

Criminal Penalties for Disclosing Classified Information to the Press in the United States

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(<http://right2info.org/resources/publications/HalperinCriminalPenaltiesforDisclosingClassifiedInformationtothePressintheUnitedStatesl.pdf>)

Since coming to office the Obama Administration has brought five criminal cases charging present and former government officials with violating the law by disclosing national security information to the press without authorization under the espionage act. In one of these cases it is seeking to force a reporter to testify and reveal the source of the information that he published on the grounds that he was the only witness to the “crime” of orally receiving information from a government official. The magnitude of these actions constitutes a startling departure from past practices and poses a serious threat to the ability of Americans to know what their government is doing. At the same time the administration is being criticized by others for not responding to information about intelligence operations that has appeared in the press.

There is now a national debate about how best to protect genuine national security secrets from being exposed in the press in a way that harms national security, while insuring that the public receives the information that it must have to play its role in shaping national security policy. Every study that has been done on this question has concluded that one essential step is to drastically reduce the amount of information that is classified. When there is vast over-classification it is hard to protect real secrets and difficult to persuade government officials that they are doing harm by providing information which is classified to the press and the public. Another key component is to improve administrative procedures, both for determining who was the source of a serious leak, and to enable the government to punish that person through administrative action including revoking a clearance or termination. Steps in this direction while, in principle unobjectionable, would need to be accompanied by protection of whistle blowers and the establishment of clear channels to report waste, abuse, and illegal activity.

A third component of deterring leaks of properly classified information is the threat of criminal penalties. Efforts to impose criminal penalties have played a surprising small role in efforts to prevent leaks.

It is true that every administration since World War II has asserted that efforts to disclose information to the press can constitute a crime and has warned of possible prosecutions. However, there were only three such indictments in the entire post war period prior to the Obama Administration and there were no efforts to compel a journalist to testify about the “crime” of receiving information.

There was nothing in the campaign rhetoric of President Obama, nor in his transition team's comments on the one case pending at the time, that provided any hint that within his first term his administration would bring forward five new cases seeking criminal penalties under the espionage law, known as section 793, for actions involving provision of classified information to the press.¹ The Obama Administration denies that it has adopted a new policy and points to the consistent public stand of all previous administrations. However, this more frequent use of section 793 and the expansion of the statute to compel journalists to testify as to sources, raises serious First Amendment issues.

Because much of the information vital to public understanding of the national security decisions and actions of the government is classified – some information properly classified under the Executive Order on Classification² and much improperly classified – the public is dependent on information routinely provided to the press and to NGOs by government officials. If the Obama Administration succeeds in this effort to use the existing statutes to criminalize this regular and very necessary process, and to compel reporters to reveal sources of information, the Administration's commitment to increased transparency and accountability will be completely undermined and the public's ability to monitor the behavior of the government eviscerated. The same result would occur if congress were to enact a statute making it a crime to publish information which the government has classified.

It is by no means clear that either effort will succeed. In fact there is considerable doubt that Congress has criminalized efforts by government officials to provide information to the press, except for very specific categories of information, and that, if it has or does, such a statute can meet constitutional scrutiny given the breadth of over-classification. Nor is it clear that the First Amendment permits the government to compel a reporter to reveal a source when the only "crime" to which he or she is a witness is the oral receipt of information.

There are three very different narratives of whether Congress has legislated such a crime and if so what the elements are that the government needs to prove to satisfy the requirements of the statute and of the First Amendment.

One narrative, held by all administrations since World War II and some commentators, is that there is a very broad statute that covers a wide range of conduct by both government officials and private citizens, with no requirement to prove either intent to harm the national interest or actual harm from the publication.

¹ Discussions of this issue including news stories often report that the administration has brought six cases. However one of these cases relies on a different section of the criminal code (18USC798) which specifically makes it a crime to publish communications intelligence and hence raises very different issues.

²**Executive Order 13526- Classified National Security Information, December 29, 2009.**

<http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>

The second, held by many advocacy groups and commentators, including the author of this paper, is that the statute on which the government relies applies only to actual espionage, defined as conduct designed to provide information to a foreign government, and that the transfer of classified information for the purpose of publication is only subject to criminal penalties when it falls within the very narrow categories of information for which Congress has passed specific legislation making it a crime, such as the statute making it a crime to publish communications intelligence³ and the Intelligence Identities Protection Act of 1982.⁴

The third narrative reflected in court decisions in the limited number of cases that the government has brought is that Congress has established a broad crime of providing information as well as documents to the press, but that additional safeguards must be written into the statute to keep it from violating the Frist Amendment.

(Full disclosure: as explained fully in footnote 25 below, I was personally involved in many of the cases described in this paper as well as the debate over the Intelligence Identities Protection Act.)

“The Espionage Statute”

These competing narratives derive from different readings of the meaning of Title 18 USC section 793 d and e, on which the government relies for its authority to bring criminal charges against government officials and private citizens for the unauthorized disclosure of broad categories of national security information.⁵ These provisions, which apply equally to those without authorization to possess classified information as well as those entrusted with such information, make it a crime to transmit documents or information, “relating to the national defense” to a person “not entitled to receive it”, or to willfully retain such material without authority. If information is transmitted orally the statute also requires proof that the person responsible has reason to believe that the information could be used to the injury of the United States or to the advantage of any foreign nation. The penalty on conviction is a fine and imprisonment for not more than 10 years for each count on which the person is convicted.⁶

The Government’s Position

Since World War II, the US Government has unfailingly taken the position -- in its public statements, warnings to government employees, and in the small number of criminal prosecutions it has brought -- that it need prove no more than what is stated in the plain language of the statute. as interpreted in court decisions in genuine espionage cases. Thus, every administration has taken the position that it to secure a conviction for transferring information to the press it need prove only:

³ 18 USC 798.

⁴ Intelligence Identities Protection Act of 1982 (Pub. L. 97-200, 50 USC sections 421–426).

⁵ See 18 USC sec. 793, text attached as Annex I, and at <http://codes.lp.findlaw.com/uscode/18/1/37/793>.

⁶ 18 USC section 793 f.

1. That the document or information allegedly transferred is “related to the national defense.” The government argues that this phrase describes a very broad category of information including defense, intelligence and foreign relations and that it includes all classified information. (Court cases in espionage prosecutions alleging efforts to transfer information to a foreign government have upheld this understanding of the statutory meaning of “related to the national defense.”)⁷
2. The person to whom the document or information was transmitted was not entitled to receive it. (The government argues that this means the person did not have both the relevant security clearance and a “need to know.” Courts have accepted this definition of those “not entitled to receive.”)⁸
3. If only information (and not documents) was transmitted, that the person had reason to believe that the information could be used either to injure the United States or to give advantage to a foreign nation.
4. That the information was being kept secret by the government. (This requirement is not explicitly stated in the statute but was established by the Supreme Court in *Gorin v. United States* (1941)⁹ and the government has conceded that it applies in all subsequent cases.)

The US government has consistently argued that it does not have to show any of the following:

1. That the person acted with the intent to harm the United States or to aid a foreign power.
2. That the person actually believed or even had reason to believe that disclosing the information would harm the national defense.
3. That the person did not act to disclose information related to illegal activity, or information of significant public interest, i.e., that the person was not acting as a “whistle blower.” (It asserts that there is simply no First Amendment right to disclose such information.)
4. That the disclosure actually caused harm to the United States,
5. That the person acted with the intent to violate the statute, or
6. That there was a reasonable belief that the disclosure would cause harm (unless only information and no documents were transferred).

The Opposing Position

⁷ *Gorin v. United States*, 312 U.S. 19, 61 S. Ct. 429, 85 L. Ed. 488 (1941); *United States v. Dedeyan*, 584 F.2d 36, 40 (4th Cir. 1978); *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

⁸ *United States v. Morison*, 844 F.2d 1057; *United States v. Jin-Woo Kim*, 2011 U.S. Dist. LEXIS 94495

⁹ *Gorin v. United States*, supra.

Critics of this position argue that section 793 of the Criminal Code was intended to apply only to transfers of information to a foreign power¹⁰ They concede that an administration can revoke the security clearance of someone who provides information to the press without authority and that the person could also be fired for this conduct. They contend that Congress may constitutionally criminalize the disclosure of some categories of information, at least by government officials, but that it must do so, as it has on a few occasions, by means of narrowly drawn statutes focused on specific categories of information. They argue that the fact that Congress has enacted such narrowly drawn statutes indicates that it does not believe that section 793 has the broad scope that administrations have contended that it has.

Finally, they argue that regardless of Congressional intent, the language of the statute is simply too sweeping and too imprecise to apply criminal penalties to conduct that directly implicates the First Amendment right to freedom of speech. Because, by all accounts much information is classified that does not meet the standard for classification in the Executive Order on classification and the classification systems considers only potential harm from disclosure and not the public right to know, citizens are dependent for their understanding of the government on information supplied to the press in “leaks” often from senior officials.

The starting point for determining the scope of section 793 must be the language and legislative history of Chapter 37 of the criminal code which includes section 793. Here there is nothing to add to a definitive and exhaustive article published by Professors Edgar and Schmidt in the *Columbia Law Review* in 1973.¹¹ The authors conclude that Congress did not intend these provisions to apply to actions intended to lead to publication, and in fact specifically rejected language that would have made it a crime to provide information to the press.

In addition, critics point out that if section 793 means what the government says it means, then Congress would have no reason to enact statutes making it a crime to reveal specific categories of information to the press covered by section 793 in specific circumstances. Congress, however, has done this on a number of occasions in the past, including for photographing defense installations, for information related to codes and communications intelligence, and for diplomatic codes and atomic energy.¹² In the last 30 years Congress has added only one other category of information, that is: the identities of covert agents.¹³

The long and careful legislative process leading to the passage of the Intelligence Identities Protection Act was needless if Congress believed that section 793 covered the disclosure to the

¹⁰ See Harold Edgar and Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 940 (1973)

¹¹ Edgar, Harold and Benno C. Schmidt, Jr. *The Espionage Statutes and Publication of Defense Information*. 73 Colum. L. Rev. 929 (1973).

¹² See Morton H. Halperin and Daniel Hoffman *Freedom v. National Security* (NY, Chelsea House, 1977) pp. 250-262, for texts of all such statutes enacted until 1977. Since then only the Intelligence Identities Protection Act has been added to this list.

¹³ Intelligence Identities Protection Act of 1982, Pub.L. 97-200, 50 U.S.C. sections 421–426

press of the identities of covert agents. If section 793 was as expansive as the government suggests, why would Congress pass a statute that provides for criminal penalties only in much narrower circumstances than those in section 793, and which imposes significant additional burdens of proof on the government?

The repeated publication in the early 1980's in a magazine of lists of names of alleged CIA agents spurred the administration and the Congress to enact this criminal statute to make the publication of such names a crime.¹⁴ No one in this debate, which spanned two administrations and three congressional sessions, even referred to section 793. Thus, there were no arguments that the statute was unnecessary because section 793 already covered this conduct, nor were there arguments that the statute was necessary because the identity of covert agents was not covered by section 793. The latter argument would not have been possible since the courts uniformly defined "related to the national defense" as a broad term including intelligence activities (such as the identities of those conducting intelligence activities), as well as defense and foreign relations.

Moreover, Congress and the executive branch engaged in a prolonged process before enacting the statute that reflected a shared understanding that First Amendment rights were implicated. After extensive hearings and detailed consultation with civil liberties groups, including the ACLU, the relevant committees, Judiciary and Intelligence, marked up a bill that was then extensively debated on the floor of both houses and again in conference committee. The result was a bill that explicitly makes it a crime for both government officials and private citizens to reveal the identities of covert agents.¹⁵ However, the elements of the crime are vastly different for the two groups. Those who learn the identities of covert agents as a result of their official duties commit a crime if they knowingly reveal the identity of a clearly defined category of covert agents.¹⁶ Conspiracy indictments are specifically excluded so that a reporter cannot be

¹⁴ Szilagyi, Andrew M. *Blowing Its Cover: How the Intelligence Identities Protection Act Has Masqueraded as an Effective Law and Why It Must Be Amended*. 51 Wm. & Mary L Rev. 2269 (2010): pp. 2275-2279.

¹⁵ Intelligence Identities Protection Act of 1982, Pub.L. 97-200, 50 USC section 421; Szilagyi, Andrew M. *Blowing Its Cover: How the Intelligence Identities Protection Act Has Masqueraded as an Effective Law and Why It Must Be Amended*. 51 Wm. & Mary L Rev. 2269 (2010): pp. 2280-2281.

¹⁶ Intelligence Identities Protection Act of 1982, Pub.L. 97-200, 50 USC section 421 a-b. The statute provides a precise definition of who is covered as follows: (4) The term "covert agent" means-

(A) a present or retired officer or employee of an intelligence agency or a present or retired member of the Armed Forces assigned to duty with an intelligence agency-(i) whose identity as such an officer, employee, or member is classified information, and(ii) who is serving outside the United States or has within the last five years served outside the United States; or

(B) a United States citizen whose intelligence relationship to the United States is classified information, and-(i) who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, an intelligence agency, or(ii) who is at the time of the disclosure acting as an agent of, or informant to, the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation; or

charged with conspiracy to violate that section of the statute.¹⁷ Private citizens, on the other hand, commit a crime only if they reveal identities in the course of what the statute called “a pattern of activities intended to identify and expose covert agents.”¹⁸ The legislative history, especially the Conference Report, makes it clear that no crime would be committed if names were revealed for the purpose of informing the public about activities of the government. Since its enactment, the press and others have continued to publish names without any threat of prosecution.

If Congress believed that section 793 covered efforts to publish information, and that criminal prosecution required proof of only the elements explicitly mentioned in the statute, it would have made no sense for it to enact a new statute which covered the same conduct but imposed much higher standards on the government.

(Some critics of the government position also argue that the Intelligence Identities Protection Act serves as a model for a statute that provides penalties for publication even by private citizens, but that meets First Amendment standards. Others contend that the Act is not narrow enough and should not cover private citizens and should provide a public interest defense for government officials.)

Judicial Interpretation

As described below, in considering each of the past prosecutions for providing information to the press, judges confronting these competing positions have taken a middle position. No court has dismissed a prosecution on the grounds that the statute simply did not cover actions leading to publication as opposed to covert transfers to a foreign power. In every case, courts have concluded that the use of the statute to punish efforts to provide information to the press raises important First Amendment considerations and that the plain language of the statute taken on its face is far too sweeping to pass First Amendment muster.¹⁹ Every court has wrestled with the precise scope of the statute and has required the government to prove more than it contends that it has to.

Criminal Prosecutions

The first case in which the government brought an indictment for efforts leading to publication of information began on June 13, 1971 when the *New York Times* began publishing material

(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified information and who is a present or former agent of, or a present or former informant or source of operational assistance to, an intelligence agency.

¹⁷ Intelligence Identities Protection Act of 1982, Pub.L. 97-200, 50 USC section 422 b(1)

¹⁸ Intelligence Identities Protection Act of 1982, Pub.L. 97-200, 50 USC section 421 c

¹⁹ As described below, there are a number of district court decisions in cases related to efforts to provide information to the press, only one Court of Appeals decision, and no Supreme Court decisions.

from what came to be known as the *Pentagon Papers*. The government, for the first time in the nation's history, went to court to seek an injunction on the further publication of information already in the possession of the press. After the Supreme Court rejected this request,²⁰ the government indicted Daniel Ellsberg, an employee of the RAND Corporation who held a security clearance, for transferring some of the volumes of the Pentagon Papers without the authority to do so.²¹ The indictment under which Ellsberg was brought to trial accused him of violating section 793, as well as theft of government property²² and conspiracy to deprive the government of a lawful function, presumably maintaining a classification system.²³ There was absolutely no mention in the indictment of the *New York Times* or any other newspaper. Rather, Ellsberg was indicted for violating procedures for storing classified information and for providing the documents to two named individuals. One, Anthony Russo, was also indicted on the grounds that he lacked "a need to know" to see the documents, despite his security clearance.²⁴ The other person mentioned was a Vietnamese national who was not alleged to be an official of the Vietnamese government.²⁵

Confronted with a case of first impression, the trial judge conducted extensive pre-trial sessions with the lawyers for both sides, pressing them on the meaning of section 793. He declined to dismiss the charges on the grounds that the government did not allege spying, but at the same time never provided definitive rulings on what proof would be required for conviction in a case related to publication. On the eve of its submission to the jury, the judge dismissed the case because of governmental misconduct.²⁶ The revelation that finally resulted in the dismissal, after numerous motions to dismiss due to prosecutorial misconduct had been denied, was a report to the court by the government that Ellsberg had been overheard on the phone-line of a consultant to the defense and that records of the interceptions were missing.²⁷ Thus, there is no clear

²⁰ *New York Times Co. v. United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971)

²¹ The indictment covered some, but not all, of the volumes which Ellsberg provided to the Times and other newspapers. The government never explained how it chose the volumes. Perhaps they were the ones that the government was ready to de-classify in their entirety, which it did for the trial.

²² 18USC641. Morisson, discussed below was also indicted and convicted for theft of government property for giving an actual government photograph to a magazine.

²³ Davidson, Sandra. *Leaks, Leakers, and Journalists: Adding Historical Context to the Age of Wikileaks*. 34 *Hastings Comm. & Ent. L.J.* 27 (2011): p. 65.

²⁴ There are no reported decisions. See Sanford Ungar, *The Papers and the Papers: An Account of the Legal and Political Battle Over the Pentagon Papers*. New York: Columbia U Press, 1989; Peter Schrag, *Test of Loyalty: Daniel Ellsberg and the Rituals of Secret Government*. New York: Simon and Schuster, 1974. (Both by reporters who covered the trial. See also: David Rudenstine, *The Day the Presses Stopped, A History of the Pentagon Papers Case*. Berkeley, CA: Univ of California Press, 1996; and John Prados and Margaret Pratt Porter (eds.) *Inside the Pentagon Papers*. University Press of Kansas, 2004.

²⁵ The Vietnamese national in question was former Ambassador of South Vietnam to the United States, Vu Van Thai who, according to Mr. Russo's testimony, had been shown portions of the documents. French, Peter A. (ed.), *Conscientious Actions: The Revelation of the Pentagon Papers*. Cambridge: Schenkman Publishing Company, 1974

²⁶ *Ibid.* See also Davidson, Sandra. *Leaks, Leakers, and Journalists: Adding Historical Context to the Age of Wikileaks*. 34 *Hastings Comm. & Ent. L.J.* 27 (2011): p. 12.

²⁷ The author of this paper was the consultant to the defense who was wiretapped. I detail here my role in each of the cases which are discussed in this paper. I had responsibility for the production of the Pentagon Papers as an

indication of what Judge Byrne would have required the government to prove if he submitted the case to the jury, but it is clear from the extensive pre-trial hearings that he was concerned both about the ambiguities in the statutory text as well as the First Amendment implications.²⁸

The second indictment under section 793 for conduct leading to publication came thirteen years later in 1984, when the Reagan Administration's Justice Department indicted Samuel Loring Morison, a consultant to the Navy with a security clearance, for allegedly providing a copy of a satellite photograph of a Soviet ship to *Jane's Weekly*, a magazine specializing in military matters.²⁹ The government alleged that Morison had cut off the classified markings on the top and bottom of the photograph and sent it to the magazine, both for a financial payment and in the hope of gaining future employment. Morison was convicted and went to prison for this act. He is the only person in American history tried and convicted under section 793 for conduct leading to publication of information. Morison was released after serving eight months of his two year prison term,³⁰ and President Clinton later pardoned him in 2001, on his last day in office.

The definitive discussion of the meaning and limits of this case is to be found in neither the decisions of the trial judge (who was not responsive to First Amendment arguments), nor the unanimous Court of Appeals decision upholding the conviction.³¹ Rather, as the judges in the AIPAC and Drake cases (discussed below) both noted, it is to be found in the two concurring opinions to the Court of Appeals judgment. While the two judges both joined in the court's opinion upholding the conviction, each wrote separately to emphasize the limits of what was decided. Both judges stated unequivocally that the conduct alleged was entitled to strong First Amendment protection. They stressed the presence of a unique set of factors which, they argued, were all necessary to sustain Morison's conviction despite the First Amendment implications.

official of the Department of Defense in the Johnson Administration. The set of volumes of the papers which Ellsberg copied and made available, first to the Congress and then to the press, was a copy over which I shared control and which I agreed to make available to him as cleared researcher for the RAND Corporation. I was subsequently a consultant to his lawyers at his criminal trial and testified at the trial that disclosure of the papers did not cause harm to the national security.

The defense team for Samuel Loring Morison, indicted and convicted for providing a satellite photograph to a magazine, included a lawyer who worked for the ACLU National Security Project which I directed at the time. I was also a consultant to the lawyers in the AIPAC case and in the Drake prosecution, and would have testified at both trials if the cases had not been dismissed.

On behalf of the ACLU I testified often before Congress on the issues discussed in this paper including on the Intelligence Identities Protection Act.

²⁸ I was present at all of these hearings and, as a consultant to the defense, participated in drafting the defense positions on these issues.

²⁹ United States v. Morison, 844 F.2d 1057 (4th Cir. 1988). Engelberg, Stephen. "Spy Photos' Sale Leads to Arrest." *The New York Times* 3 October 1984: <http://www.nytimes.com/1984/10/03/world/spy-photos-sale-leads-to-arrest.html> (last accessed: 30 January 2012)

³⁰ Loeb, Vernon. "Clinton Ignored CIA in Pardoning Intelligence Analyst." *The Washington Post* 17 February 2001: <http://www.fas.org/sgp/news/2001/02/wp021701.html> (last accessed: 30 January 2012); Tankard, James W. "Samuel L. Morison and the government crackdown on the leaking of classified information." *Journalism History Magazine*, April 1, 1998.

³¹ United States v. Morison, 844 F.2d 1057 (4th Cir. 1988)

These included the fact that a physical document with security markings was given by Morison to the press; that Morison had cut off the security markings before transferring the document; that Morison had a security clearance; that he knew the harm that the publication would cause; and that he had provided the document for personal gain and not to warn the public of malfeasance. Because these concurring opinions are central to understanding how the courts have interpreted section 793 in the few cases involving publication, I provide an extensive quote from the two opinions in an attachment to this paper.

(It should be noted that Morison disputed many of these facts, especially those related to his motives, and seems to have wanted to alert the American public to what he perceived to be a failure of the US Government to take seriously what he considered to be a grave Soviet naval threat. However, to accurately understand the precedent set by this case, the facts that the panel assumed to be true are relevant; not what the actual facts may have been.)

It was to be another 20 years before the government, under the second Bush Administration, filed the third indictments under section 793 for acts not related to espionage. After a government official, Lawrence Franklin, pleaded guilty to providing classified information to two employees of AIPAC, an organization that lobbies on issues related to US-Israeli relations, the two employees, Steven J. Rosen and Keith Weissman, were indicted for allegedly passing this information on to the press and to officials of the Israeli government.³² This was the first, and to this day, the only, indictment of a person without a security clearance accused of receiving information related to the national defense, and the first case involving the alleged transfer of information rather than documents.

The government began the case asserting its maximalist position that it had to prove only that the defendants had received information related to the national defense from a government official and had given it to reporters.

The district court judge at first seemed to accept this position at the outset, but increasingly became convinced that First Amendment issues were at stake on the basis that the alleged conduct occurred regularly in Washington and was the source of much of the national security stories in the press. In pre-trial rulings relying explicitly on the concurring opinions in the Court of Appeals in the Morison case cited above,³³ he ruled that section 793 was constitutional

³² Lee, William E. *Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes*. 36 Am. J. Crim. L. 129 (2009): p. 130; Lichtblau, Eric. "Pentagon Analyst Admits Sharing Secret Data." *The New York Times* 6 October 2005: <http://www.nytimes.com/2005/10/06/politics/06spy.html> (last accessed: 30 January 2012). For the full texts of the main documents in the case see <http://www.fas.org/sgp/jud/aipac/>.

³³ *US v. Rosen and Weissman*, Memorandum Opinion, Case No. 1:05cr225 (E.D. Va., filed 08/09/2006), at pp. 41-2, available at <http://www.fas.org/sgp/jud/rosen080906.pdf>: "The Fourth Circuit's holding in *Morison*, chiefly relied on by the government to support its position, is not to the contrary. While Judge Russell, writing for the panel, found that the statute's application to Morison did not implicate the First Amendment, both Judge Wilkinson and Judge Phillips wrote separately to express their respective views that the First Amendment

because “(1) it limits the breadth of the term ‘related to the national defense’ to matters closely held by the government for the legitimate reason that their disclosure could threaten our collective security; and (2) it imposes rigorous *scienter* requirements as a condition for finding criminal liability.”³⁴ The government would have to prove that the information released fit all the elements of national defense information (NDI), including that it was closely held by the government and not available to the public, and that its disclosure would be damaging to the national interest. In addition, the government would have to prove that the defendants not only knew that the information was NDI, but that he had transmitted the information with a “bad purpose,” that is, the court held, with the intent to disobey or disregard the law. Finally, because information and not documents were disclosed, the government would need to show that the information was communicated with reason to believe that it could be used to injure the United States or give advantage to a foreign power.³⁵

was implicated by Morison’s prosecution, but that the government’s interest in that case was sufficient to overcome Morison’s First Amendment rights. *Compare Morison*, 844 F.2d at 1068 (Russell, J.) (“[W]e do not perceive any First Amendment rights to be implicated here.”) with *id.* at 1081 (Wilkinson, J., concurring) (“I do not think the First Amendment interests here are insignificant.”); *id.* at 1085 (Phillips, J., concurring) (“I agree with Judge Wilkinson’s differing view that the first amendment issues raised by Morison are real and substantial and require the serious attention which his concurring opinion then gives them.”). Thus, the panel majority in *Morison* viewed the application of § 793(e) to Morison as implicating the First Amendment. Also worth noting is that the conduct alleged here is arguably more squarely within the ambit of the First Amendment than Morison’s conduct. Morison was convicted of “purloining from the intelligence files of the Navy national defense materials clearly marked as ‘Intelligence Information’ and ‘Secret’ and for transmitting that material to ‘one not entitled to receive it.’” *Morison*, 844 F.2d at 1067. In the instant case, defendants are accused of the unauthorized possession of information relating to the national defense, which they then orally communicated to others, all within the context of seeking to influence United States foreign policy relating to the Middle East by participating in the public debate on this policy. In the end, the government’s attempt to invoke Judge Russell’s analogy of Morison’s conduct to theft is, at the very least, strained. For these reasons, *Morison* cannot be taken to stand for the proposition that prosecutions brought pursuant to § 793 do not implicate the First Amendment.

³⁴ *US v. Rosen and Weissman*, *ibid.*, at p. 67.

³⁵ *US v. Rosen and Weissman*, *ibid.*, at 62-63: “As construed herein, §§ 793(d) and (e) punish only those people who transmit information related to the national defense, in tangible or intangible form, to one not entitled to receive it. To prove that the information is related to the national defense, the government must prove: (1) that the information relates to the nation’s military activities, intelligence gathering or foreign policy, (2) that the information is closely held by the government, in that it does not exist in the public domain; and (3) that the information is such that its disclosure could cause injury to the nation’s security. To prove that the information was transmitted to one not entitled to receive it, the government must prove that a validly promulgated executive branch regulation or order restricted the disclosure of information to a certain set of identifiable people, and that the defendant delivered the information to a person outside this set. In addition, the government must also prove that the person alleged to have violated these provisions knew the nature of the information, knew that the person with whom they were communicating was not entitled to the information, and knew that such communication was illegal, but proceeded nonetheless. Finally, with respect only to intangible information, the government must prove that the defendant had a reason to believe that the disclosure of the information could harm the United States or aid a foreign nation, which the Supreme Court has interpreted as a requirement of bad faith. See *Gorin*, 312 U.S. at 28.”

The incoming Obama Administration reviewed the court's rulings and dropped the case.³⁶ Almost immediately it began moving in a different direction bring a succession of cases in short order. (It should be noted that it has only indicted people who had authorized access to the classified information that it alleges was disclosed.)

The first case to be brought by the Obama Administration was the indictment in 2010 of Thomas Drake, a former official of the National Security Agency who held a security clearance. Drake was charged with unlawful possession and retention of classified information under 18USC 993 (e).³⁷ The indictment mentioned his dealings with a Baltimore Sun Reporter to show that his actions were willful and intentional, but the government did not charge him with providing information related to the national defense to the press. It conceded that the stories written by the Sun reporter did not include any classified information.

Notwithstanding the weight of court rulings and the Obama Justice Department's decision to drop the AIPAC case, the government began the process with the same maximalist position as previous administrations, arguing that it had to show only what was alleged in the indictment, i.e., that Drake had documents on his personal computer and in his home basement that the government alleged were classified (and thus related to the national defense) and that Drake was not entitled to retain. Once again the trial judge struggled with how to interpret the plain language of the statute. His view was influenced by the fact that he viewed the case as a "retention" case and not a "disclosure" case and hence not one implicating the Frist Amendment. Nonetheless, after extensive briefings and oral arguments, the court ruled that the government in order to prove that the information in the documents Drake was alleged to have retained related to the national defense, would need to establish that the documents in question were both actually and properly classified, that the disclosure of the information could reasonably be expected to cause harm and that Drake willfully retained the documents. Faced with these rulings and others related to the treatment of classified documents at the trial, the government once again essentially dropped the case on the eve of trial, accepting a plea to a minor charge.³⁸

A second case involves Pfc. Bradley E. Manning, who stands accused in a military courts martial of violating section 793 by disclosing numerous classified government documents to

³⁶ Lee, William E. *Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes*. 36 Am. J. Crim. L. 129 (2009): p. 131; and Markon, Jerry, "U.S. Drops Case Against Ex-Lobbyists: Former AIPAC Employees Faced Espionage Charges." *Washington Post* 2 May 2009: <http://www.washingtonpost.com/wpdyn/content/article/2009/05/01/AR2009050101310.html>.

³⁷ Indictment, United States v. Thomas Andrews Drake, (N.D. MD, Case No. 1:10-CR-0181-RDB, filed 4/14/2010): available at <http://www.fas.org/sgp/news/2010/04/drake-indict.pdf> (last accessed: 30 January 2012); Shane, Scott. "Complaint seeks Punishment for Classification of Documents." *The New York Times* 1 August 2011: <http://www.nytimes.com/2011/08/02/us/02secret.html?scp=4&sq=thomas%20drake&st=cse> (last accessed: 30 January 2012). Key documents on the case are available at <http://www.fas.org/sgp/jud/drake/>

³⁸ Wheeler, Marcy. "Government Case Against Whistleblower Thomas Drake Collapses." *The Nation* 13 June 2011: <http://www.thenation.com/article/161376/government-case-against-whistleblower-thomas-drake-collapses> (last accessed: 30 January 2012).

WikiLeaks.³⁹ Manning, who was held in solitary confinement for eight months,⁴⁰ was as of May 2012 in the midst of court martial proceedings and the government is reported to be using a grand jury to investigate private persons who may have received documents from Manning.⁴¹

In addition to Manning there are as of May 2012, three pending cases. Each involves a former government official with a security clearance who is specifically charged with providing classified information to the press.⁴²

Stephen Jin-Woo Kim, a former senior adviser for intelligence on detail to the State Department's arms control compliance bureau, is charged with disclosing national defense information derived from a classified document to a reporter.⁴³ In his order dismissing Kim's First Amendment challenge to section 793, the trial judge applied the same three-part test articulated in the Morison case both by the District Court judge and the opinion of the Court of Appeals.⁴⁴ For the government to secure a conviction, it would need to prove that: (1) the information met all the requirements of national defense information (i.e., that the information was being kept secret by the government and that the publication of the information could reasonably be expected to cause harm to the national security; (2) the defendant knew the information was NDI; (3) that he knew that his conduct violated the law; and (4) he had reason to believe that disclosure could injure the US or benefit a foreign country (given that Kim only disclosed information and not the document itself).⁴⁵

Jeffrey Alexander Sterling, an ex-CIA officer, is charged with unauthorized retention of information related to the national defense and with providing such information to a journalist

³⁹ Thompson, Ginger. "Hearing in Soldier's WikiLeaks Case Ends." *The New York Times* 22 December 2011: <http://www.nytimes.com/2011/12/23/us/hearing-in-private-mannings-wikileaks-case-ends.html?scp=5&sq=bradley%20manning&st=cse> (last accessed: 30 January 2012).

⁴⁰ Juan Mendez, United Nations Special Rapporteur on Torture, UN News Center, 18 October 2011: <http://www.un.org/apps/news/story.asp?NewsID=40097>.

⁴¹ Ibid.

⁴² Hsu, Spencer S. "State Dept. contractor charged in leak to news organization." *The Washington Post* 28 August 2010: <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/27/AR2010082704602.html> (last accessed: 30 January 2012); Savage, Charlie. "Ex-C.I.A. Officer Named in Disclosure Indictment." *The New York Times* 6 January 2011: <http://www.nytimes.com/2011/01/07/us/07indict.html> (last accessed: 30 January 2012); Savage, Charlie. "Ex-C.I.A. Officer Charged in Information Leak." *The New York Times* 23 January 2012: <http://www.nytimes.com/2012/01/24/us/ex-cia-officer-john-kiriakou-accused-in-leak.html?scp=1&sq=kiriakou&st=cse> (last accessed: 30 January 2012).

⁴³ United States v. Stephen Jin-Woo Kim, Indictment, Case No. 1:10-cr-00225-CKK (D.C. filed 08/19/2010). Available at <http://www.fas.org/sgp/jud/kim/indict.pdf>; Selected case files are at <http://www.fas.org/sgp/jud/kim/>

⁴⁴ United States v. Morison, 844 F.2d 1057 (4th Cir. 1988)

⁴⁵ Memorandum Opinion and Order, United States v. Stephen Jin-Woo Kim, Case No. 1:10cr-00225-CKK (D.C. filed 08/24/2011), see p 12. Available at <http://www.fas.org/sgp/jud/kim/082411-order.pdf>. The Court held that: "the Government must prove not only that Defendant had a reasonable belief that the information he possessed could be used to the injury of the United States or to the advantage of any foreign nation, but also that Defendant willfully communicated that information to a person not entitled to receive it.[I]n order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.' Bryan v. United States, 524U.S. 184, 191-92 (1998) (internal quotation marks omitted). Because the Government must prove that Defendant knew his conduct was unlawful, he cannot complain that he did not have fair warning that he could be criminally prosecuted for his actions."

named James Risen.⁴⁶ The government asserts that the information at issue was published by Risen in a book⁴⁷. For the first time in a case based on section 793, the government is seeking to compel the testimony of the reporter to whom it alleges the unauthorized disclosures were made. The trial judge declined to compel this testimony on the narrow grounds that he has a “qualified reporter’s privilege and that the government had not shown that it needed the information.”⁴⁸ the government filed an appeal which was pending as of May 2012.⁴⁹ In its brief to the Court of Appeals, the government notes that the grand jury has not charged Risen with a crime, but that, nonetheless, at his request has granted him immunity from prosecution.⁵⁰ As of May 2012, the trial judge had not made any rulings on the elements which need to be proven at trial.

John Kiriakou, another former CIA officer, is charged with leaking classified information to two reporters concerning the interrogation techniques applied against Abu Zubaydah, a suspected member of Al Qaeda, in violation of section 793 (d). He is also the first person charged with violating the Intelligence Identities Protection Act for revealing the identity of a covert agent as that term is defined in the statute, during the same transfer of information.⁵¹

Conclusion

The determined efforts of the Obama Administration to use section 793 to punish activities leading to publication of information creates a serious threat to the public right to know and to the process by which Americans learn about the activities of the US government on national security matters. Equally serious are the efforts in the Congress to enact a sweeping new statute which would make it a crime to disclose information which the government had classified.⁵²

⁴⁶ Indictment, United States v. Jeffrey Alexander Sterling, Case No. 1:10-cr-00485-LMB (E.C. Va. Filed 12/22/2010). Available at <http://www.fas.org/sgp/jud/sterling/indict.pdf> Selected case files are at <http://www.fas.org/sgp/jud/sterling/index.html>

⁴⁷ James Risen, *State of War: The Secret History of the CIA and the Bush Administration* (NY: Free Press.2006) Chapter 9 “A Rogue Operation.”

⁴⁸ <http://www.fas.org/sgp/jud/sterling/072911-memop.pdf>

⁴⁹ Savage, Charlie. “Subpoena Issued to Writer in C.I.A.-Iran Leak Case.” *The New York Times* 24 May 2011: <http://www.nytimes.com/2011/05/25/us/25subpoena.html?scp=1&sq=times%20journalist%20subpoena&st=cse> (last accessed: 30 January 2012); Goodale, James C., John S. Kiernan, Jeremy Feigelson, Erik Bierbauer, Joseph D. Murphy, Jennifer Freeman, Kamy Mehta, Debevoise & Plimpton LLP. “REPORTER’S PRIVILEGE: RECENT DEVELOPMENTS 2010-2011.” 1068 PLI/Pat 223 (2011): p. 321.

⁵⁰ Brief for the United States, United States v. Jeffrey Alexander Sterling, No. 11-5028. Available at <http://www.fas.org/sgp/jud/sterling/011312-govbrief.pdf>

⁵¹ Indictment, United States v. John Kiriakou, Case No. 1:12MJ33 (E.D. Va., filed 04/5/2012). Available at <http://www.fas.org/sgp/jud/kiriakou/indict.pdf>. Selected case files are at <http://www.fas.org/sgp/jud/kiriakou/>

⁵² See eg FAS Secrecy News, April 23, 2012. “At her May 17, 2011 [confirmation hearing](#) to be head of the Justice Department’s National Security Division (NSD), Lisa O. Monaco noted the role of the Senate Intelligence Committee in pushing the issue. “This Committee has... pressed the [Justice] Department and the intelligence community... to ensure that unauthorized disclosures are prosecuted and pursued, either by criminal means or the use of administrative sanctions,” she said.

After Ms. Monaco described each of the multiple pending leak prosecutions that were pending at that time, she was nevertheless asked (in [pre-hearing questions](#)) “Are there any steps that the Department could take to increase the number of individuals who are prosecuted for making unauthorized disclosures of classified information to members

In a perfect world the Congress and the Administration would retreat from these maximalist positions and accept that given the breadth of over-classification, under the First Amendment, actions to provide information to the public may be considered criminal only if Congress has enacted a narrow statute covering a specific and well-defined category of information meriting such protection and stating the circumstances under which either government officials or private citizens have committed a crime.

There is, however, no possibility that the administration will retreat from such a long held executive branch position especially now that it is under criticism for not bring indictments for other leaks to the press. However, the government's posture in the cases brought by the Obama administration suggests that it may have learned from previous cases brought under section 793. For instance, the AIPAC case suggests that indictments brought against private citizens without security clearances cannot be sustained. The Drake case may have led to conclusions that the government should only issue indictments when the information revealed was rightly classified in that its disclosure would clearly harm the national interests.

In the short run Congress will not legislate to prevent 18USC793 from being used to punish efforts to publish information. Congress is, in fact, much more likely to enact a statute which does make it a crime, at least for government officials, to disclose any classified information to the press. It must be urged to move slowly and deliberately.

Starting from the premises that more information must be made public and that the government has the right to keep some information secret in the name of national security, we need a public and congressional dialogue about what set of measures would be most effective in meeting these two equally important objectives. Finally reducing government secrecy must certainly be a key component of any such measures. The government should also be able to take measures to administratively punish those who reveal critical information without authority, while strengthening protections for whistleblowers. Finally, it would be appropriate for Congress to consider whether it should make it a crime for government officials to reveal other specific and narrow categories of information, as it has done with atomic energy, communications intelligence, and the identities of covert agents. Any new legislation should be enacted only after full deliberations and public hearings by both the Judiciary and Intelligence Committees with the active participation of concerned public interest organizations. Any such effort should make it clear the 18USC793 is not an appropriate means for seeking to punish disclosures to the press.

An area requiring immediate attention is the question of whether journalists can be compelled to testify before grand juries or at criminal trials about the sources of the information which they publish. The government is currently arguing in the Sterling case that courts should compel such

of the news media?"

Ms. Monaco told the Intelligence Committee that "the NSD has been working closely with the Intelligence Community to expedite and improve the handling of such cases." She pledged to the Committee that it would be "my priority to continue the aggressive pursuit of these cases." And so it has been.

testimony if the government is proceeding in good faith and if there are no other witnesses to the “crime” of providing the information to the reporter. This matter is before the federal appeals court and the outcome is uncertain. A serious effort should be made by the press and NGOs concerned with government secrecy to persuade the administration that it should accept two limitations, or at least one or the other. The first is that the courts should adopt a balancing test to determine if the disclosure was in the public interest. Alternatively, it should agree that the “crimes” to which a reporter can be compelled to testify should exclude those actions related solely to providing information to a reporter for publication. Irrespective of what the administration does, it is possible that the Supreme Court may be persuaded to accept one or both of these limitations.

If the administration refuses to retreat and the courts compel the testimony, there will be no choice but to make efforts to persuade the Congress that it should enact protection for journalists along the lines presented above.

It remains unclear why the administration has relied so much more than its predecessors on criminal penalties in dealing with leaks. One can only hope that the criticism it is receiving from both directions will persuade it to lead a serious public debate about how to most effectively balance the public right to know with the need to protect genuine secrets.

7/1/12

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

CHAPTER 37—ESPIONAGE AND CENSORSHIP

§ 793. Gathering, transmitting or losing defense information

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

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

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) 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 demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photo- graph, 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; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photo- graph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or in- formation, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

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

(g) 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.

Annex II

Concurring Opinions in *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

Judge Wilkinson wrote:

I do not think the First Amendment interests here are insignificant. Criminal restraints on the disclosure of information threaten the ability of the press to scrutinize and report on government activity. There exists the tendency, even in a constitutional democracy, for government to withhold reports of disquieting developments and to manage news in a fashion most favorable to itself. Public debate, however, is diminished without access to unfiltered facts.... The First Amendment interest in informed **popular** debate does not simply vanish at the invocation of the words "national security." National security is public security, not government security from informed criticism. ... investigative reporting is a critical component of the First Amendment's goal of accountability in government. To stifle it might leave the public interest prey to the manifold abuses of unexamined power. It is far from clear, however, that an affirmance here would ever lead to that result. The Supreme Court has cautioned that to reverse a conviction on the basis of other purely hypothetical applications of a statute, the overbreadth must "not only be real, but substantial as well." *Broadrick v. Oklahoma*, [413 U.S. 601](#), 615, 93 S.Ct. 2908, 2918, 37 L.Ed.2d 830 (1973). I question whether the spectre presented by the above examples is in any sense real or whether they have much in common with *Morison's* conduct. Even if juries could ever be found that would convict those who truly expose governmental waste and misconduct, the political firestorm that would follow prosecution of one who exposed an administration's own ineptitude would make such prosecutions a rare and unrealistic prospect. Because the potential overbreadth of the espionage statute is not real or substantial in comparison to its plainly legitimate sweep, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* at 615-16, 93 S.Ct. at 2918. On the facts of *Morison's* case, I agree with Judge Russell's conclusion that the limiting instructions given by the district court were sufficient.... The district court's limiting instructions properly confine prosecution under the statute to disclosures of classified information potentially damaging to the military security of the United States. In this way the requirements of the vagueness and overbreadth doctrines restrain the possibility that the broad language of this statute would ever be used as a means of punishing mere criticism of incompetence and corruption in the government. Without undertaking the detailed examination of the government's interest in secrecy that would be required for a traditional balancing analysis, the strictures of these limiting instructions confine prosecution to cases of serious consequence to our national security. I recognize that application of the vagueness and overbreadth doctrines is not free of difficulty, and that limiting instructions at some point can reconstruct a statute. In this case, however, the district court's instructions served to guarantee important constitutional safeguards without undermining the legitimate operation of the statute.... At the same time, it is important to emphasize what is not before us today. This prosecution was not an attempt to apply the espionage statute to the press for either the receipt or publication of classified materials...

What is at issue in this case is the constitutionality of a particular conviction. As to that, I am prepared to concur with Judge Russell that the First Amendment imposes no blanket prohibition on prosecutions for unauthorized leaks of damaging national security information, and that this particular prosecution comported with constitutional guarantees.

Judge Ames Dickson Phillips, the other concurring judge wrote this:

I concur in the judgment and, with only one reservation, in Judge Russell's careful opinion for the court. My reservation has to do only, but critically, with that opinion's discussion of the first amendment issues raised by the defendant. While these are ultimately discussed and rejected, there are earlier suggestions that as applied to conduct of the type charged to Morison, the Espionage Act statutes simply do not implicate any first amendment rights. On that point, I agree with Judge Wilkinson's differing view that the first amendment issues raised by Morison are real and substantial and require the serious attention which his concurring opinion then gives them. I therefore concur in that opinion. If one thing is clear, it is that the Espionage Act statutes as now broadly drawn are unwieldy and imprecise instruments for prosecuting government "leakers" to the press as opposed to government "moles" in the service of other countries. Judge Wilkinson's opinion convincingly demonstrates that those statutes can only be constitutionally applied to convict press leakers (acting for whatever purposes) by limiting jury instructions which sufficiently flesh out the statutes' key element of "relating to the national defense" which, as facially stated, is in my view, both constitutionally overbroad and vague. Though the point is to me a close one, I agree that the limiting instruction which required proof that the information leaked was either "potentially damaging to the United States or might be useful to an enemy" sufficiently remedied the facial vice. Without such a limitation on the statute's apparent reach, leaks of information which, though undoubtedly "related to defense" in some marginal way, threaten only embarrassment to the official guardians of government "defense" secrets, could lead to criminal convictions. Such a limitation is therefore necessary to define the very line at which I believe the first amendment precludes criminal prosecution, because of the interests rightly recognized in Judge Wilkinson's concurring opinion. This means, as I assume we reaffirm today, that notwithstanding information may have been classified, the government must still be required to prove that it was in fact "potentially damaging ... or useful," i.e., that the fact of classification is merely probative, not conclusive, on that issue, though it must be conclusive on the question of authority to possess or receive the information. This must be so to avoid converting the Espionage Act into the simple Government Secrets Act which Congress has refused to enact. ... But in doing so, I observe that jury instructions on a case-by-case basis are a slender reed upon which to rely for constitutional application of these critical statutes; and that the instructions we find necessary here surely press to the limit the judiciary's right and obligation to narrow, without "reconstructing," statutes whose constitutionality is drawn in question.

