., Aug. 17, 2006, at A8 (“The statute is notably vague, meaning it is ripe for selective prosecution and misuse against political or partisan enemies.”).

⁸ Editorial, *A Leaky Espionage Law*, PALM BEACH POST, Aug. 18, 2006, at 20A (referring to the Espionage Act as an unconstitutionally broad law).

⁹ A chilling effect is “[t]he result of a law or practice that seriously discourages the exercise of a constitutional right, such as the right to appeal or the right of free speech.” BLACK’S LAW DICTIONARY 257 (8th ed. 2004).

¹⁰ See Nora Boustany, *Press Freedom Erodes in U.S.*, *Report Says*, WASH. POST, Oct. 24, 2006, at A15.

¹¹ *Id.* “Northern European countries top the index with no reported censorship, intimidation or physical reprisals, either by officials or the public, in Finland, Ireland, Iceland and the Netherlands.” *Id.* Reporters Without Borders is a news media advocacy organization that issues the Worldwide Press Freedom Index, an annual report which tracks actions against news media See http://www.rsf.org/rubrique.php3?id_rubrique=20.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (reporting on Reporters Without Borders).

¹⁵ *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006).

that has broad free-speech implications.¹⁶ Part II considers the legislative history of the Espionage Act and the appellate decisions that have analyzed and interpreted its statutory language prior to this critical case. Part III provides an overview of *Rosen*, in which presiding U.S. District Judge T.S. Ellis III suggested “that the time is ripe for Congress to engage in a thorough review and revision” of Section 793(e) of the Espionage Act.¹⁷ Part IV examines Section 793(e) under the overbreadth and vagueness doctrines of First Amendment jurisprudence and argues that in spite of the fact that courts have unanimously upheld the constitutionality of the Act itself, the statute’s provisions inhibit constitutionally protected speech. Part V proposes legislative solutions to more effectively protect the fundamental right to freedom of speech for all Americans without endangering the national defense and security of the United States. Part V concludes that there is a low probability that Congress will act on these proposals.

II. THE EVOLVING ANALYSIS AND INTERPRETATION OF THE ESPIONAGE ACT

A. Legislative History

The Espionage Act of 1917 became law after nine weeks of grueling, divisive, and impassioned congressional debate.¹⁸ The pertinent part of the original statute made it a crime when the nation was at war for any person:

(a) willfully to ‘make or convey false reports or false statements with intent to interfere’ with the military success of the United States or ‘to promote the success of its enemies’; (b) willfully to ‘cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States’; or (c) willfully to ‘obstruct the recruiting or enlistment service of the United States.’¹⁹

Lawmakers and judges have characterized this language as ambiguous from the start. During congressional deliberations prior to the Act’s passage, Senator William Borah noted, “I have not found any two Senators

¹⁶ Walter Pincus, *Ruling Raises Bar in Lobbyists’ Case: Government Now Must Prove Former AIPAC Workers Intended to Harm U.S.*, WASH. POST, Aug. 19, 2006, at A4.

¹⁷ *Rosen*, 445 F. Supp. 2d at 646.

¹⁸ Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 352 (2003) [hereinafter Stone, *Espionage Act*]; see also Letter from Geoffrey R. Stone, Harry Kalven, Jr. Distinguished Service Professor of Law, University of Chicago Law School, to Rep. Peter Hoekstra, Chairman, Permanent Select Committee on Intelligence, and Rep. Jane Harman, Ranking Member, Permanent Select Committee on Intelligence (May 19, 2006) (on file with author) [hereinafter Stone, Letter] (summarizing legislative history of Espionage Act of 1917).

¹⁹ Stone, *Espionage Act*, *supra* note 18, at 352 (quoting Espionage Act of June 15, 1917, ch. 30, 40 Stat. 219 (codified as amended at 18 U.S.C. §§ 791–799 (2000))).

who agree upon what [the Act] means.”²⁰ In addition, some members of Congress at the time considered the statutory language not only vague, but also a serious impediment to the First Amendment. In a House Judiciary Committee hearing, Representative Charles Eaton voiced concern over the “distinct vagueness among the members of the committee as to how far this abridgment of speech is going.”²¹

However, the Espionage Act, as originally presented by the Woodrow Wilson administration, proposed a much broader abridgment of speech than the Act Congress eventually passed.²² President Wilson’s version contained a “press censorship” provision which provoked heated discussion among members of the national legislature.²³ This provision sought to make it unlawful for any individual in a time of war “to publish any information that the President, in his judgment, declared to be ‘of such character that it is or might be useful to the enemy.’”²⁴ The provision triggered extensive protest, especially from the press who argued that it would give the President final authority to determine whether they could publish information about war.²⁵

Congressional opposition to the press censorship provision was also fierce.²⁶ Senator Henry Cabot Lodge expressed concern “that the government officials who would administer this provision would naturally be inclined to use their authority to censor legitimate public criticism.”²⁷ This concern implied that the provision was unconstitutionally vague and therefore had significant potential for political abuse. The House of Representatives defeated President Wilson’s press censorship provision by a vote of 184 to 144.²⁸ Nevertheless, the Act that Congress eventually passed was anything but immune from subsequent First Amendment challenges.

²⁰ 65 CONG. REC. 2120 (1917) (statement of Sen. Borah); Stone, *Espionage Act*, *supra* note 18, at 353 (quoting Senator Borah).

²¹ *Espionage and Intelligence with Neutrality: Hearing on H.R. 291 Before the H. Comm. On the Judiciary*, 65th Cong. 25 (1917) (statement of Representative Charles Eaton), 1st Sess, Hearings on HR 291 at 19–25 (Apr. 9 & 12, 1917); Stone, *Espionage Act*, *supra* note 18, at 354 (quoting Rep. Eaton).

²² Stone, *Espionage Act*, *supra* note 18, at 346.

²³ *Id.*; see also GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 146–49 (2004) (describing the debate over press censorship provision).

²⁴ See Stone, *Espionage Act*, *supra* note 18, at 345 (quoting 65 CONG. REC. 1695 (1917) (statement of Rep. Morgan)).

²⁵ Stone, *Espionage Act*, *supra* note 18, at 346.

²⁶ *Id.* at 347.

²⁷ *Id.* at 348. (quoting Senator Lodge); Stone, Letter, *supra* note 18.

²⁸ See Stone, *Espionage Act*, *supra* note 18, at 349 (citing *House Defeats Censorship Law by 184 to 144*, N.Y. TIMES, June 1, 1917 (reporting that the bill’s defeat shattered party lines)).

B. *Schenck v. United States*: The Constitutional Challenges Begin

Charles T. Schenck, the general secretary of the Socialist party in 1917, was the first individual to challenge the constitutionality of the Espionage Act after his conviction on charges of conspiracy to violate its provisions.²⁹ According to the U.S. government, Schenck attempted to obstruct military recruitment during World War I by printing and circulating leaflets urging American men not to submit to the military draft.³⁰ Schenck appealed for reversal of his conviction, arguing that the Espionage Act contravened the First Amendment's prohibition of making any law abridging the freedom of speech, or of the press.³¹

Writing for a unanimous Supreme Court, Justice Oliver Wendell Holmes, Jr., acknowledged that Schenck's actions would have been protected by his First Amendment rights in most cases; however, "the character of every act depends upon the circumstances in which it is done."³² Justice Holmes elaborated, explaining that

[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.³³

The Court reasoned that the Constitution was of no avail to Schenck because the nation was at war and his actions hindered the war effort.³⁴ Thus, the Espionage Act survived the first of what would be many subsequent constitutional challenges because the government's compelling interest in the national defense under the "clear and present danger" balancing test outweighed individual civil liberty.³⁵

²⁹ See *Schenck v. United States*, 249 U.S. 47, 48–49 (1919).

³⁰ See *id.* at 49–51.

³¹ See *id.* at 49, 51.

³² *Id.* at 52 (citing *Aikens v. Wisconsin*, 195 U.S. 194, 205, 206 (1904)).

³³ *Id.* (establishing the "clear and present danger" test). The clear and present danger doctrine "determines whether certain speech crosses the line from permissible advocacy to improper incitement to violence." Holly S. Hawkins, Note, *A Sliding Scale Approach for Evaluating the Terrorist Threat over the Internet*, 73 GEO. WASH. L. REV. 633, 634 (2005). The clear and present danger doctrine, although reformulated since *Schenck*, remains good law today. See *e.g.*, *Denver Area Educ. Telecoms. Consortium v. FCC*, 518 U.S. 727, 778 (1996) (Souter, J., concurring) ("[t]he clear and present danger of *Schenck v. United States* . . . evolved into the modern incitement rule of *Brandenburg v. Ohio* . . ." (internal citations omitted)).

³⁴ *Schenck*, 249 U.S. at 52.

³⁵ See, *e.g.*, *Frohwerk v. United States*, 249 U.S. 204 (1919). See also *Debs v. United States*, 249 U.S. 211 (1919) (rejecting claim that Espionage Act violates the First Amendment by interfering with free speech).

C. *Abrams v. United States*: Justice Holmes Clashes with the Supreme Court over the Espionage Act

In a subsequent 1919 decision, *Abrams v. United States*, a majority of the Supreme Court upheld a trial court's verdict that found Jacob Abrams and his coconspirators guilty of violating the Espionage Act.³⁶ The Court reasoned that there was substantial evidence in the record to support the finding that the defendants intended to incite resistance to the war and curtail production of ammunition.³⁷ The defendants had been convicted on charges of conspiring to violate the Sedition Act,³⁸ a provision of the Espionage Act, by printing and distributing 5,000 pamphlets that contained "disloyal" language about the United States government during a time of war.³⁹ The Sedition Act prohibited: communicating with the intent to obstruct the selling of war bonds;⁴⁰ uttering, printing, writing, or publishing "any disloyal, profane, scurrilous, or abusive language" with the intent to cause contempt or scorn for the form of the United States government, the Constitution, or the flag;⁴¹ urging the curtailment of production of war materials with the intent to hinder the war effort;⁴² or uttering any words

³⁶ *Abrams v. United States*, 250 U.S. 616 (1919).

³⁷ *Id.* at 617, 619, 624.

³⁸ Sedition Act of May 16, 1918, ch. 75, 40 Stat. 553 (repealed Act of Mar. 3, 1921, ch. 136, 61 Stat. 1359).

³⁹ *See Abrams*, 250 U.S. at 617–18.

⁴⁰ Ch. 75, 40 Stat. 553, sec. 3.

Whoever, when the United States is at war . . . shall willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by or to the United States, . . . shall be punished

Id.

⁴¹ *Id.*

[W]hoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, . . . or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute, . . . shall be punished

Id.

⁴²

[W]hoever . . . shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, . . . shall be punished

Id.

which supported the cause of a country at war with the United States or which opposed the cause of the United States.⁴³

The defendants in *Abrams* argued that the Sedition Act was unconstitutional because it inherently conflicted with the First Amendment guarantees of free speech and freedom of the press.⁴⁴ The majority of the Court, citing *Schenck*, rejected this argument, holding that the Sedition Act did not violate First Amendment rights, and that the federal government could impose criminal sanctions on speech that presented a clear and present danger to the United States.⁴⁵ Interestingly, Justice Holmes, the author of the *Schenck* opinion, disagreed with the *Abrams* holding.

In dissent, Justice Holmes argued that the Espionage Act was not immune from First Amendment scrutiny.⁴⁶ He distinguished *Abrams* from *Schenck*, explaining that *Abrams* and his coconspirators did not intend to pose an imminent clear and present danger to the United States.⁴⁷ According to Holmes, “[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.”⁴⁸ Justice Holmes’ dissent enunciated an imminence and bad faith requirement to Espionage Act prosecutions which fueled subsequent constitutional challenges under the First Amendment, and engendered rivalries and alliances among members of the Supreme Court.⁴⁹

D. *Schaefer v. United States* and *Pierce v. United States*: Justices Holmes and Brandeis Form an Alliance on “Clear and Present Danger”

During World War I, the United States government prosecuted more than 2,000 individuals under the Espionage Act.⁵⁰ By the end of 1919, the Supreme Court had heard a number of First Amendment challenges from individual defendants convicted under the Act, including *Schenck* and *Abrams*, and had upheld all of their convictions.⁵¹ In 1920, however, Jus-

⁴³ *Id.* [W]hoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished . . .” *Id.*

⁴⁴ *Abrams*, 250 U.S. at 618–19.

⁴⁵ *Id.* The Court explicitly cited *Schenck* when it rejected the defendants’ First Amendment argument: “This contention is sufficiently discussed and is definitely negated in *Schenck v. United States* . . .” *Id.* at 619.

⁴⁶ *See id.* at 628 (Holmes, J., dissenting).

⁴⁷ *See id.* at 624–31 (Homes, J., dissenting).

⁴⁸ *Id.* at 628.

⁴⁹ *See Schaefer v. United States*, 251 U.S. 466, 482 (1920); *Pierce v. United States*, 252 U.S. 239, 253 (1920).

⁵⁰ Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV., 675, 698–99 (2004).

⁵¹ *See Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams*, 250 U.S. at 616.

tice Brandeis joined Justice Holmes to dissent in decisions in which the majority did not adopt the clear and present danger balancing approach when the application of this test would have resulted in the reversal of the defendants' convictions.⁵² These dissents triggered a jurisprudential approach that would become prevalent in later decisions.⁵³

1. *Schaefer v. United States*

In *Schaefer v. United States*, defendants appealed a conviction under Section 3 of the 1917 Espionage Act⁵⁴ for printing, publishing, and circulating newspapers that contained allegedly false reports and statements about the United States' war effort against Germany.⁵⁵ A majority of the Court found that the defendants' statements were deliberate and willfully false, and that they engendered opposition toward the war.⁵⁶ According to the majority, this finding was sufficient to uphold the defendants' convictions under the Espionage Act.⁵⁷

Justice Brandeis, however, wrote a dissent in which Justice Holmes joined, arguing that the Court majority erred in failing to apply the clear and present danger balancing test established in the unanimous *Schenck* decision.⁵⁸ According to Brandeis, "[t]he question whether in a particular instance the words spoken or written fall within the permissible curtailment of free speech is, under the rule enunciated by this court, one of degree"⁵⁹ Under this analysis, Brandeis found that the defendants' criticism of the war was not a false report or false statement that had the potential to interfere with the operation or success of the United States war effort or

⁵² See *Schaefer*, 251 U.S. at 482–95 (Brandeis, J., dissenting); *Pierce*, 252 U.S. at 253–73 (Brandeis, J., dissenting).

⁵³ See, e.g., *Gorin v. United States*, 312 U.S. 19 (1941); *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam); *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006).

⁵⁴ Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished

Espionage Act of 1917, ch. 30, § 3, 40 Stat. 219 (codified as amended at 18 U.S.C. §§ 791–799 (2000)).

⁵⁵ See *Schaefer*, 251 U.S. at 468.

⁵⁶ *Id.* at 480–81.

⁵⁷ *Id.* at 482.

⁵⁸ See *id.* at 482–83 (Brandeis, J., dissenting).

⁵⁹ *Id.* at 483.

promote the enemy's success.⁶⁰ Instead, Brandeis found that the defendants' criticism of the war was speech that deserved protection under the First Amendment.⁶¹ He reasoned that the prosecution of war criticism which lacks potential to incite conduct that could hinder the war effort would discourage the critical commentary of government found at the core of the First Amendment's protections.⁶² The reasoning of Justices Brandeis and Holmes was entirely consistent with dicta from the latter's *Abrams* dissent: a court should always be vigilant against attempts to prohibit the expression of speech that criticizes the government, unless such censorship is "required to save the country."⁶³

2. *Pierce v. United States*

In *Pierce v. United States*, the defendants were convicted of circulating pamphlets containing statements that both incited opposition to World War I and the U.S. government, and were calculated to interfere with the morale of American troops.⁶⁴ The Supreme Court upheld the District Court's finding that the evidence was sufficient to support conviction.⁶⁵ The majority again gave deference to the trial court's determination without subjecting it to the clear and present danger test.⁶⁶

In another dissenting opinion joined by Justice Holmes, Justice Brandeis reemphasized the need for the Court to apply the *Schenck* clear and present danger test.⁶⁷ Brandeis also questioned the unresolved issue of "whether the act of uttering or publishing was done willfully, that is, with the intent to produce the result which the Congress sought to prevent."⁶⁸ Brandeis' focus on intent in *Pierce* was a derivative of Justice Holmes' dissent in

⁶⁰ *See id.* at 492–93. According to Justice Brandeis, the only kind of false statements covered by the Espionage Act were

[w]illfully untrue statements which might mislead the people as to the financial condition of the government and thereby embarrass it; as to the adequacy of the preparations for war or the support of the forces; as to the sufficiency of the food supply; or willfully untrue statements or reports of military operations which might mislead public opinion as to the competency of the army and navy or its leader; or willfully untrue statements or reports which might mislead officials in the execution of the law, or military authorities in the disposition of the forces

Id. (citation omitted).

⁶¹ *Id.* at 482.

⁶² *Id.* at 493–94.

⁶³ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁶⁴ *United States v. Pierce*, 245 F. 878, 881–82 (N.D.N.Y. 1917), *aff'd*, 252 U.S. 239 (1920).

⁶⁵ *See Pierce v. United States*, 252 U.S. 239, 251 (1920) (concluding that the District Court would have erred if it had directed an acquittal because substantial evidence existed in support of the charges).

⁶⁶ *See id.* (failing to use clear and present danger test in analysis of majority opinion).

⁶⁷ *See id.* at 255 (Brandeis, J., dissenting).

⁶⁸ *Id.*

Abrams, in which he stated that “[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion”⁶⁹ Justice Brandeis acknowledged that “insubordination, disloyalty, mutiny and refusal of duty” were serious crimes in the military or naval forces.⁷⁰ However, he argued that the *Pierce* defendants’ convictions should be reversed because there was no clear and present danger that these crimes would actually occur, given that the defendants did not distribute the pamphlets among members of the military or the naval services.⁷¹ Accordingly, Brandeis argued that the requisite evil intent to bring about imminent danger was lacking.⁷² This element of bad faith emphasized by Justice Brandeis and Justice Holmes in their dissents would surface in later cases in which courts required the prosecution to prove such intent.⁷³

These early Espionage Act cases demonstrate that Justice Holmes and Justice Brandeis, two of the most venerable jurists in American history, refused to deny First Amendment freedoms when convictions under the Espionage Act were not supported by threat of imminent danger to the United States or the presence of bad faith on the part of the individual whose rights were at stake.⁷⁴ The reoccurring dissents from these two legendary justices provided support for a subsequent decision that clarified the language of the Espionage Act by ruling that a bad faith element is necessary for conviction.⁷⁵

E. Gorin v. United States: The Supreme Court Rejects Claim that the Espionage Act is Unconstitutionally Vague

Shortly after *Pierce*, the Supreme Court held in *Connally v. General Construction Co.* that a law is facially invalid for vagueness if persons “of common intelligence must necessarily guess at its meaning and differ as to its application.”⁷⁶ The Court later elaborated that a law must convey “sufficiently definite warning as to the proscribed conduct when measured by

⁶⁹ *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

⁷⁰ *Pierce*, 252 U.S. at 272–73 (Brandeis, J., dissenting).

⁷¹ *Id.*

⁷² *See id.* at 272.

⁷³ *See Gorin v. United States*, 312 U.S. 19, 28 (1941) (finding that the Espionage Act punishes the release of classified information only when that release is the product of bad faith); *United States v. Rosen*, 445 F. Supp. 2d 602, 643 (E.D. Va. 2006) (holding that the United States must prove that Rosen and Weissman disclosed the classified information in bad faith).

⁷⁴ *See Abrams*, 250 U.S. at 624–31 (Holmes, J., dissenting); *Schaefer v. United States*, 251 U.S. 466, 482–95 (1920) (Brandeis, J., dissenting); *Pierce*, 252 U.S. at 253–73 (Brandeis, J., dissenting).

⁷⁵ *See Gorin*, 312 U.S. at 28.

⁷⁶ 269 U.S. 385, 391 (1926).

common understanding and practices” to pass constitutional muster under the vagueness doctrine.⁷⁷ This standard was applied to the Espionage Act in *Gorin v. United States*.⁷⁸

In 1940, two decades after *Pierce*, a citizen of the U.S.S.R. sought and received from a U.S. naval intelligence officer the substance of reports concerning Japanese activities in the United States.⁷⁹ Both the Soviet citizen and the American officer conspired to transmit this information back to the Soviet Union.⁸⁰ Upon conviction under what is now codified as Section 794(a) of the Espionage Act,⁸¹ the two coconspirators appealed to the Supreme Court on the argument that the 1917 law is unconstitutionally vague.⁸² The Court rejected the defendants’ vagueness challenge.⁸³ In its opinion, the *Gorin* majority adopted an approach articulated in the dissents of Justice Holmes and Justice Brandeis, holding that the Espionage Act “requires those prosecuted to have acted in bad faith” with the reasonable belief that such action could harm the United States.⁸⁴ Therefore, the Court held, the Espionage Act is not unconstitutionally vague because it is limited by intent and imminence.⁸⁵

⁷⁷ *Jordan v. DeGeorge*, 341 U.S. 223, 231–32 (1951).

⁷⁸ *Gorin*, 312 U.S. 19.

⁷⁹ *Id.* at 22.

⁸⁰ *See id.*

⁸¹ Section 794(a) provides:

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, or attempts to communicate, deliver or transmit, 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, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, 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, if there is no jury, 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) 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.

18 U.S.C. § 794(a) (2000).

⁸² *See Gorin*, 312 U.S. at 23.

⁸³ *See id.* at 28.

⁸⁴ *Id.*

⁸⁵ *See id.*; see also *supra* note 81 for text of Section 794(a) of the Espionage Act regarding intent and imminence requirements.

F. *New York Times Co. v. United States*: The Supreme Court Gives Deference to the First Amendment

Even three decades after *Gorin*, the dissents of Justice Holmes and Justice Brandeis still influenced the Supreme Court in cases concerning the interplay between the First Amendment and the Espionage Act. In a 1971 plurality decision, the Court in *New York Times Co. v. United States* confirmed Holmes and Brandeis's overarching argument that First Amendment interests must prevail over the government's interest in national security where the threat to national security is slight and explicit rights under the First Amendment, such as freedom of the press, are at stake.⁸⁶ *New York Times Co. v. United States*, also known as the "Pentagon Papers"⁸⁷ case, is perhaps the most famous decision to address leaks to the press of classified information concerning national security.⁸⁸

Prior to this decision, Congress passed the Internal Security Act of 1950⁸⁹ which amended the Espionage Act of 1917 and remains part of the Espionage Act today.⁹⁰ The 1950 amendments were adopted in response to the perceived threat to national security posed by the Communist movement.⁹¹ They expanded the scope of the 1917 Act by prohibiting the retention of classified information by someone who does not have lawful possession of such information, and by prohibiting the transmission of such information by someone with lawful possession to someone without such entitlement.⁹² Congress codified these prohibitions into Sections 793(d) and (e) of the Espionage Act.⁹³

⁸⁶ See *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam).

⁸⁷ See, e.g., Mitchell J. Michalec, Comment, *The Classified Information Protection Act: Killing the Messenger or Killing the Message?*, 50 CLEV. ST. L. REV. 455, 459–60 (2003) (referring to *New York Times Co. v. United States* as the Pentagon Papers case).

⁸⁸ Trudell, *supra* note 4, at 209.

⁸⁹ Internal Security Act of 1950, ch. 1024, 64 Stat. 987, 1003–04 (1950) (codified as amended at 18 U.S.C. §§ 793(d)–(e) (2000)).

⁹⁰ Trudell, *supra* note 4, at 205–11 (describing enactment and application of the Espionage Act).

⁹¹ *Id.*

⁹² *Id.* at 207 (explaining that the mere retention of defense information became a crime under the amended Act).

⁹³ Section 793(d) provides:

Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on

Violations of Sections 793(d) and (e) were at issue in the landmark Pentagon Papers case,⁹⁴ which involved a classified study obtained by the *New York Times* and the *Washington Post*.⁹⁵ Both newspapers sought to publish excerpts of the multi-volume study, known as the “Pentagon Papers,” which described the history of the nation’s role in Indochina, and specifically American policy with respect to Vietnam.⁹⁶ In addition to seeking injunctions against the newspapers, the government charged two individuals, Daniel Ellsberg and Anthony Russo, with leaking this classified information to the press in violation of Sections 793(d) and (e) of the Espionage Act.⁹⁷ However, the Department of Justice eventually dropped the prosecution of Ellsberg and Russo because the burglars involved in the Watergate scandal had tainted the government’s case when they also broke into the office of Ellsberg’s psychiatrist.⁹⁸ The Court, therefore, only addressed the issue of whether the government could enjoin the publication of news that reporters obtained through an unauthorized transfer of classified information.⁹⁹

The plurality opinion held that to prevent publication of the Pentagon Papers would have amounted to an unconstitutional prior restraint on the press.¹⁰⁰ A prior restraint is “[a] governmental restriction on speech or publication before its actual expression. Prior restraints violate the First

demand to the officer or employee of the United States entitled to receive it . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 793(d) (emphasis added).

Section 793(e) provides:

Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 793(e) (emphasis added).

⁹⁴ *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam).

⁹⁵ *Id.* at 714.

⁹⁶ *See id.* at 717 (Black, J., concurring).

⁹⁷ *See* Trudell, *supra* note 4, at 209–10. *See also* Michalec, *supra* note 87, at 459 (describing the events which led to the indictment of the newspapers and Ellsberg and Russo).

⁹⁸ *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 523 n.503 (2002). *See also* Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974) (discussing the fate of the individuals involved in the Pentagon Papers case).

⁹⁹ *Pentagon Papers*, 403 U.S. at 714 (per curiam).

¹⁰⁰ *See id.*

Amendment unless the speech is obscene, is defamatory, or creates a clear and present danger to society.”¹⁰¹ Although the Pentagon Papers contained classified information relating to national security, a plurality of the Supreme Court found that the information did not rebut the presumption of the unconstitutionality of a prior restraint on its publication.¹⁰² Thus, the Court’s rejection of the government’s attempt to stop publication was a victory for American journalists and freedom of the press.¹⁰³

Although a plurality of justices ruled that the government could not enjoin publication, a separate coalition of justices hinted that the government could still prosecute the newspapers for violating the Espionage Act.¹⁰⁴ Justice Marshall, in a concurring opinion, suggested that the statute permits prosecution of the newspapers after publication of the classified material.¹⁰⁵ Justice White, joined by Justice Stewart, stated in his concurring opinion that the “failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication.”¹⁰⁶ White elaborated that he “would have no difficulty in sustaining convictions under [Section 793(e) of the Espionage Act] on facts that would not justify the intervention of equity and the imposition of a prior restraint.”¹⁰⁷

Significantly, Justice Harlan, in dissent, bluntly critiqued Section 793(e) as “a singularly opaque statute.”¹⁰⁸ The United States Court of Appeals for the Fourth Circuit would eventually agree with this characterization in *United States v. Morison*,¹⁰⁹ a case that addressed an issue that the Penta-

¹⁰¹ BLACK’S LAW DICTIONARY 1232 (8th ed. 2004).

¹⁰² See *Pentagon Papers*, 403 U.S. at 714.

¹⁰³ David H. Topol, *United States v. Morison: A Threat to the First Amendment Right to Publish National Security Information*, 43 S.C. L. REV. 581, 586 (1992).

¹⁰⁴ “[T]he Government has the power under statutory grant to use traditional criminal law to protect the country” *Pentagon Papers*, 403 U.S. at 747 (Marshall, J., concurring). “[F]ailure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.” *Id.* at 733 (White, J., concurring). See also *Does the First Amendment’s Freedom of the Press Clause Place the Institutional Media Above the Law of Classified Secrets?: Hearing Addressing Obligations of the Media With Respect to Publication of Classified Information Before the H. Permanent Select Committee on Intelligence*, 109th Cong. 6 (2006) (statement of Dr. John C. Eastman, Henry Salvatori Professor of Law & Community Service, Chapman University School of Law). “[F]ive Justices in [the Pentagon Papers] case (Chief Justice Burger and Justices White, Stewart, Harlan, and Blackmun), recognized [that] . . . a prohibition on prior restraints does not eliminate liability for post-publication prosecution” *Id.*

¹⁰⁵ See *Pentagon Papers*, 403 U.S. at 743–48 (Marshall, J., concurring).

¹⁰⁶ *Id.* at 733 (White, J., concurring).

¹⁰⁷ *Id.* at 737.

¹⁰⁸ *Id.* at 754 (Harlan, J., dissenting).

¹⁰⁹ See *United States v. Morison*, 844 F.2d 1057, 1060 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988).

gon Papers case did not: whether Section 793(e) of the Espionage Act is constitutionally applicable to individuals who leak classified information to the press.

G. *United States v. Morison*: The Media and the Espionage Act Finally Intertwine

United States v. Morison constituted the first successful prosecution of an individual under the Espionage Act for leaking information to the media.¹¹⁰ Morison worked at the Naval Intelligence Support Center (“NISC”) from 1974 to 1984¹¹¹ as a national intelligence officer.¹¹² With the approval of the NISC, Morison also performed off-duty work for *Jane’s Fighting Ships*, a British publication about international naval operations.¹¹³ In 1984, Morison mailed “Top Secret” American photos of a Soviet aircraft carrier that was under construction to *Jane’s Defence Weekly* (“*Jane’s*”), a magazine related to *Jane’s Fighting Ships*.¹¹⁴ The photographs, which had been taken by an American KH-11 reconnaissance satellite camera, were published in *Jane’s* and the *Washington Post*.¹¹⁵ Morison also sent *Jane’s* a summary of a secret report, and the U.S. government found secret military information in Morison’s apartment.¹¹⁶

In a subsequent prosecution of Morison under the Espionage Act, the government claimed that Morison’s leaks confirmed the satellite’s capability to the Soviet Union, a declared enemy of the United States, even though it conceded that the Soviets already had access to some of the same photographs.¹¹⁷ Morison argued that the fact that he disclosed information to the press and not to a foreign government agent distinguished his case, and that the court should accordingly find his actions did not fall under the ambit of Sections 793(d) and (e).¹¹⁸ In addition, Morison argued that criminal punishment of leaks to the press would render the Espionage Act unconstitutional as a violation of the First Amendment.¹¹⁹ In support of this claim, many newspapers filed amicus curiae briefs contending that a deci-

¹¹⁰ See *Morison*, 844 F.2d at 1066–67; Topol, *supra* note 103, at 590. See also Michalec, *supra* note 87, at 473. “*United States v. Morison*[,] is extraordinarily important[,] because it demonstrates the reasoning one court used to apply existing statutes to . . . leaks of classified information from a government employee to the press.” *Id.* at 472–73(citations omitted).

¹¹¹ *Morison*, 844 F.2d at 1060.

¹¹² *Id.* at 1083.

¹¹³ *Id.* at 1060.

¹¹⁴ *Id.* at 1061.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1062.

¹¹⁷ *Id.* at 1060, 1080.

¹¹⁸ *Id.* at 1063.

¹¹⁹ *Id.* at 1068.

sion against Morison could “expose the press and its sources to criminal sanctions, regardless of whether any injury to the United States is intended or likely to result.”¹²⁰

In response to Morison’s arguments, the Fourth Circuit found that the United States could use Section 793 to prosecute government employees who leaked classified information to the media.¹²¹ In its reasoning, the Fourth Circuit cited *Branzburg v. Hayes*, which held that the First Amendment does not “confer[] a license on either the reporter or his news sources to violate valid criminal laws.”¹²² Thus, logically, the court found that the *Branzburg* rule applies to individuals such as Morison who assisted the media by violating valid criminal laws.¹²³

Moreover, *United States v. Morison* left open the possibility for the government to prosecute journalists for publishing classified information.¹²⁴ Although the Department of Justice has yet to prosecute individual reporters who unlawfully receive classified information under the Espionage Act,¹²⁵ the agency did not hesitate recently to indict Steven J. Rosen and Keith Weissman, the first American, non-government employees to face charges under the modern Espionage Act.¹²⁶

III. UNITED STATES V. ROSEN: THE ESPIONAGE ACT TARGETS A NEW DEMOGRAPHIC

Although *United States v. Morison* was important as the first media-related Espionage Act conviction,¹²⁷ the defendant Morison was a government employee who leaked information to the press by physical transfer of documents and photos in violation of the Act. *United States v. Rosen* is the

¹²⁰ Topol, *supra* note 103, at 591 (citing Brief for Amici Curiae, Washington Post et al., at 11, *Morison*, 844 F.2d 1057 (No. 86–5008), *cert. denied*, 488 U.S. 908 (1988)).

¹²¹ See *Morison*, 844 F.2d at 1070–73.

¹²² *Id.* at 1068 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 691–92 (1972)). The “valid criminal laws” that the *Morison* opinion refers to are 18 U.S.C. §§ 793(d) and (e), the Espionage Act statutes of which the United States had charged Morison for violating. *Morison*, 844 F.2d at 1060. “Section (d) was applied as to the photographs, as he arguably had authorized possession. Section (e) was applied as to the secret reports, because he had retained them without authorization.” Michalec, *supra* note 87, at 474. The only difference between Section (d) and Section (e) is that Section (d) pertains to those individuals who “lawfully” have possession; whereas, Section (e) pertains to those individuals who have “unauthorized possession.” 18 U.S.C. §§ 793(d)–(e) (2000). See *supra* note 93 for text of Sections 793(d)–(e) of the Espionage Act.

¹²³ See *Morison*, 844 F.2d at 1070.

¹²⁴ Topol, *supra* note 103, at 591 (commenting on the decision’s potential to further infringe on freedom of the press by prosecuting journalists).

¹²⁵ Editorial, *Secrecy and the Media*, L.A. TIMES, Aug. 27, 2006, at M4.

¹²⁶ See Government’s Supplemental Response to Defendants’ Motion to Dismiss the Superseding Indictment at 4–5, 14–16, *United States v. Rosen*, No. 1:05CR225 (E.D. Va. Filed Mar. 2006); Pincus, *supra* note 16.

¹²⁷ Topol, *supra* note 103, at 590.

first case in which a court has denied a motion to dismiss the indictment on a finding that citizens other than government employees may face charges for receiving and verbally disclosing secret information in violation of the Espionage Act.¹²⁸ This case has far-reaching free-speech implications for a broad segment of the public, including lobbyists, academics, journalists, and others who work closely with high-ranking government officials.¹²⁹

A. Statement of Facts

Steven Rosen and Keith Weissman worked for the American Israel Public Affairs Committee (“AIPAC”), “a pro-Israel organization that lobbies the United States executive and legislative branches on issues of interest to Israel, especially U.S. foreign policy with respect to the Middle East.”¹³⁰ Rosen was AIPAC’s Director of Foreign Policy Issues whose primary responsibility entailed lobbying executive branch officials who had policy-making authority over issues of concern to AIPAC.¹³¹ Weissman was the Senior Middle East Analyst for AIPAC who collaborated with Rosen in lobbying executive branch officials.¹³² In 2005, a federal grand jury indicted Rosen and Weissman on charges of conspiring to obtain and transmit information relating to Iran and other Middle East nations to those not entitled to receive such reports,¹³³ in violation of 18 U.S.C. § 793(g).¹³⁴ Both defendants were also indicted for allegedly conspiring to violate Section 793(e).¹³⁵

Section 793(e) pertains to the unauthorized possession of classified information.¹³⁶ The classified information obtained by Rosen and Weissman was specifically related to United States policy toward Iran, potential attacks on American forces in Iraq, covert actions in Iraq, and other intelli-

¹²⁸ See generally *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006); Pincus, *supra* note 16.

¹²⁹ The memorandum opinion on this pre-trial motion was 68 pages, which demonstrates the magnitude of free-speech implications this case entails. See *Rosen*, No. 1:05cr225, slip op. See also Pincus, *supra* note 16; Richard B. Schmitt, *Lobbyists to Stand Trial in Spy Case: A Judge Rejects the Arguments of Pro-Israel Activists Charged under a 1917 Espionage Law Conspiring to Obtain U.S. Secrets*, L.A. TIMES, Aug. 11, 2006, at A13.

¹³⁰ *Rosen*, 445 F. Supp. 2d at 607. See also AIPAC: The American Israel Public Affairs Committee, <http://www.aipac.org> (last visited Mar. 25, 2007).

¹³¹ *Rosen*, 445 F. Supp. 2d at 608.

¹³² *Id.*

¹³³ *Id.* at 607; Schmitt, *supra* note 129.

¹³⁴ Section 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.

18 U.S.C. § 793(g) (2000).

¹³⁵ See *Rosen*, 445 F. Supp. 2d at 610. See *supra* note 93 for text of Section 793(e).

¹³⁶ § 793(e).

gence relating to the Middle East.¹³⁷ Lawrence Franklin, an analyst who worked on the Iran desk in the Office of the Secretary of the Department of Defense,¹³⁸ leaked the classified information in conversations with Rosen and Weissman.¹³⁹ Franklin pled guilty to conspiracy to communicate information relating to the national defense to one not entitled to receive it, in violation of 18 U.S.C. §§ 793(d) and (g).¹⁴⁰ In January 2006, Franklin was sentenced to more than 12 years in prison.¹⁴¹

Section 793(e) not only concerns the unauthorized possession of classified information, but also the willful communication of such information “to any person not entitled to receive it.”¹⁴² After receipt of the information from Franklin, Rosen and Weissman verbally transmitted the classified information to other AIPAC colleagues, a *Washington Post* reporter, and an Israeli diplomat.¹⁴³ Not only are Rosen and Weissman the first non-government-affiliated American citizens to face charges under the modern Espionage Act, but they are also the only individuals the government has ever indicted for receiving and transmitting classified information through oral, rather than tangible, communication.¹⁴⁴

Rosen and Weissman sought to dismiss the indictments by attacking the constitutionality of Section 793(e) of the Espionage Act.¹⁴⁵ Rosen and Weissman argued that the statute, as applied to them, is unconstitutionally vague, abridges their First Amendment rights to free speech and to petition the government, and is facially overbroad.¹⁴⁶ In the alternative, Rosen and Weissman urged Judge T.S. Ellis III, presiding over the case in the U.S. District Court for the Eastern District of Virginia, to interpret Section 793(e) of the Espionage Act as applicable to the transmission of tangible items only.¹⁴⁷

B. Vagueness Challenge

In their motion to dismiss the indictment, the defendants argued that Section 793(e) is unconstitutionally vague because the statute’s allegedly inde-

¹³⁷ *Rosen*, 445 F. Supp. 2d at 609.

¹³⁸ *Id.* at 608.

¹³⁹ See Jeffrey Goldberg, *Real Insiders: A Pro-Israel Lobby and an F.B.I. Sting*, THE NEW YORKER, July 4, 2005, at 34 (providing a narrative of the events that led to Franklin’s indictment).

¹⁴⁰ *Rosen*, 445 F. Supp. 2d at 608 n.3. See *supra* note 93 for text of Section 793(d), and *supra* note 134 for text of Section 793(g).

¹⁴¹ Schmitt, *supra* note 129.

¹⁴² 18 U.S.C. § 793(e) (2000).

¹⁴³ *Rosen*, 445 F. Supp. 2d at 609–10.

¹⁴⁴ See *Id.*; Pincus, *supra* note 16.

¹⁴⁵ Supplemental Brief in Support of Defendants Steven J. Rosen’s and Keith Weissman’s Motion to Dismiss the Superseding Indictment, *supra* note 6.

¹⁴⁶ *Id.*

¹⁴⁷ *Rosen*, 445 F. Supp. 2d at 607.

terminate language failed to provide them with adequate notice that their conduct was unlawful.¹⁴⁸ They specifically alleged that the statute is vague with respect to determining “the content of the information covered by the phrase ‘information relating to the national defense,’ and . . . the individuals ‘not entitled to receive’ that information.”¹⁴⁹ Rosen and Weissman further argued that the phrase “information relating to the national defense” does not explicitly indicate whether oral communication falls into this category.¹⁵⁰ Although Judge Ellis acknowledged that this language was not clear, he reasoned that judicial precedent has limited and clarified “information relating to the national defense” as any government secret, the unauthorized disclosure of which could threaten the national security.¹⁵¹ Accordingly, Judge Ellis held that the phrase is not vague.¹⁵²

As for “not entitled to receive,” Rosen and Weissman argued that this phrase is particularly vague, especially given the fact that they received the information orally; they could not have known that the information was classified because verbal communications do not possess markings such as “SECRET,” “CONFIDENTIAL,” or other indicia of confidentiality.¹⁵³ Once again, Judge Ellis recognized that the statutory language lacks precision; however, he reasoned that prior judicial authority “has clarified that the statute incorporates the executive branch’s classification regulations, which provide the requisite constitutional clarity.”¹⁵⁴ Judge Ellis, therefore, rejected the defendants’ vagueness challenge to the constitutionality of the Espionage Act.¹⁵⁵

C. Constitutional Challenges on the Grounds of Free Speech and Right to Petition the Government for Grievances

In opposing the claims in Rosen and Weissman’s pretrial motion, the government proposed a categorical rule that the Espionage Act cannot implicate the First Amendment.¹⁵⁶ Judge Ellis, demonstrating that he might have joined the dissents of Justice Holmes and Justice Brandeis in the first

¹⁴⁸ *Id.* at 610.

¹⁴⁹ *Id.* at 617 (quoting 18 U.S.C. §§ 793(d)–(e) (2000)).

¹⁵⁰ *Id.* at 618.

¹⁵¹ *See id.* at 621–22 (citing *Gorin v. United States*, 312 U.S. 19, 28 (1941) (requiring that information relating to the national defense be information that the government holds closely)); *United States v. Morison*, 844 F.2d 1057, 1071–72 (4th Cir. 1988) (“[I]nformation relating to the national defense [requires that its]. . . disclosure would be potentially damaging to the United States or useful to an enemy of the United States.” (quoting District judge’s jury instructions)).

¹⁵² *Rosen*, 445 F.Supp. 2d at 622.

¹⁵³ *Id.*

¹⁵⁴ *See id.* at 623 (citing *Morison*, 844 F.2d at 1075).

¹⁵⁵ *See id.* at 629.

¹⁵⁶ *See id.* at 629–30.

Espionage Act cases, rejected this argument and ruled that “the application of § 793 to the defendants is unquestionably . . . deserving of First Amendment scrutiny.”¹⁵⁷ He elaborated that “mere invocation of ‘national security’ or ‘government secrecy’ does not foreclose a First Amendment inquiry.”¹⁵⁸

Judge Ellis acknowledged that the defendants’ First Amendment interests at issue implicate core constitutional values, but ultimately held that Section 793 does not violate Rosen and Weissman’s First Amendment guarantee of free speech and does not violate their right to petition the government.¹⁵⁹ Rosen and Weissman contended that their allegedly wrongful conduct was protected by their right to petition because their ability to influence the executive and legislative branches necessarily requires “access to the sensitive information that informs the government’s internal debate over foreign policy.”¹⁶⁰ However, Judge Ellis ruled that under *Morison*,¹⁶¹ the individual right to petition the government must yield to the government’s interest when national security is genuinely at risk.¹⁶²

D. Overbreadth Challenge

Rosen and Weissman additionally claimed that Section 793 unconstitutionally infringes upon First Amendment liberties because it is overbroad and, as such, chills speech protected by the Constitution.¹⁶³ Judge Ellis also rejected this overbreadth challenge, citing the statutory interpretation of a similar provision of the Act¹⁶⁴ that was at issue in *Gorin v. United States*.¹⁶⁵ Applying a *Gorin* analysis, Judge Ellis concluded that “the statute is narrowly and sensibly tailored to serve the government’s legitimate interest in protecting the national defense and security, and its effect on First Amendment freedoms is neither real nor substantial as judged in relation to this legitimate sweep.”¹⁶⁶

¹⁵⁷ *Id.* at 630. “[T]he conduct at issue – collecting information about United States’ foreign policy and discussing that information with government officials (both United States and foreign), journalists, and other participants in the foreign policy establishment – is at the core of the First Amendment’s guarantees.” *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 633, 640, 642–43.

¹⁶⁰ *Id.* at 641.

¹⁶¹ *United States v. Morison* emphasized that Congress may limit free expression when national security is genuinely at risk. *See id.* at 634 (citing *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988)).

¹⁶² *Rosen*, 445 F. Supp. 2d at 637.

¹⁶³ *See id.* at 629.

¹⁶⁴ 18 U.S.C. § 794(a) (2000). *See supra* note 81 for text of Section 794(a).

¹⁶⁵ 312 U.S. 19 (1941).

¹⁶⁶ *Rosen*, 445 F. Supp. 2d at 643.

E. Argument for Interpretation of Section 793 as Only Applicable to the Transmission of Tangible Items

Rosen and Weissman's alternative statutory argument that the court should construe the word "information" in Section 793 as only applicable to tangible information also failed to persuade the court.¹⁶⁷ Judge Ellis applied a plain meaning approach to the word, and held that it is a general term which encompasses knowledge from both tangible and intangible sources.¹⁶⁸

Judge Ellis also examined the statute's legislative history. While he acknowledged that the drafters of the Espionage Act were careless, he found that they did not intend to restrict the term "information" to include only tangible terms.¹⁶⁹ Judge Ellis reasoned that the term "information" as applicable to both tangible and intangible information is consistent with the statute's legislative history¹⁷⁰ which, according to legal scholars Harold Edgar and Benno C. Schmidt, Jr., demonstrates that the drafters did not intend to limit its reach to information only in documentary form.¹⁷¹

Judge Ellis further looked to an earlier statute, "[t]he grandfather of . . . § 793, . . . [which] clearly prohibited the willful communication of any 'knowledge of anything connected with the national defense.'"¹⁷² In accord with earlier statutory language and interpretation, Judge Ellis rejected Rosen and Weissman's alternative argument that Section 793 of the Espionage Act applies to the transmission of tangible items only, and held that the statutory provision also allows for the government to prosecute under the Espionage Act when intangible information is at issue.¹⁷³

F. A Partial Victory for Rosen and Weissman

Although Judge Ellis rejected Rosen and Weissman's motion to dismiss, he interpreted Section 793 at least partially in the defendants' favor.¹⁷⁴ In order for the government to obtain a conviction at trial, Judge Ellis ruled that the prosecution must prove beyond a reasonable doubt that Rosen and Weissman knew that the United States held the information at issue

¹⁶⁷ See *id.* at 614.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 613–14.

¹⁷⁰ See *id.* at 616–17.

¹⁷¹ *Id.* at 616 (citing Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1021–31, 1050 (1973)).

¹⁷² *Rosen*, 445 F. Supp. 2d at 616.

¹⁷³ See *id.* at 615–17.

¹⁷⁴ See *id.* See also Pincus, *supra* note 16. "The federal judge who . . . refused to throw out charges of conspiring to violate the 1917 Espionage Act against two former pro-Israel lobbyists simultaneously made it much more difficult for the government to prove its case against them." *Id.*

closely, that the disclosure of such information could potentially harm the United States, and that they knew that the individuals to whom they communicated that information lacked authority under the classification regulations to receive it.¹⁷⁵

Furthermore, Judge Ellis found that Section 793 requires a bad faith element for conviction. Accordingly, he held that the government must prove beyond a reasonable doubt “that the defendants communicated the information they had received from their government sources with ‘a bad purpose either to disobey or to disregard the law.’”¹⁷⁶ Although Judge Ellis held that Section 793 passes constitutional muster, his memorandum opinion on the defendants’ motion to dismiss, particularly the orders requiring both proof of knowledge and bad faith for conviction, casts doubt on the government’s ultimate success in this case.

G. Dicta in Favor of Journalists, Academics, Think-tank Experts, and Other Individuals

The court also acknowledged that Rosen and Weissman’s “First Amendment challenge exposes the inherent tension between the government transparency so essential to a democratic society and the government’s equally compelling need to protect from disclosure information that could be used by those who wish this nation harm.”¹⁷⁷ In fact, at the close of his memorandum opinion, Judge Ellis wrote, “[t]he conclusion that the statute is constitutionally permissible does not reflect a judgment about whether Congress could strike a more appropriate balance between these competing interests, or whether a more carefully drawn statute could better serve both the national security and the value of public debate.”¹⁷⁸ Judge Ellis reasoned that “great technological advances affecting not only the nature and potential devastation of modern warfare, but also the very nature of information and communication . . . suggest to even the most casual observer that the time is ripe for Congress to engage in a thorough review and revision” of the Espionage Act’s provisions, “to ensure that they reflect both these changes, and contemporary views about the appropriate balance between our nation’s security and our citizens’ ability to engage in public debate about the United States’ conduct in the society of nations.”¹⁷⁹

Although Judge Ellis held that Section 793 of the Espionage Act is constitutional under First Amendment vagueness and overbreadth doctrinal tests, he nonetheless indicated that he does not necessarily praise its provisions, which place unreasonable restrictions on the public discourse and

¹⁷⁵ *Rosen*, 445 F. Supp. 2d at 625.

¹⁷⁶ *Id.* (quoting *United States v. Morison*, 844 F.2d 1057, 1071 (4th Cir. 1988)).

¹⁷⁷ *Rosen*, 445 F. Supp. 2d at 629.

¹⁷⁸ *Id.* at 646.

¹⁷⁹ *Id.* at 667–68.

the marketplace of ideas. Thus, even as he followed judicial authority and legislative history, Judge Ellis found it necessary to call on Congress to re-address the proper tradeoff between national security and free-speech rights in the communicatively advanced post-modern era.

IV. SECTION 793 INHIBITS CONSTITUTIONALLY PROTECTED SPEECH

Pursuant to precedent, Judge Ellis rejected the vagueness and overbreadth challenges raised by Rosen and Weissman.¹⁸⁰ However, leading journalists and publications suggest that the court decisions in *Gorin*, *Morrison*, and *Rosen* failed to take into consideration the reality of the everyday situations facing journalists, lobbyists, academics, think-tank experts, and others, particularly in Washington, whose daily stock in trade is the acquisition and exchange of information, often secret or classified.¹⁸¹ Journalist fear that the potential for criminal prosecution under the Act as envisioned by these rulings will chill and frustrate the free-flow of information, classified or not, that is vital to the daily workings of Washington.¹⁸² Moreover, these holdings could allow the scope of prosecution under the Espionage Act to expand to a point where the First Amendment rights of journalists and others could be seriously jeopardized.¹⁸³ According to Paul McMasters, a former journalist and current ombudsman at the First Amendment Center, “[i]f this can happen to those people at AIPAC, it can happen to journalists.”¹⁸⁴ McMasters explains that the AIPAC case presents a “danger of opening another front that would restrict the ability of the American press to bring information to the American people.”¹⁸⁵

Critics of Judge Ellis’s opinion argue that he should have ruled as U.S. District Judge Audrey Collins did in *Humanitarian Law Project v. Ashcroft*.¹⁸⁶ In *Humanitarian Law Project*, the court struck down terms of

¹⁸⁰ See generally *Rosen*, 445 F. Supp. 2d 602. See, e.g., *Gorin v. United States*, 312 U.S. 19, 28 (1941). *Gorin* rejected a vagueness challenge to the “information relating to the national defense” clause in Section 2(a) of Section 794(a), a provision of the Espionage Act with similar wording to Section 793(e). *Id.* See *supra* note 81 for text of Section 794(a); and *supra* note 93 for text of Section 793(e).

¹⁸¹ See Joan Indiana Rigdon, *Crime or Privilege? Leaking Classified Information*, WASH. LAW., May 2006, at 21; *Espionage Acting*, *supra* note 7.

¹⁸² See Rigdon, *supra* note 181.

¹⁸³ *Id.*

¹⁸⁴ *Id.* (quoting McMasters).

¹⁸⁵ *Id.* (quoting McMasters). *Contra* Eastman, *supra* note 104, at 13–14. Eastman argues that the executive branch should be able to prosecute journalists who disclose “classified, highly-sensitive intelligence-gathering information.” *Id.* at 14.

¹⁸⁶ *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1201 (C.D. Cal. 2004).

the USA PATRIOT Act¹⁸⁷ that banned the provision of expert advice or assistance by any citizen to groups that the federal government had designated as terrorist organizations.¹⁸⁸ Judge Collins held that this provision was unconstitutionally vague because a court could construe “expert advice or assistance” to include innocent contacts that are unequivocally pure speech or advocacy afforded First Amendment protection.¹⁸⁹ This type of statutory interpretation leads to the frustration of communication that is vital in a functioning democracy. Finding that the provision inherently created an undue chilling effect on free speech because “expert advice or assistance” was not sufficiently clear to allow persons of common intelligence a reasonable opportunity to understand what was prohibited,¹⁹⁰ the U.S. District Court for the Central District of California appropriately overturned it. Critics of Judge Ellis’s opinion in the *Rosen* case argue that the ambiguous provisions of the Espionage Act not only are so overbroad that they chill speech, but also are so unconstitutionally vague that they easily could lead to the criminal prosecution of journalists.¹⁹¹

A. Vagueness

Under the vagueness doctrine, criminal statutes “either standing alone or as construed, [must make] reasonably clear at the relevant time that the defendant’s conduct was criminal.”¹⁹² The premise of this doctrine is that the Due Process Clause of the U.S. Constitution¹⁹³ requires the government to provide fair warning to potential defendants that their conduct or speech may be unlawful.¹⁹⁴ Concerns that vague statutes could encourage arbitrary and discriminatory enforcement further buttress the vagueness doctrine’s necessity.¹⁹⁵

¹⁸⁷ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, 50 U.S.C.).

¹⁸⁸ *Humanitarian Law Project*, 309 F. Supp. 2d at 1201; John Mintz, *Part of Patriot Act Struck Down: Ban on ‘Expert Advice’ to Terrorist Groups Vague, Judge Says*, WASH. POST, Jan. 27, 2004, at A15.

¹⁸⁹ *Humanitarian Law Project*, 309 F. Supp. 2d at 1201; Mintz, *supra* note 188.

¹⁹⁰ *Humanitarian Law Project*, 309 F. Supp. 2d at 1200. See *supra* note 9 for a definition of chilling effect.

¹⁹¹ See *Espionage Acting*, *supra* note 7; Bruce Fein, *A More Secret Government?*, WASH. TIMES, Aug. 22, 2006, at A15. See also *Secrecy and the Media*, *supra* note 125 (suggesting that Judge Ellis should have accepted Rosen and Weissman’s vagueness argument).

¹⁹² *United States v. Lanier*, 520 U.S. 259, 267 (1997). See also *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *Id.* at 604 (quoting *NAACP v. Button*, 371 U.S. 415, 432–33 (1963)).

¹⁹³ U.S. CONST. amend. V.

¹⁹⁴ See *United States v. Rosen*, 445 F. Supp. 2d 602, 617 (E.D. Va. 2006); *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999).

¹⁹⁵ See *Rosen*, 445 F. Supp. 2d at 617; *Morales*, 527 U.S. at 56.

In *Rosen*, Judge Ellis ruled that Section 793(e) passes constitutional muster under the vagueness doctrine because prior courts have narrowly construed the statutory phrase “information relating to the national defense” as referring to information that is “‘potentially damaging to the United States or might be useful to an enemy.’”¹⁹⁶ However, Jane Kirtley, University of Minnesota professor of media ethics and law, counters that Judge Ellis’s reasoning “‘is predicated on an idea that the executive and judicial branches will operate with rectitude and only prosecute cases where there is a genuine risk of harming national security’ rather than political considerations. . . . [This] ‘presumes a degree of honest government that, sadly, does not always exist.’”¹⁹⁷

Others have also asserted that Section 793’s vagueness creates the potential for selective prosecution and political abuse against partisan enemies.¹⁹⁸ These critics contend that on any given day in Washington, journalists, lobbyists, and others orally receive and dispatch classified information for which they lack authorized possession, and which will eventually appear in print or on the air.¹⁹⁹ However, often these “secrets” are not “truly vital to national security but have been classified for political reasons, or because information is power and many bureaucrats like to control the flow of information.”²⁰⁰

According to Geoffrey R. Stone, the Harry Kalven, Jr. Distinguished Service Professor of Law at the University of Chicago, there are three different types of secrets: “illegitimate” government secrets, “legitimate but newsworthy” government secrets, and “legitimate and non-newsworthy” government secrets.²⁰¹ In the illegitimate category of secrets, government officials are “attempting to shield from public scrutiny their own misjudgments, incompetence, misconduct, venality, cupidity, corruption, or criminality.”²⁰² Stone suggests that government officials who wish to “maintain such secrets may invoke the claim of national security as a cover.”²⁰³

¹⁹⁶ See *Rosen*, 445 F. Supp. 2d at 621–22 (quoting *United States v. Morison*, 844 F.2d 1057, 1084 (4th Cir. 1988) (Phillips, J., concurring)).

¹⁹⁷ Schmitt, *supra* note 129 (quoting Jane Kirtley, University of Minnesota Professor of Media Ethics and Law).

¹⁹⁸ See Rigdon, *supra* note 181; *Espionage Acting*, *supra* note 7.

¹⁹⁹ See Rigdon, *supra* note 181.

What is remarkable is that the alleged spies are being prosecuted not for stealing or paying for classified information, but for knowingly receiving it in conversation and then passing it on—something that lobbyists, journalists, lawyers, government officials, diplomats, policy wonks, and many others do every day in the course of their jobs.

Id.

²⁰⁰ *Espionage Acting*, *supra* note 7.

²⁰¹ Stone, Letter, *supra* note 18.

²⁰² *Id.*

²⁰³ *Id.*

For example, on November 20, 2006, the American Civil Liberties Union (“ACLU”) received a subpoena ordering the return of a classified document that Stone might consider an illegitimate government secret.²⁰⁴ According to the ACLU, although the document at issue is classified, it is only “mildly embarrassing” to the government and “has nothing to do with national defense.”²⁰⁵ Federal prosecutors, nonetheless, targeted the ACLU for obtaining this classified information in violation of the Espionage Act.²⁰⁶ Because the Department of Justice cannot possibly investigate every retention or leak of classified information, the potential for selective prosecution and political abuse is glaring.²⁰⁷

Some outspoken critics of *Rosen* not only consider the current prosecution of Rosen and Weissman as an example of bureaucratic aggression, but also claim that the government’s use of the Espionage Act in this case “amounts to the imposition, by executive fiat, of a U.S. version of Britain’s Official Secrets Act.”²⁰⁸ The Official Secrets Act includes a type of prior restraint on the press that criminalizes the publication of classified material.²⁰⁹ Such restriction on the freedom of speech and the press is “alien to the American legal tradition of First Amendment rights.”²¹⁰ According to the ACLU, “[n]o official secrets act has yet been enacted into law, and the grand jury’s subpoena power cannot be employed to create one.”²¹¹

²⁰⁴ See Dan Eggen, *U.S. Gets Subpoena to Force ACLU to Return Leaked Memo*, WASH. POST, Dec. 14, 2006, at A8; Adam Liptak, *U.S. Subpoena Is Seen as Bid to Stop Leaks*, N.Y. TIMES, Dec. 14, 2006, at A1 [hereinafter Liptak, *U.S. Subpoena*]. On December 18, 2006, federal prosecutors withdrew the subpoena. See Adam Liptak, *Prosecutors Drop A.C.L.U. Subpoena in Document Fight*, N.Y. TIMES, Dec. 19, 2006, at A26.

²⁰⁵ Eggen, *supra* note 204 (quoting the ACLU). See also Editorial, *Pentagon Papers Revisited: The Bush Administration’s Ever-Expanding War on the First Amendment*, WASH. POST, Dec. 15, 2006, at A34 [hereinafter *Pentagon Papers Revisited*]. “This subpoena, as the ACLU argues, has no ‘investigatory purpose’ but only a ‘confiscatory, information-suppressive one.’” *Id.* (quoting the ACLU).

²⁰⁶ See Eggen, *supra* note 204. See also *Pentagon Papers Revisited*, *supra* note 205 (arguing that a federal judge should grant the ACLU’s request to quash the subpoena). But see Liptak, *U.S. Subpoena*, *supra* note 204. “Assuming [the document]’s properly classified, . . . I actually think the government is bending over backwards to accommodate the A.C.L.U. rather than pulling the trigger in prosecuting them.” *Id.* (quoting John C. Eastman, law professor, Chapman University).

²⁰⁷ See *Espionage Acting*, *supra* note 7.

²⁰⁸ *Id.* See also Goldberg, *supra* note 139. Goldberg describes the Official Secrets Act as “the British law that makes journalists liable to prosecution if they publish classified material.” *Id.*

²⁰⁹ See Official Secrets Act, 1989, c. 6 (Eng.). See also *Secrecy and the Media*, *supra* note 125. If the U.S. District Court finds Rosen and Weissman guilty and higher courts uphold their convictions, “the Espionage Act could mutate into a British-style Official Secrets Act” that the government could use against journalists. *Id.*

²¹⁰ *Espionage Acting*, *supra* note 7.

²¹¹ Eggen, *supra* note 204 (quoting the ACLU after federal prosecutors issued a grand jury subpoena demanding that the organization turn over all copies of a classified document). See Editorial, *A Gag on Free Speech*, N.Y. TIMES, Dec. 15, 2006, at A40. “The sub-

The effect of a de facto American Official Secrets Act on the press would contradict the legislative history of the Espionage Act, which became law only after Congress eliminated language that would have punished newspapers for articles determined by the President to be useful to the enemy.²¹² Furthermore, the government will compromise the First Amendment if it decides to prosecute journalists under the Espionage Act. Since the ratification of the Bill of Rights in 1791, no federal legislation has ever prohibited the press from publishing government secrets,²¹³ thereby fulfilling the promise of the First Amendment, that “Congress shall make no law . . . abridging the freedom . . . of the press.”²¹⁴ In fact, the federal government has never imposed criminal sanctions on the press for publishing government secrets.²¹⁵ If the Department of Justice abridges the freedom of the press by prosecuting journalists for the publication of classified information under Section 793(e), the marketplace of ideas and the public’s awareness about the workings of government could become drastically limited.²¹⁶ As Justice Potter Stewart’s concurring opinion in *New York Times Co. v. United States* expressed, “a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.”²¹⁷

poena is also a prior restraint because the government is trying to stop the A.C.L.U. in advance from speaking about the document’s contents.” *Id.* See also *Pentagon Papers Revisited*, *supra* note 205. “If the ACLU, which advocates and litigates on issues of public policy, can be forced to comply with such a subpoena, news organizations would be similarly at risk.” *Id.*

²¹² *Secrecy and the Media*, *supra* note 125.

²¹³ Stone, Letter, *supra* note 18.

²¹⁴ U.S. CONST. amend. I.

²¹⁵ Stone, Letter, *supra* note 18.

²¹⁶ According to the ACLU:

Many of the most important news articles of [2006] (such as those concerning N.S.A. eavesdropping, rendition of foreign prisoners of our nation to others nations, Defense Secretary [Donald] Rumsfeld’s views on the deteriorating situation in Iraq, National Security Advisor [Stephen] Hadley’s assessment of Iraqi Prime Minister [Nuri al-] Maliki, and the report on the Iraq insurgency’s funding sources) have been based on classified documents leaked to reporters

Liptak, *U.S. Subpoena*, *supra* note 204 (quoting the ACLU). *But cf.* Eastman, *supra* note 104, at 13 (“The constitutionality of protecting intelligence gathering and other operational military secrets in time of war is . . . beyond dispute and the institutional press is no more permitted to ignore the legal restrictions imposed by the Espionage Act . . . than are ordinary citizens.”)

²¹⁷ *New York Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 728 (Stewart, J., concurring).

B. Overbreadth

The First Amendment doctrine of overbreadth declares that “a governmental purpose to control or prevent activities constitutionally subject to . . . regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”²¹⁸ This doctrine developed out of concern that “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”²¹⁹ Thus, to minimize this burden on the citizenry, the Supreme Court has demanded that Congress seek the narrowest means available to carry out a government interest.

The U.S. District Court for the Eastern District of Virginia rejected Rosen and Weissman’s overbreadth challenge to Section 793, citing *Gorin*.²²⁰ Judge Ellis reasoned that the language of Section 793 does not sweep too broadly because the Supreme Court in *Gorin* narrowly construed a similar statutory provision of the Act²²¹ to include only the bad faith release of classified information that could endanger the United States via disclosure.²²²

However, some individuals who are not parties in the *Rosen* case continue to urge dismissal of the indictment, notwithstanding Judge Ellis’s ruling, on the argument that the Espionage Act is in fact unconstitutionally overbroad.²²³ According to Bruce Fein, a constitutional lawyer and former Justice Department official in the Reagan administration,²²⁴ “[t]he Espionage Act is unconstitutionally overbroad because it makes no distinction between genuine and contrived dangers despite the common knowledge that presidents instinctively exaggerate to justify secrecy.”²²⁵ Other legal experts suggest that Judge Ellis’s failure to acknowledge this reality could chill the ability of lobbyists, academics, and journalists “to learn about the inner workings of government and expose misconduct or controversial programs of public interest.”²²⁶

²¹⁸ NAACP v. Alabama, 377 U.S. 288, 307 (1964).

²¹⁹ Virginia v. Hicks, 539 U.S. 113, 119 (2003).

²²⁰ United States v. Rosen, 445 F. Supp. 2d 602, 643 (E.D. Va. 2006) (citing *Gorin v. United States*, 312 U.S. 19, 28 (1941)).

²²¹ 18 U.S.C. § 794(a) (2000). See *supra* note 81 for text of Section 794(a).

²²² *Rosen*, 445 F. Supp. 2d at 643 (citing *Gorin*, 312 U.S. at 28).

²²³ See Fein, *supra* note 191.

²²⁴ The Lichfield Group, Principals, <http://www.thelichfieldgroup.com/principals> (last visited Jan. 31, 2007).

²²⁵ *Id.*

²²⁶ Schmitt, *supra* note 129. In addition, Richard Sauber, a partner specializing in First Amendment law at Fried, Frank, Harris, Shriver & Jacobson LLP, suggests that prosecutors in cases such as *Rosen* are attempting to criminalize practices in Washington that are not

David Carr of the *New York Times* observed that no one knows the number of stories the media is now failing to report out of fear of prosecution.²²⁷ According to Carr, at least “one [story] collapsed because of the pervasive chill in the air,” the result of journalists and others who fuel the public discourse increasingly becoming the targets of law enforcement investigations.²²⁸ Therefore, the overbreadth doctrine that exists to prevent the chilling of the public discourse seems to be yielding to the executive enforcement and judicial approval of a statute that many have acknowledged is overly broad on its face.²²⁹

V. SOLUTIONS FOR CONGRESS TO MORE EFFECTIVELY BALANCE FREE-SPEECH RIGHTS AND NATIONAL SECURITY INTERESTS

To prevent further abridgment of the press and free-speech rights, Congress must revise the Espionage Act. If Congress engages in this task, it can more effectively carry out the Act’s purpose of protecting the national defense of the United States without undermining the fundamental First Amendment rights of American citizens. Bruce Fein argues that, independent of appellate review, “Congress should amend the Espionage Act to strike a more prudent balance between national security and freedom of the press.”²³⁰ Furthermore, despite his preliminary dismissal of Rosen and Weissman’s constitutional arguments of vagueness and overbreadth against their prosecution under the Espionage Act, Judge Ellis acknowledged that “the time is ripe for Congress to engage in a thorough review and revision of the [Espionage Act’s] provisions”²³¹

just frequent, but are actually in the interest of the United States. Rigdon, *supra* note 181 (referencing Sauber).

²²⁷ David Carr, *An Obsession with Leaks and Plugs*, N.Y. TIMES, Sep. 25, 2006, at C1.

²²⁸ *Id.* (mentioning, for example, that the Bush Administration is investigating who may have leaked information to reporters James Risen and Eric Lichtblau for their series of articles on the National Security Agency’s policy on listening to domestic phone calls).

²²⁹ See Fein, *supra* note 191. See also *A Leaky Espionage Law*, *supra* note 8. “Congress wrote an unconstitutionally broad law that has let the judge further blur the line between leakers, who often have been subjected to abusive prosecution, and the recipients of leaked information, including private citizens.” *Id.*

²³⁰ Fein, *supra* note 191. See also *A Leaky Espionage Law*, *supra* note 8 (suggesting that Congress should revise the Espionage Act because it is vague and overbroad in its current form). But see Gabriel Schoenfeld, *All the News That’s Fit to Prosecute: Should the DOJ Go after Journalists?*, WKLY. STANDARD, July 17, 2006, at 19. “[T]he remedy for our current dilemmas probably does not lie in drafting new legislation. It would be far better to see that existing law is stringently enforced.” *Id.*

²³¹ *United States v. Rosen*, 445 F. Supp. 2d 602, 646 (E.D. Va. 2006).

A. Revising the “Reason to Believe” Clause

To better serve the public discourse and, accordingly, the marketplace of ideas, Congress should replace the clause “reason to believe could be used to the injury of the United States or to the advantage of any foreign nation”²³² with “*knew* could be used to the injury of the United States or to the advantage of any foreign nation” in Sections 793(d) and (e) of the Espionage Act. If the “reason to believe” clause remains part of the statutory language, “predictability will largely be sacrificed with a resulting chill on publication”²³³ Not only will the “reason to believe” clause continue to yield an undesirable chilling effect on speech,²³⁴ but it could also enable the executive branch to punish individuals lacking bad faith intent through a lengthy prison sentence or costly fine.²³⁵ If the United States truly values the freedom of speech as a fundamental right as the Supreme Court has consistently decreed,²³⁶ Congress must amend the Espionage Act to ensure that the federal government does not unjustly punish the exercise of this liberty.

Judge Ellis noted that Sections 793(d) and (e) prohibit the communication of information the possessor has mere “reason to believe could be used to the injury of the United States” rather than actual knowledge of its harmful potential.²³⁷ He explained that this language could “subject non-governmental employees to prosecution for the innocent, albeit negligent, disclosure of information relating to the national defense.”²³⁸ Noted Judge Ellis, “[p]unishing defendants engaged in public debate for unwittingly harming a legitimate government interest is inconsistent with the Supreme Court’s First Amendment jurisprudence.”²³⁹ Therefore, as counterbalance, Judge Ellis added weight to the prosecution’s burden in seeking convictions of Rosen and Weissman, ruling that “information relating to the national defense, whether tangible or intangible, must necessarily be information which if disclosed, is potentially harmful to the United States, and the

²³² 18 U.S.C. §§ 793(d)–(e) (2000).

²³³ Edgar & Schmidt, *supra* note 171, at 1087. Their comment additionally suggested that the Espionage Act has “room for improvement,” and that it needs “clarification by legislation” *See id.* at 1076–77. *But see* Schoenfeld, *supra* note 230.

²³⁴ *See supra* note 9 for definition of “chilling effect.”

²³⁵ Penalties for violation include up to ten years in prison or up to \$10,000 in fines. 18 U.S.C. § 793 (2000).

²³⁶ “Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution.” *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Strongberg v. California*, 283 U.S. 359, 368 (1931); *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Grosjean v. American Press Co.*, 297 U.S. 233, 243–44 (1936)).

²³⁷ *See* *United States v. Rosen*, 445 F. Supp. 2d 602, 640–41 (E.D. Va. 2006).

²³⁸ *Id.* at 640.

²³⁹ *Id.* (citing *BE & K Construction Co. v. N.L.R.B.*, 536 U.S. 516 (2002); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Snepp v. United States*, 444 U.S. 507 (1980)).

defendant must *know* that disclosure of the information is potentially harmful to the United States.”²⁴⁰

However, Judge Ellis’s statutory analysis and interpretation regarding the “reason to believe” clause is not controlling outside of the Eastern District of Virginia. Therefore, Congress must replace “reason to believe” with “knew” in order to ensure uniform First Amendment rights among all jurisdictions.

B. Revising “to the advantage of any foreign nation”

Congress would not jeopardize national security if it removed “to the advantage of any foreign nation” from Sections 793(d) and (e).²⁴¹ Any information disclosed to an enemy of the United States would inherently qualify under the “could be used to the injury of the United States” clause.

Alternatively, Congress could replace “to the advantage of any foreign nation” with “to an *enemy* of the United States” or “to the advantage of an enemy of the United States” in order to ensure that the federal courts would find such disclosure unlawful.²⁴² An enemy of the United States should include anyone who could qualify as a lawful or unlawful enemy combatant under the Military Commissions Act of 2006.²⁴³ Thus, the statute would cover both state actors under the “lawful enemy combatant” definition,²⁴⁴ and non-state actors under the “unlawful enemy combatant” definition.²⁴⁵ By editing the “to the advantage of any foreign nation” clause

²⁴⁰ *Rosen*, 445 F. Supp. 2d at 641 (emphasis added). See also Pincus, *supra* note 16 (reporting that First Amendment advocates contend that this ruling will make it more difficult to successfully prosecute Espionage Act charges against private citizens).

²⁴¹ See *supra* note 93 for text of Sections 793(d)–(e) of the Espionage Act.

²⁴² See *United States v. Morison*, 844 F.2d 1057, 1084 (4th Cir. 1988) (Wilkinson, J., concurring). Judge Phillips insisted on instructing a jury to limit “[information] relating to the national defense” to information “potentially damaging to the United States or . . . useful to an *enemy* of the United States.” *Id.* at 1086 (Phillips, J., concurring) (emphasis added).

²⁴³ Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S.C.).

²⁴⁴ The Military Commissions Act of 2006 provides:

The term “lawful enemy combatant” means a person who is—(A) a member of the regular forces of a State party engaged in hostilities against the United States; (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or (C) a member of a regular armed force who possesses allegiance to a government engaged in such hostilities, but not recognized by the United States.

§ 948a(2), 120 Stat. 2601.

²⁴⁵ The Military Commissions Act of 2006 provides:

The term “unlawful enemy combatant” means—(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person

in this fashion, Congress would effectively widen the scope of classified information on which journalists could report without threat of prosecution, thereby contributing more to the marketplace of ideas and enlightening Americans without jeopardizing national security.

In his memorandum opinion, Judge Ellis focused on the language of Sections 793(d) and (e) that prohibits the communication of “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”²⁴⁶ upon disclosure.²⁴⁷ According to Judge Ellis, such language implies that the statute would “permit prosecution for the communication of information in instances where there is no reason to believe the information could harm the United States, but there is reason to believe it could be used to the advantage of a foreign nation.”²⁴⁸ Judge Ellis rejected this type of prosecution as unconstitutional under the First Amendment and inconsistent with the statute’s purpose of protecting the national defense and security of the United States without unduly burdening civil rights.²⁴⁹

Second Circuit Judge Learned Hand actually observed this same shortcoming of the Act long before the indictments of Rosen and Weissman:

[The Espionage Act] as enacted necessarily implies that there are some kinds of information ‘relating to the national defense’ which must not be given to a friendly power, not even to an ally, no matter how innocent, or even commendable, the purpose of the sender may be. Obviously, so drastic a repression of the free exchange of information it is wise carefully to scrutinize, lest extravagant and absurd consequences result.²⁵⁰

However, not all federal courts will follow the statutory analysis and interpretation of Judges Ellis and Hand because they are binding precedent only within their respective jurisdictions. Therefore, heeding Ellis and Hand, Congress should revise the “to the advantage of any foreign nation” clause in Sections 793(d) and (e).

Revision of the “to the advantage of any foreign nation” clause is necessary because the disclosure of information to the advantage of key allies of the United States, such as Israel in this case, could actually be beneficial in

who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Id.

²⁴⁶ 18 U.S.C. §§ 793(d)–(e) (2000) (emphasis added).

²⁴⁷ See *United States v. Rosen*, 445 F. Supp. 2d 602, 640 (E.D. Va. 2006).

²⁴⁸ *Id.*

²⁴⁹ *Id.* Judge Ellis also demonstrated the absurdity of the statutory language by suggesting that it could “reach disclosure of the government’s closely held secret that a foreign nation is sitting atop a huge oil reserve, when the disclosure of such information cannot plausibly cause harm to the United States.” *Id.*

²⁵⁰ *United States v. Heine*, 151 F.2d 813, 815 (2d Cir. 1945).

a time of war.²⁵¹ Accordingly such communication should fall under First Amendment protection. This revision, along with the replacement of “information the possessor has reason to believe” with “information the possessor has reason to *know*,” would still heavily take into account the national interest in defense and security while simultaneously advancing the individual interest in freedom that the Framers of the Bill of Rights held dear and that present-day Americans cherish.

C. The Probability of Revision

Some, however, are skeptical about congressional amendments to the Espionage Act in the current political climate. Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press, finds the idea of Congress addressing this issue “a distressing thought.”²⁵² As an example of her concern, Dalglish points to a bill introduced by Republican Senator Christopher S. Bond from Missouri that would prosecute government employees who leaked classified information; however, the prosecution would not need to demonstrate harm to the United States or aid to a foreign government in order to prove guilt.²⁵³ As this bill demonstrates, Congress might act upon the court’s recommendation to review the Espionage Act, but the representatives and senators might revise it in a way that would be entirely inconsistent with Judge Ellis’s opinion.²⁵⁴

Moreover, congressional indifference to First Amendment freedoms is not unique to the post-9/11 era. President Bill Clinton, during his tenure, vetoed a bill similar to the bill that Senator Bond introduced.²⁵⁵ The fact that the House of Representatives and the Senate passed such a measure before September 11, 2001, unfortunately demonstrates that Congress has been disinclined to act in the interest of the public discourse in the past, even in the face of relative peace. The introduction of similar legislation by Senator Bond even as more journalists come under fire shows that Congress has had no interest in changing course.

The President can oftentimes effectively lobby Congress to engage in certain statutory revision, but the Bush Administration has refused to un-

²⁵¹ See discussion *supra* note 226.

²⁵² Pincus, *supra* note 16 (quoting Lucy Dalglish).

²⁵³ *Id.* See also S. 3774, 109th Cong. (2006).

²⁵⁴ On the other hand, S. 3774 remained in the Senate Committee on the Judiciary at the closing of the 109th Congress, and could cease to exist after the inauguration of the 110th Congress which, unlike the 109th Congress, is comprised of a Democratic Party majority. See Bruce Fein, *Pelosi’s Chance to Be Lady Liberty*, WASH. TIMES, Nov. 14, 2006, at A17. Fein recommends that the agenda of incoming Speaker of the House Nancy Pelosi should include “a media exception to criminal prosecutions for disclosing national defense information under the Espionage Act of 1917.” *Id.*

²⁵⁵ Pincus, *supra* note 16. See generally H.R. 5630, 106th Cong. (2000).

dertake such an endeavor regarding the Espionage Act.²⁵⁶ In October of 2002, the Bush administration decided that no changes were necessary after carrying out a review of secrecy laws.²⁵⁷

VI. CONCLUSION

Congress must revise the Espionage Act. A revision is necessary in order to more effectively carry out the Act's purpose of guarding and protecting the national defense of the United States, while simultaneously protecting the fundamental First Amendment rights of American citizens. Historically, the United States has been a beacon for democracy because of its exemplary balance in the tradeoff between security and freedom. A revision that allows for more exercise of First Amendment rights than the Espionage Act in its current form would help to maintain this equilibrium. Unfortunately, such a revision is not likely to occur, if ever, until after the 2008 Presidential election with the advent of an agenda from a new administration.

²⁵⁶ See Pincus, *supra* note 16.

²⁵⁷ *Id.*