REPORTING ON THE WAR ON TERROR:
THE ESPIONAGE ACT AND OTHER SCARY STATUTES

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The U.S. military campaign against the Taliban regime and the al Qaeda terrorist network has spawned considerable debate (and at least one lawsuit)[1] over press access to military operations in Central Asia and information about them. It is a topic that seems destined to be revisited with each modern military campaign our nation embarks on.[2] There has been far less public discussion about the government's power to restrict the dissemination of truthful information about the military campaign once it is gathered by the press from sources other than official government sources. We know from *New York Times Co. v. United States*[3] that governmental efforts to enjoin reporting about matters of national security can rarely pass muster under the First Amendment. What we also know from *The Pentagon Papers* case is that at least some members of the Supreme Court were then of the opinion that those who published The Pentagon Papers might be subject to criminal prosecution for doing so.[4] The Justice Department wisely

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1 Flynt v. Rumsfeld, 1:01CV 02399 (PLF) (D.D.C.) (filed November 16, 2001).

2 There has been much scholarship on the subject of press access to wars since World War II. For World War II *see*, *e.g.*, PETER BRAESTRUP, BATTLE LINES 27-40 (1985); PHILLIP KNIGHTLY, THE FIRST CASUALTY: FROM THE CRIMEA TO VIETNAM: THE WAR CORRESPONDENT AS HERO, PROPAGANDIST, AND MYTH MAKER (1975); MEYER L. STEIN, UNDER FIRE: THE STORY OF AMERICAN WAR CORRESPONDENTS (rev. ed. 1995). For the Korean War *see*, *e.g.*, BRAESTRUP, *supra*, at 47-60; KNIGHTLY, *supra*; STEIN, *supra*. For the Vietnam War, *see*, *e.g.*, BRAESTRUP, *supra*, at 61-75; DANIEL C. HALLIN, THE UNCENSORED WAR: THE MEDIA AND VIETNAM (1986); KNIGHTLY, *supra*; STEIN, *supra*. For Grenada *see*, *e.g.*, BRAESTRUP, *supra*, at 83-109; STEIN, *supra*. For the Persian Gulf War *see*, *e.g.*, STEIN, *supra*; Michael W. Klein, *The Censor's Red Flair, the Bombs Bursting in Air: The Constitutionality of the Desert Storm Media Restrictions*, 19 HASTINGS CONST. L.Q. 1037, 1048-54 (1992); Michael D. Steger, *Slicing the Gordian Knot: A Proposal to Reform Military Regulation of Media Coverage of Combat Operations*, 28 U.S.F. L. REV. 957, 972-78 (1994).

3 403 U.S. 713 (1971).

4 *See* discussion at pp. 9-10, *infra*.

never pursued any prosecutions of the press there and the criminal case against Daniel Ellsberg and Anthony Russo was ultimately abandoned as well.[5] But the vague statutes alluded to in *dicta* by members of the Court then and many others making criminal the dissemination of information concerning the national defense remain on the books today. This article will briefly review the most pertinent federal statutes presently in force and highlight some of the more important cases from the modest body of authority interpreting those statutes.

There are a number of statutes scattered throughout the United States Code of which a media law practitioner should be aware in counseling his or her clients on issues relating to national security. They include both broad and amorphous provisions and others that are far more narrow and specific. This article will first address the more amorphous provisions (sections 793 and 794 of the Espionage Act) because an understanding of those sections and how they have been interpreted by the courts is critical to an understanding of the more narrow statutes that followed. It will then briefly address more targeted provisions restricting the dissemination of information concerning specific national security issues, such as designated military installations, codes, ciphers and communications intelligence systems, covert agents and data restricted under The Atomic Energy Act. It concludes with a brief discussion of the catch-all federal criminal statute concerning the theft of government property.

But the starting place is the Espionage Act. And the starting place within the Espionage Act is 18 U.S.C. § 793.

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5 The prosecution was abandoned as a result of prosecutorial misconduct. *See* Melville B. Nimmer, *National Security Secrets v. Free Speech: the Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974) ("Nimmer").

18 U.S.C. § 793: "Gathering, transmitting or losing defense information"

On its face 18 U.S.C. § 793 purports to restrict the gathering, retention or communication of documents or information "respecting," "relating to" or "connected with" the national defense.

- Sections 793(a) and (b)[6]

Section 793(a) prohibits the gathering of information from, broadly speaking, *places* connected to the national defense if done "for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation . . . ." Such places include, by way of example, any vessel, aircraft, naval station, submarine base, camp, building, office or research laboratory owned, under the control of or within the exclusive jurisdiction of the United States and "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."

Section 793(b) prohibits the copying, taking, making or obtaining any "sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense" or any attempt to do so with the same purpose and intent set forth in section 793(a).

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6 Sections 793 (a) and (b) were originally enacted as sections 1(a) and 1(b) of the Espionage Act of 1917.

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It is an understatement to say that on their face, sections 793(a) and (b) are maddeningly overbroad. Could Congress possibly have intended to prohibit the gathering or duplication of all documents "connected with the national defense"? Could it really be true that negligence alone ("with reason to believe") could trigger criminal liability for gathering or copying such material? The only reason that sections 793(a) and (b) present little cause for sleepless nights is a result of judicial interpretation of some of the more troubling statutory language.

In *Gorin v. United States*, 312 U.S. 19 (1941), the defendant mounted an attack against the statutory terms "relating to the national defense" and "connected to the national defense" arguing that they were unconstitutionally vague. The Supreme Court rejected the claim finding that the term "national defense" had a "well understood connotation." *Id*. at 28. National defense, the Court ruled, is "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."[7] What the Court *did* do to narrow the statute's reach was to make clear that *scienter* or bad faith is now required to make out a conviction under sections 793(a) and (b).[8]

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Espionage Act of June 15, 1917, c. 30, 40 Stat. 217. Some of the statutory language was carried over from provisions of the Espionage Act of 1911.

7 Gorin, 312 U.S. at 28 (internal quotation marks omitted). This was the definition that had been proffered by the government. *Id*.

8 The Court found the bad faith standard to be lurking in the requirement that the information be "used to the injury of the United States, or to the advantage of any foreign nation." Gorin, 312 U.S. at 27-28. For additional cases discussing Gorin's *scienter* standard, *see*, *e.g.*, In re Squillacote, 2002 WL 58567 (D.C. Cir. 2002); United States v. Truong Dinh Hung, 629 F.2d 908, 918 (4th Cir. 1980); United States v. Enger, 472 F. Supp. 490, 508 (D.N.J. 1978).

In *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945), the Second Circuit directly addressed the ambiguity of the phrase "relating to the national defense."[9] There the defendant had collected publicly available material (concerning the national defense) from newspapers, periodicals and the like, and packed it off to Germany with the requisite criminal intent. The Second Circuit reversed the conviction, holding that unless the information was kept secret by the government, it could not be considered information "relating to the national defense." *Id.* at 816. As the Fourth Circuit has more recently phrased it, information relating to the national defense is information that is "closely held" by the government; information that is widely available to the public or information that is officially disclosed by the government is not. *United States v. Squillacote*, 221 F.3d 542, 578 (4th Cir. 2000). But if the information *is* closely held by the government, the Fourth Circuit has also ruled, even if snippets of it have been "leaked," it would continue to be information "relating to the national defense."

> [A] document containing official government information relating to the national defense will not be considered available to the public (and therefore no longer national defense information) until the *official* information in that document is lawfully available. Thus, as the government argues, mere leaks of classified information are insufficient to prevent prosecution for the transmission of a classified document that is the official source of the leaked information.

Id. (emphasis in original).

How does this all play out in the press context? Sections 793(a) and (b) should be construed to have no application at all to the act of publication. The statutes are concerned with the gathering and copying of information related to the national defense; they do not speak to

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9 It did so in considering the statutory precursor to § 794(a). *See* United States v. Heine, 151 F.2d at 814 n.1.

communicating such information to others or to publishing such information. As for newsgathering efforts in advance of publication, the *scienter* requirement imposed by *Gorin* provides the best legal defense to liability under these statutes.

Although sections 793(a) and (b) leave much to be desired, they pale in comparison to the madness of sections 793(d) and (e).

- Sections 793(d) and (e)[10]

Section 793(d) prohibits anyone lawfully having possession of any document, writing, photograph (and a host of other things) "relating to the national defense" from "willfully" communicating or transmitting it to anyone not entitled to receive it. On the face of the statute, no specific intent to injure the United States (or to benefit a foreign nation or enemy) is required to trigger liability under section 793(d) where tangible documents or things are at issue; the communication need only be "willful." The section also prohibits the willful communication of "information relating to the national defense [distinguished from documents and things] 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" to anyone not entitled to receive it.

Section 793(d) applies to those having lawful possession of such documents or information, such as government employees or Members of Congress. It criminalizes the conduct

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10 Sections 793(d) and (e) find their roots in section 1(d) of the Espionage Act of 1917, although some of the language in that section had been carried over from the Espionage Act of 1911. The separate offenses described in sections 793(d) and (e) were broken out into two parts as part of the amendments to the Espionage Act enacted by the Internal Security Act of 1950.

of the source, not the recipient of the document or information. Which brings us to section 793(e).

Section 793(e) is one of the most troublesome sections of the Espionage Act from the perspective of the press, the provision that has spawned the most debate in the press context and, at first blush, pretty much one of the scariest statutes around. Because of its importance, it is worth quoting in its entirety. Section 793(e) provides:

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

The issues raised by section 793(e) are highly problematic and, for the most part, largely unresolved. As with section 793(d), from the face of the statute it would appear that retaining (and not returning) or communicating documents or other tangible things "relating to the national defense" is prohibited regardless of whether the recipient has reason to believe that the document could be used to the injury of the United States or to the advantage of any foreign nation. The "which" clause, if you will, only modifies "information." If that is so (and if it is constitutional), the statute would make it a crime for any person not authorized to have it to retain (and not return) any document or tangible thing "relating to the national defense" or to communicate any document or tangible thing "relating to the national defense" regardless of motivation

as long as it is done "willfully." Communicating other "information" relating to the national defense or retaining and not returning the same is conduct subject to criminal penalties as well but the possessor of the information must have 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 issue of whether section 793(e) can fairly be said to apply to the press was first discussed in the district court's opinion in *The Pentagon Papers* case. Declining to enter the preliminary injunction sought by the government there, Judge Gurfein rejected the government's effort to rely on section 793(e) as providing a valid statutory basis for the entry of the injunction. Judge Gurfein was particularly persuaded by the fact that section 793(e) does not prohibit "publishing" as other sections of the Espionage Act do as "indicating that newspapers were not intended by Congress to come within the purview of Section 793." *United States v. New York Times Co*., 328 F. Supp. 324, 329 (S.D.N.Y. 1971).

The Second Circuit did not address the issue in its opinion reversing Judge Gurfein. *See United States v. New York Times Co.*, 444 F.2d 544 (2d Cir. 1971) (*en banc*). Nor was it the subject of any ruling by the United States Supreme Court in the case. In his concurring opinion, Justice Douglas (joined by Justice Black) agreed with Judge Gurfein that section 793 simply did not apply to the press. *See New York Times Co. v. United States*, 403 U.S. 713, 720-21 (1971) (Douglas, J., concurring). Justice White, joined by Justice Stewart, remarked that "it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793(e) if they communicate or withhold the materials covered by that section." *Id.* at 738 n.9 (White, J., concurring). Justice White declined to offer his views on Judge Gurfein's conclusion that press publications could not be considered "communications"

under section 793(e), adding that the simple retention of the Papers could make out a violation of the section in any event. *Id*. After noting that Judge Gurfein's construction of the statute had some support in the legislative history, Justice Marshall offered that it was not the only plausible construction of the statute, citing to Justice White's opinion. *See id.* at 745 (Marshall, J., concurring).

Prompted by this dicta, in 1973 Harold Edgar and Benno Schmidt, Jr. undertook a serious analysis of the consequences of applying the Espionage Act in general (and sections 793(d) and (e) in particular) to press publications (and conduct preparatory to publication) in what was to become the landmark law review article on the subject. H. Edgar and B. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUMBIA L. REV. 929 (1973) ("EDGAR & SCHMIDT I"). What Warren and Brandeis were to privacy and the press,[11] Edgar and Schmidt are to the Espionage Act and the press. Exhaustively marshaling the legislative history of the various espionage statutes to support their arguments, Edgar and Schmidt persuasively urged that sections 793(d) and (e) — which they characterized as "so sweeping as to be absurd"[12] — were not intended to be applied to the "publication of defense information that is motivated by the routine desires to initiate public debate or sell newspapers." EDGAR & SCHMIDT I at 1033.

The legislative materials relied on by Edgar and Schmidt are voluminous and are painstakingly detailed in their article. Three brief points bear particular mention:

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11 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

- In considering the Espionage Act of 1917, Congress rejected a provision that would have permitted the President to prohibit newspapers from publishing information concerning the national defense that the President determined might be useful to the enemy at the same time it passed the statutory predecessor of sections 793(d) and (e).[13]

- When the Espionage Act was amended in 1950 (creating the separate sections now known as 793(d) and (e)), both the Legislative Reference Service and the Attorney General opined that section 793 would not in their view apply to conduct ordinarily engaged in by newspapers.[14]

- At the same time the 1950 amendments were passed, and specifically to address the concerns of some members of Congress as to the perilous breadth of section 793(e), a provision was enacted stating that "[n]othing in this Act shall be construed to authorize, require or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect."[15]

To effectuate the intent of Congress, Edgar and Schmidt urged that the term "willfully" in both sections 793(d) and (e) should be construed so as to exclude, among other things, conduct undertaken for purposes of stimulating public debate (although they candidly conceded that to do so was a bit of a strain). *Id*. at 1046. Short of that, the authors offered that the statutes were simply too vague and overbroad to pass muster under the First Amendment. *Id*. at 1058.

In its report to Congress in 1982 on the effectiveness of then-existing laws to prohibit the disclosure of classified information (commonly referred to as the "Willard Report"), the

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12 EDGAR & SCHMIDT I at 1032.

13 EDGAR & SCHMIDT I at 946-65. *See* discussion at p. 26, *infra*.

14 EDGAR & SCHMIDT I at 1025-26.

15 EDGAR & SCHMIDT I at 1026-27. The provision was included as part of the Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (1950) and codified as the proviso to the Subversive Activities Act of 1950.

inter-departmental task force headed by Justice Department Deputy Assistant Attorney General Richard Willard offered a different view of the scope of sections 793(d) and (e).

> Certain provisions of the espionage laws may also be violated by unauthorized disclosures of sensitive information. The two provisions that would most likely be violated by an unauthorized disclosure of classified information to the media would be 18 U.S.C. 793(d) and (e). . . .
>
> These provisions have not been used in the past to prosecute unauthorized disclosures of classified information, and their application to such cases is not entirely clear. However, the Department of Justice has taken the position that these statutes would be violated by the unauthorized disclosure to a member of the media of classified documents or information relating to the national defense, although intent to injure the United States or benefit a foreign nation would have to be present where the disclosure is of "information" rather than documents or other tangible materials. These laws could also be used to prosecute a journalist who knowingly receives and publishes classified documents or information.[16]

In the years since the publication of Edgar and Schmidt's article and the Willard Report there has been good news and bad. The good news is that it is still the case that no member of the press has ever been prosecuted for violating section 793(e). Whether that is a function of our nation's commitment to the principles embodied in the First Amendment, of the government's reluctance to air sensitive information in the course of a public prosecution or of the political untenability of prosecuting news organizations for reporting news and information to the public, it is a fact that should provide considerable comfort. The bad news is that the only court that has considered issues raised by sections 793(d) and (e) in the press context since was not terribly receptive to many of Edgar and Schmidt's arguments. *See United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

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16 *Report of the Interdepartmental Group on Unauthorized Disclosures of Classified Information*, March 31, 1982 ("WILLARD REPORT"), reprinted as Appendix 2 to *Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 98th Cong. 171-72 (1984).

In 1984, while employed by the Naval Intelligence Support Center, Samuel Morison stole classified pictures of a Soviet aircraft carrier under construction in a shipyard on the Black Sea taken by one of the Navy's KH-11 reconnaissance satellites. He provided the pictures to Jane's Defence Weekly, a British publication. Morison had worked with Jane's on other stories, with the consent of the NISC. The photographs were published by Jane's; one was republished in the Washington Post. After persuading Jane's to return the photographs, the Justice Department was able to identify Morison as the leaker largely as a result of discovering his fingerprint on one of the photographs. Although the government could have taken the position that it did not need to prove that there was reason to believe that the transmission of the information would cause any injury to the United States or any advantage to a foreign nation (because photographs were at issue), the government urged that the photographs enabled our nation's enemies (particularly the Soviet Union) to better understand the reconnaissance capabilities of the KH-11 satellite to the nation's detriment. Morison argued that the publication of the photographs would help the public better understand the Soviet Union's military readiness, a topic about which he claimed the American public was being misled. Morison was found guilty of violating sections 793(d) and (e) among other crimes.

On appeal to the Fourth Circuit Morison urged (as he had to the district court) that section 793 was never intended to apply to the conduct with which he was charged, *i.e*. leaking information to the press, but, rather, was intended to prohibit communications with a foreign country or other enemy. Morison also argued that the statute should be read as exempting communications with the press (pointing to the same legislative history relied on by Edgar and Schmidt) and, if it were not, it would violate the First Amendment. In the alternative Morison

urged that the statute was unconstitutional as applied in his context on the grounds that it was both vague and overbroad. The Fourth Circuit affirmed the conviction.

On the issue of whether sections 793(d) and (e) applied to Morison's conduct or were limited to classic spying, the Fourth Circuit engaged in what it viewed as a straightforward statutory analysis. On their face, the Fourth Circuit reasoned, sections 793(d) and (e) prohibit the willful transmittal of information to "those not entitled to receive it." According to the court, the press was no more entitled "to receive it" than anyone else. The court stated:

> The language of the two statutes includes no limitation to spies or to "an agent of a foreign government," either as to the transmitter or the transmittee of the information, and they declare no exemption in favor of one who leaks to the press. It covers "anyone." It is difficult to conceive of any language more definite and clear.

Morison, 844 F.2d at 1063. As such, the court ruled, the legislative history was simply irrelevant on the issue. And, even assuming that the legislative history should be looked to for a proper interpretation of the statute, the court concluded, it did not support Morison's arguments in any event. As the court also observed, the structure of the Espionage Act was inconsistent with Morison's claim that section 793 should be limited to classic espionage, pointing to section 794 (discussed below), which specifically prohibits communications with foreign governments, foreign military forces and/or their agents. If section 793 were to be limited to classic espionage, the court reasoned, the statute would be redundant of section 794, a result that could not properly be ascribed to Congress. Accordingly, the court held, sections 793(d) and (e) were not limited to conduct that one would ordinarily view as "classic spying."

The Fourth Circuit also rejected Morison's claims that sections 793(d) and (e) were vague and overbroad. The court ruled that any vagueness in the statutory phrase "relating

to the national defense" was cured by the trial court's instructions and that the phrase was not vague as applied to Morison's conduct in any event. *Morison*, 844 F.2d at 1073.[17] Addressing Morison's claim that the phrase "anyone not entitled to receive it," was also vague, the court held that for the purposes of Morison's case the phrase could be limited (and was properly limited by the trial court's instructions) to persons not entitled to receive information classified under the government's classification system. *Id*. at 1074. Understandably the court devoted a considerable amount of attention to Morison's position as an experienced intelligence officer, his explicit knowledge of the classified status of the photographs, his familiarity with the classification system as a whole and his written agreement to abide by it. *Id*. at 1073-74. Morison's overbreadth arguments were essentially rejected on the same grounds as his vagueness arguments. *Id*. at 1076.

The Fourth Circuit's analysis of the broader First Amendment issues raised by Morison is more difficult to parse. Although the principal opinion in the case was written by Judge Russell (and joined by Judge Wilkinson), the two concurring judges approached the First Amendment issues with far more sensitivity. Judge Phillips concurred in the judgment and joined in Judge Russell's opinion except as to its discussion of the First Amendment issues raised by the case. As to those issues, he joined in Judge Wilkinson's opinion. As such, each of the opinions should separately be considered on these issues with the most precedential weight afforded to Judge Wilkinson's opinion.

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17 The trial court's instructions on intent were also sustained. "An act is done *wilfully* if it is done voluntarily and *intentionally* and with *the specific intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or disregard the law*. Morison, 844 F.2d at 1071 (emphasis in original).

Judge Russell concluded that the legislative history of the Espionage Act was "silent on any Congressional intent in enacting sections 793(d) and (e) to exempt from its application the transmittal of secret military information by a defendant to the press or a representative of the press." *Morison*, 844 F.2d at 1067. Turning to Morison's argument that unless such an exemption were read into the statute, it would run afoul of the First Amendment, Judge Russell offered that he did not perceive "any First Amendment rights to be implicated here" observing, rather curiously, that the case was not a prior restraint case, but a criminal prosecution of a government employee. That the First Amendment offered no "asylum" to Morison was, in Judge Russell's view, made clear by the Supreme Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). Judge Russell quoted at length from Justice White's opinion there:

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

Morison, 844 F.2d at 1068 (quoting *Branzburg v. Hayes*, 408 U.S. at 691). Significantly, Judge Russell also pointed to the decisions in *Snepp v. United States*, 444 U.S. 507 (1980) and *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), both dealing with the ability of the government to prohibit government employees from divulging confidential information in violation of confidentiality agreements, in support of his reasoning. However, Judge Russell made quite clear that *Branzburg* was the authority he deemed dispositive of the First Amendment arguments. *Morison*, 844 F.2d at 1069.

In his concurring opinion (joined by Judge Phillips), Judge Wilkinson chose to address the broader First Amendment issues "directly and on their own terms" after observing,

significantly, that "Morison as a source would raise newsgathering rights on behalf of press organizations that are not being, *and probably could not be*, prosecuted under the espionage statute. *Morison*, 844 F.2d at 1081 (Wilkinson, J., concurring) (emphasis added). Responding to the arguments of the media *amici* that reporting leaked information was critical to informing the public about the operations of government and had often been vital in exposing governmental misconduct, Judge Wilkinson offered:

> [I]nvestigative 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. . . . 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 1084 (Wilkinson, J., concurring) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973)).

As for the case before him, Judge Wilkinson concluded that it could only be resolved by a balancing of the important First Amendment rights raised and the equally important threat to national security posed by Morison's conduct. "Aggressive balancing" was not appropriate in this context, according to Judge Wilkinson, because issues of national security were at stake. Both Congress and the executive branch were entitled to substantial deference in such a context, he reasoned, because the alternative would simply be too grave.

> To reverse Morison's conviction on the general ground that it chills press access would be tantamount to a judicial declaration that the government may never use criminal penalties to secure the confidentiality of intelligence information. Rather

> than enhancing the operation of democracy, as Morison suggests, this course would install every government worker with access to classified information as a veritable satrap. . . . The question, however, is not one of motives as much as who finally must decide. The answer has to be the Congress and those accountable to the Chief Executive. While periods of profound disillusionment with government have brought intense demands for increased scrutiny, those elected still remain the repositories of a public trust. Where matters of exquisite sensitivity are in question, we cannot invariably install, as the ultimate arbiter of disclosure, even the conscience of the well-meaning employee.

Morison, 844 F.2d at 1083 (Wilkinson, J. concurring).

Judge Phillips's opinion reflects that he was deeply troubled by the statutory phrase "relating to the national defense" and expressed the view that it was unconstitutionally vague and overbroad on its face. *Morison*, 844 F.2d at 1086 (Phillips, J., concurring). Because the trial court's jury instructions had sufficiently "flesh[ed] out" this key element consistent with Fourth Circuit precedent, Judge Phillips was prepared to let the conviction stand. *Id*. At the same time he observed that

> [J]ury 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.

Id. He urged Congress to provide a solution, *id*., commenting that

> 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.

Id. at 1085.

Although the Fourth Circuit's opinion in *Morison* was viewed with dismay by many as soon as it was issued, it is not quite as bleak as its critics claim. To be sure, a victory for Morison would have been a victory for the press too, but Morison's loss hardly translates eas-

ily to others. The press was not prosecuted in *Morison*, the leaker was. And this particular leaker was, as the Fourth Circuit stressed, a sophisticated government employee who knew precisely what he was doing. And although it is true that the Fourth Circuit necessarily rejected Edgar and Schmidt's contention that the legislative history of the Espionage Act demonstrates that communications *to* the press were intended to be exempt from section 793's reach, its holding certainly does not preclude the argument (even in the Fourth Circuit) that section 793(e) cannot constitutionally be applied where the "communication" at issue is the publication *by* the press of news and information to the public.

Judge Russell's reliance on *Branzburg* is troubling but it is worth pausing to suggest that his reasoning in this regard has been seriously undermined by the Supreme Court's opinion last term in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). In *Bartnicki* too the Supreme Court was quick to point out that the press is not exempt from criminal statutes of general applicability (*see id.* at 1764 n.19), but when faced with the issue of whether the press could be criminally liable for the act of publishing information obtained in violation of the federal wiretap statutes, the Supreme Court declined to extend liability to the press. To be sure the Supreme Court took pains to stress that its holding was narrow and fact-specific, but the fact remains that the Court distinguished between the acquirer and the publisher in applying a criminal law of otherwise general applicability. On the other hand, if history is a guide, it would be unrealistic to predict with any degree of confidence that the Court would look as kindly on the dissemination of information concerning sensitive issues of national security as it did to the dissemination of union threats of violence.

At the end of the day, *Morison* left open as many issues as it answered. The disturbing vagueness and ambiguity of the statute remains, despite the Fourth Circuit's effort to refine the statutory language "as applied to" Morison. In fact the Fourth Circuit's efforts to do so only serve to reinforce the arguments that the statutory language is hopelessly imprecise and potentially boundless.[18]

18 U.S.C. § 794: "Gathering or delivering defense information to aid foreign government"[19]

Section 794(a) prohibits conduct that one would ordinarily view as classic espionage. It prohibits the communication or transmission of the same documents and things listed in sections 793(d) and (e) (documents, writings, photographs, etc.) or any "information relating to the national defense" 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" if done 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." The death penalty may be imposed if the offense resulted in the identification by a foreign power of an individual acting as an agent of the United States who dies as a consequence of the identification *or* if the information disclosed "directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or re-

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18 Section 793 contains several other provisions not discussed here, the most important of which is section 793(c), the section that carries the baggage of every other section in the statute. Section 793(c) imposes liability on the recipient of a document "connected with the national defense, knowing or having reason to believe, at the time he receives [it]" (or agrees or attempts to obtain it) "that it has been or will be obtained . . . or disposed of [in violation of this chapter.]" *See also* 18 U.S.C. § 793(f) (making it a crime for those entrusted with information "relating to the national defense" to lose it); *id*. § 794(f) (the conspiracy section); *id*. § 794(h) (the forfeiture provision).

19 Sections 794(a) and (b) were also enacted as part of the Espionage Act of 1917.

taliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy."

That section 794(a) was not intended to reach press publications finds strong support in both the statutory language and the legislative history. Most fundamentally, section 794 concerns communications to foreign governments, foreign factions and the like, as the *Morison* court noted. *See Morison*, 844 F.2d at 1065. And, although section 794(a) — like 793 — bars the communication or transmission of information, it does not use the word "publish" to describe prohibited acts. To be sure, an aggressive prosecutor could certainly argue that a publication is, by definition, a communication, but the argument is wholly inconsistent with the structure of the statute. That is because section 794(b), adopted at precisely the same time, does list publishing as a prohibited act. Although the intent requirement is not a model of legislative precision, it is clear from *Gorin* that proof of bad faith would be required to sustain a conviction under section 794(a). *Gorin*, 312 U.S. at 27-28. In short, this is not a statute that realistically could be applied to the ordinary reporting of news and information to the public.

On its face, section 794(b) is more problematic. It provides:

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

Unlike the provisions discussed above, section 794(b) specifically uses the word "publishes" in describing prohibited conduct. By publishing a newspaper article about troop movements does one "inten[d] that the same be communicated to the enemy"? Presumably the newspaper publisher intends to communicate with anyone who chooses to read his newspaper. The limitation that the statute only applies "in time of war" also provides little solace. The courts have given little indication as to what "in time of war" means in this context.[20] If it means a war declared by Congress pursuant to Article I of the Constitution, we are not today in "a time of war."[21] If it means pretty much anything else, we surely are (at least at this writing). And at the end of the day it might not even matter whether we are now at "war" or not. That is because 18 U.S.C. § 798A extended section 794(b) during the period of national emergency first announced by President Truman in 1950. Although it is clear that all powers and authorities granted to the executive as a consequence of Truman's declaration have since been repealed, the state of emergency declared by Truman has technically not been and arguably remains in effect today.[22]

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20 In United States v. Sobell, 314 F.2d 314 (2d Cir. 1963), the Second Circuit concluded that the question of whether and when there is a "time of war" is one of law but observed that it is a question that "is not readily answered even by judges." *Id*. at 326.

21 Congress has not issued a formal declaration of war. On September 14, 2001 Congress passed a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorists attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

22 In 1976 Congress passed the National Emergencies Act, now codified at 50 U.S.C. §§ 1601 *et seq*., apparently intending to end the various states of emergency then in effect, including the state of emergency declared by President Truman. *See* S. Rep. No. 94-1168, at 2, *reprinted in* 1976 U.S.C.C.A.N. 2288, 2289 ("Enactment of this legislation would end the states of emergency under which the United States has been operating for more than 40 years.") The statute itself terminates the powers and authorities possessed by the executive branch as a result of then-existing states of emergencies, but did not literally terminate the state of emergency declared by President Truman. *See CRS Report for Congress, National Emergency Powers* 8, 12 (Congressional Research Service) (updated Sept. 18, 2001).

As with sections 793 (d) and (e), Edgar and Schmidt make a powerful case that section 794(b) was not intended to reach press publications pointing, once again, to the legislative history of the original Espionage Act. *See* EDGAR & SCHMIDT I at 946-965. The fact that there was a proposal to permit the President to designate national defense information unsuitable for print in the very section that ultimately became section 794 — a proposal that was specifically rejected by Congress — is persuasive evidence that the provisions that did pass were not intended to reach ordinary reporting by the press. *Id*. On the other hand, the defeated provision has also been read as simply evidencing Congress' abhorrence to prior restraints; section 794(b), under this view, would still permit subsequent punishment of the press. *See New York Times Co*., 403 U.S. at 733-34 (White, J., concurring).

As noted above, section 794(b) does use the word "publish" making the argument that it cannot be applied to press publications a less attractive one than can be mounted against section 793 (which does not). The debates about the lack of an intent requirement in the defeated provision also lend credence to the view that the simple act of publishing a newspaper to any and all is not alone sufficient to satisfy the requirement that the publication be made "with the intent that the same shall be communicated to the enemy" but would also require a conscious purpose to inform the enemy.[23] *See* EDGAR & SCHMIDT I at 958, 965.

As a practical matter it is inconceivable that the Justice Department would seek to invoke section 794(b) to prosecute the press for the ordinary reporting of news and information

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23 Gorin's narrowing construction does not automatically translate to section 794(b) because the statute does not contain the requirement that the information at issue be "used to the injury of the United States or the advantage of any foreign nation." *See* n. 8, *supra*. Section 794(b) requires only that the information "might be useful to the enemy."

to the public. But it is a bit troubling that all that stands in the way are political pressure, prosecutorial discretion and somewhat arcane debates about the intentions of a Congress engulfed in World War I. The statute itself is wholly unsatisfying in defining its potentially formidable reach.

Sections 793 and 794: An Epilogue

No one can read the debates in 1917 over what would become sections 793 and 794 without being struck by the passion and commitment to our nation's need for a free and unfettered press even (and particularly) in the midst of "The Great War." Those (President Wilson among them) who supported more severe restrictions on the dissemination of information concerning the national defense were equally passionate in defense of their cause. This irreconcilable conflict of views undoubtedly contributed to the passage of such vague and ambiguous laws.

During the course of one of the many hearings Congress has held in the last century on the issue of how best to protect against the disclosure of classified information, Anthony Lapham, then General Counsel of the CIA, offered the following views on sections 793 and 794 and their applicability to the press:

> I would like to be able to say to you that the meaning and scope of these statutes are reasonably definite. Unhappily I can give you no such assurance. . . . What has never been sorted out is whether these statutes can be applied, and would be constitutional if applied, to the compromise of national security information that occurs as a result of anonymous leaks to the press or attributed publications. I cannot tell you with any confidence what these laws mean in these contexts. I cannot tell you, for example, whether the leak of classified information to the press is a criminal act, or whether the publication of that same information by a newspaper is a criminal act, or whether this conduct becomes criminal if committed with a provable intent to injure the United States but remains non-criminal if committed without such intent.

> . . . . We have then, at least in my opinion, the worst of both worlds. On the one hand the laws stand idle and are not enforced at least in part because their meaning is so obscure, and on the other hand it is likely that the very obscurity of these laws serves to deter perfectly legitimate expression and debate by persons who must be as unsure of their liabilities as I am unsure of their obligations.[24]

If the *Morison* case is correct, we now know the answer to at least one of the questions posed by Mr. Lapham (at least in the Fourth Circuit), namely whether a criminal conviction can be sustained under section 793 for leaking classified information to the press. But the other questions he posed remain as debatable today as they were then. And the very substantial danger to which Mr. Lapham pointed — that the sweeping vagueness of the statutes alone may serve to deter perfectly legitimate expression and debate — is likely more real today in reporting on the difficult issues raised by our nation's war on terror.

There is no question that the legislative history of the Espionage Act of 1917 offers powerful evidence that sections 793 and 794 should not be applied to activities of the press as frustrating as the language of the statutes may be. As we shall see, the other powerful evidence is that in the years since the passage of the Espionage Act Congress has enacted numerous provisions seeking to protect particular information concerning national security from dissemination. If Congress understood sections 793 and 794 to be as broad as their language would seem to suggest, the passage of most of the statutes discussed below would have been wholly unnecessary.

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24 *Espionage Laws and Leaks: Hearing Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 22 (1979).

18 U.S.C. §§ 795 and 797: Photographing and publishing photographs of defense installations

For decades, conspiracy theorists, U.F.O. enthusiasts and others have been obsessed with a military test site in the Nevada desert that has come to be known as Area 51. It has been said that alien spacecrafts are housed there by the government (a vision that came to the screen in the movie "Independence Day") and that other equally mysterious activities are underway deep beneath the ground. For many years the government refused even to acknowledge the existence of Area 51. Now about the only information you will learn if you ask is that what goes on there is *very* classified but that there are *definitely* no aliens. If you visit the surrounding area be sure to dine at The Little A' Le' Inn (read it again), the only restaurant in town. But if you're hoping to snag a few pictures — even from public parklands nearby — you might want to consider 18 U.S.C. §§ 795 and 797.[25]

18 U.S.C. § 795 provides that whenever, "in the interests of the national defense," the President designates certain military and naval installations or equipment "as requiring protection against the general dissemination of information relative thereto," it is unlawful to make any "photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installations or equipment" without the permission of the commanding officer. Section 797 makes it a crime to reproduce or publish any such photographs, etc. without obtaining the permission of the commanding officer unless it is clearly indicated on the photograph, picture, etc. that it has been censored by the proper military authorities.

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25 Sections 795 and 797 were originally enacted in 1938. Act of January 12, 1938, c.2, §§ 1, 3, 4, 5 Stat. 3, 4.

Although sections 795 and 797 are among the most clearly articulated of the provisions of the Espionage Act, the executive order currently in effect that enumerates those military and naval installations and equipment requiring protection goes far beyond what the statute envisions. That order, Executive Order No. 10104, 15 F.R. 597, also issued by President Truman, essentially designates all military installations and equipment that are classified as those requiring protection against the dissemination of information. Thus, no photograph of a classified military installation can presumably be published consistent with section 797 "without first obtaining permission of the commanding officer" unless the photograph bears a legend indicating that it has been "censored." Notably the executive order also purports to designate all "official military, naval or air-force documents" that are marked "top secret," "secret," "confidential" or "restricted" as "requiring protection against the general dissemination of information relative thereto." If Executive Order 10104 is valid in this respect (which seems dubious in light of the statutory language), its effect, together with section 797, would make criminal the publication of any classified military document as long as it contained the appropriate legend and did not indicate that it had been censored. No intent to injure the United States is required. The penalty for violating section 797 is a fine, imprisonment up to one year or both.

There have been no reported cases testing the validity of the scope of Executive Order No. 10104. Nor have sections 795 and 797 themselves been the focus of judicial opinions.[26]

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26 A statute substantially similar to § 795 was passed at the outset of World War II and prohibits, among other things, the photographing of any military installation "or other places used for national defense purposes by the War or Navy Departments" within the territory or jurisdiction of the United States (whether classified or not) and the photographing of any equipment or any other property located within any such installation

Footnote continued on next page.

18 U.S.C. § 798: "Disclosure of Classified Information"

On June 7, 1942, the Chicago Tribune published a front-page story reporting on the Battle of Midway, one of the U.S. Navy's most important victories in the Pacific theater and a turning point in the war against Japan. The article was headlined "Navy Had Word of Jap Plan to Strike at Sea."[27] It didn't require a savvy reader to infer from the article that the success of the military effort was attributable, at least in part, to the fact that the United States had broken Japanese communications codes. That fact had never been reported and was, to say the least, a fact that the U.S. government was attempting to keep quite close to Uncle Sam's vest.[28] President Roosevelt was reportedly so angry about the report that he threatened to send Marines to occupy the Tribune's offices. A grand jury was convened in Chicago to consider an indictment against the newspaper's managing editor and its naval correspondent under the Espionage Act.[29]

Footnote continued from previous page.

(whether classified or not). *See* 50 U.S.C. App. § 781, *et seq*. Whether the statute remains in effect today is in doubt. By its terms, it was to have expired six months after the termination of the national emergency declared by President Truman in 1950. As noted above, that state of emergency has never technically been "terminated" although all executive powers conferred by reason of it clearly have been. *See* n. 22, *supra.*

27 *See* JOSEPH E. PERSICO, ROOSEVELT'S SECRET WAR: FDR AND WORLD WAR II ESPIONAGE (2001) ("ROOSEVELT'S SECRET WAR") at 188-190; Dina Goren, *Communication Intelligence and the Freedom of the Press: The* Chicago Tribune*'s Battle of Midway Dispatch and the Breaking of the Japanese Naval Code*, 16 Journal of Contemporary History 663-90 (1981) ("Goren").

28 The Chicago Tribune's report was written by, but not attributed to, its naval correspondent, Samuel Johnston. Johnston reportedly came upon the information by peeking at some confidential dispatches while on board the USS Barnett. Goren at 674-76.

29 ROOSEVELT'S SECRET WAR at 189-90; Goren at 665.

If a similar scenario were played out today, the Justice Department would need look no further than 18 U.S.C. § 798.[30]

Notwithstanding its misleadingly broad title, section 798 prohibits the publication or disclosure of classified information concerning codes, cryptographic systems and communications intelligence systems. Whatever else can be said of section 798, its effort to achieve the kind of clarity one would hope to expect from statutes dealing with such serious matters is refreshing even if the effort was not altogether successful. Subsection (a) of the statute provides:

> (a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—
>
> (1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or
>
> (2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or
>
> (3) concerning the communication intelligence activities of the United States or any foreign government; or
>
> (4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—
>
> Shall be fined under this title or imprisoned not more than ten years, or both.

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30 Section 798 was enacted in 1950, just shortly before the amendments to §§ 793 and 794 were passed. Pub. L. No. 81-513, 64 Stat. 159.

18 U.S.C. § 798(a).[31] The statute applies to any willful publication; no intent to injure the United States is required. Note that the statute applies not only to codes, cryptographic systems and communications intelligence activities of the United States but also those of "any foreign nation."

The protection of codes and coded matter is also the subject of 18 U.S.C. § 952 which prohibits government employees from publishing or furnishing "to another" any "official diplomatic code or any matter prepared in any such code." Government employees are also broadly prohibited from communicating any classified information of *any* kind to an agent or representative of a foreign government. *See* 50 U.S.C. § 783. In 1982, the interdepartmental group chaired by Justice Department Deputy Assistant Attorney General Richard Willard opined that it was "unlikely that [section 783] would be construed to apply to unauthorized disclosures of classified information to the media, even though the information could find its way into the hands of an agent of a foreign government or a member of a communist organization as a consequence of its publication." *Willard Report*, *supra* n. 16 at 171.

There have been numerous other efforts throughout the years to criminalize the leaking of classified information of a sort far beyond that identified in section 798. The most recent effort was that mounted as part of the Intelligence Authorization Act for Fiscal Year 2001. That Act, passed by both houses of Congress, contained a provision, section 304, that would have prohibited all present and former government employees from disclosing any information

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31 The statute goes on to define "classified information," "code, cipher and cryptographic system," "foreign government," "communication intelligence" and "unauthorized person." *See* 18 U.S.C. § 798(b). The statute also contains a detailed forfeiture provision. *See id*., § 798(d).

that is classified to anyone not authorized to have access to such information. Intelligence Authorization Act for Fiscal Year 2001, H.R. 4392, 106th Cong. § 304 (2000). Media organizations and civil rights groups roundly criticized the provision and the Act was vetoed by President Clinton because of it. (It was later reintroduced and enacted without the offending section.).

The issue may well resurface soon. On December 28, 2001 the Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 310, 115 Stat. 1394 (2001) was enacted requiring the Attorney General, in consultation with other heads of federal agencies, to conduct a comprehensive review of all current laws and procedures to determine whether they are adequate to protect against the leaking of classified information. In response to the legislation, Attorney General Ashcroft announced the formation of an inter-agency task force to conduct that review; it will report back to Congress no later than May 1, 2002. The task force will study, among other things, whether new federal legislation is needed to prohibit the disclosure of classified information.

As for the effort to prosecute the Chicago Tribune, it never came to fruition. After the grand jury had been convened to consider indictments, the Navy reversed course and declined to cooperate, fearing that the prosecution would only serve further to publicize sensitive information. As it turned out, the Tribune was apparently not on the preferred reading list for Japanese military commanders. Japan never learned of the disclosure.[32] But in the era of the internet . . .

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32 ROOSEVELT'S SECRET WAR at 190; Goren at 667-68.

50 U.S.C. § 421 *et seq*.: Intelligence Identities Protection Act

The first American casualty of our nation's war on terror was Johnny Micheal Spann, a CIA officer killed during the uprising of Taliban prisoners outside Mazar-e Sharif. In an uncharacteristic move apparently prompted by the numerous press reports about his death, the CIA promptly released his name and confirmed his relationship with the agency. His identity was widely reported. The CIA's disclosures made it unnecessary for media lawyers to dust off their copies of the Intelligence Identities Protection Act ("IIPA") but it remains a statute that has particular relevance during a war on terror.[33]

50 U.S.C. § 421 is designed to protect against the disclosure of information that reveals the identity of covert agents. Sections (a) and (b) prohibit those having authorized access to classified information from disclosing a covert agent's identity or information sufficient to identify a covert agent. Section (c), which is not so limited, provides:

> (c) Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined under Title 18, or imprisoned not more than three years or both.

50 U.S.C. § 421(c).

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33 The Intelligence Identities Protection Act was passed in 1982. Pub. L. No. 97-200, 96 Stat. 122.

It is a defense to a prosecution under the statute if, before the commission of the offense, the United States "has publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution." 50 U.S.C. § 422.

Unlike the Espionage Act, the IIPA contains a detailed definitional section. The term "disclose" as used in the statute means "to communicate, provide, impart, transmit, transfer, *publish* or otherwise make available." 50 U.S.C. § 426(3) (emphasis added). A covert agent is:

- a present or retired officer or employee of an intelligence agency (or a member of the Armed Forces assigned to duty with an intelligence agency) whose identity as such is classified *and* who is serving outside the United States or has within the last five years;
- a United States citizen whose intelligence relationship with the United States is classified and either (a) resides and acts outside the United States as an agent of, informant or source of operational assistance to an intelligence agency or (b) acts as an agent of or an informant to the foreign counterintelligence or foreign counterterrorism components of the FBI, or;
- an individual (other than a United States citizen) whose past or present intelligence relationship with the United States is classified *and* who is a present or former agent of, or informant or source of operational assistance to an intelligence agency.

50 U.S.C. § 426(4). For purposes of the Act, the term "intelligence agency" means the CIA, a foreign counterintelligence component of the Department of Defense or the foreign counterintelligence or foreign counterterrorism components of the FBI. *Id*. § 426(5). A "pattern of activities" is defined as "a series of acts with a common purpose or objective." *Id*. § 426(10).

Not surprisingly the IIPA was extremely controversial and hotly debated at the time it was proposed. The statute was characterized by Professor Philip Kurland as "the clearest

violation of the First Amendment attempted by Congress in this era"[34] and by Professor Thomas Emerson as "a classic example of an official secrets act" which "would seriously curtail freedom of expression in the United States and violates the constitutional right of freedom of speech and of the press as embodied in the First Amendment."[35]

Doubts as to section 421(c)'s constitutionality repeatedly surfaced in the House and Senate during the more than two years that various versions of this legislation were debated. *See, e.g.*, House Select Comm. on Intelligence, Intelligence Identities Protection Act, H.R. Rep. No. 97-221, 97th Cong., lst Sess. 6 (1981) ("The Committee recognizes fully that the bill's proscriptions operate in an area fraught with first amendment concerns"); Senate Judiciary Comm., Intelligence Identities Protection Act, S.Rep. No. 96-990, 96th Cong., 2d Sess. 6, 18 (1980) (proposing revisions to [the section that became 421(c)] and amendments to other sections, which were not adopted, "to deal with the serious constitutional objections to the bill" and "to ensure that the bill would not be facially unconstitutional").

Individual Senators and Congressmen who strongly supported the general goals of the IIPA expressed serious reservations concerning section 421(c), recognizing that it "falls within a questionable area of constitutional law"[36] and might not "pass constitutional muster."[37]

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34 Letter from Professor Philip B. Kurland University of Chicago Law School, to Senator Edward M. Kennedy dated Sept. 25, 1980, *reprinted in* 126 CONG. REC. 28,068 (Sept. 30, 1980).

35 Letter from Professor Thomas Emerson, Yale University Law School, to Senator Edward M. Kennedy, dated Sept. 5, 1980, *reprinted in* 126 CONG. REC. 28,066 (Sept. 30, 1980). *See also* Letter from Professor Laurence H. Tribe Harvard University Law School, to Senator Edward M. Kennedy dated Sept. 8, 1980, *reprinted in* 126 CONG. REC. 28,065-28,066 (Sept. 30, 1980).

36 128 CONG. REC. 4,493 (March 17, 1982) (statement of Senator Mitchell).

As Senator Moynihan stated on the floor of the Senate after passage of an amendment eliminating the intent requirement for criminal sanctions under the statute:

> I think we are errantly and somewhat arrogantly crossing a constitutional boundary. We are trivializing some of the most revered and protected and depended on constitutional protections that we have known in our country, the first amendment to our constitution. . . . I happen to believe that the amendment we adopted this afternoon is unconstitutional. . . . This cannot be but a mournful and ominous event.

128 CONG. REC. 4,502 (March 17, 1982). Similarly, as Congressman Edwards of California stated on the floor of the House:

> [S]ection [421(c)] of the bill, however well intentioned in its effort to prevent exposure of our covert agents, tramples on protected first amendment freedoms. For the first time in American history, the publication of information obtained lawfully from publicly available sources would be made criminal.
>
> [I]t is my firm belief, which is supported by many noted constitutional experts, that no amount of tinkering can rehabilitate a law which criminalizes constitutionally protected freedoms of speech, press, and political expression.

127 CONG. REC. 21,732 (Sept. 23, 1981).

The most significant problem with section 421(c) is that it does not predicate liability on either access to or publication of classified information.[38] It prohibits disclosure of any information identifying an individual as a "covert agent" by any person who makes such a

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37 Senate Judiciary Comm., Intelligence Identities Protection Act, S.REP. NO. 96-990, 96th Cong., 2d Sess. 29 (1980) (additional views of Senator Kennedy).

38 In a letter to the Senate Judiciary Committee, 51 law professors expressed their view that for this reason alone section 421(c) was unconstitutional. See 126 CONG. REC. 28,065 (Sept. 30, 1980) ("We believe that [the provision ultimately codified as § 421(c)], which would punish disclosure of the identity of covert CIA and FBI agents derived solely from unclassified information, violates the First Amendment").

disclosure "in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States. . . ." On its face, the statute would arguably make it a crime under many circumstances for a print or broadcast journalist to disclose any information that identifies an individual as a "covert agent". That the statute was not intended to apply to ordinary news reporting finds force in the pattern requirement and the legislative history that gave rise to it.

The IIPA was passed in response to a concerted campaign by Philip Agee (and others) to reveal the identities of U.S. intelligence agents employed by the CIA. Agee was, in the view of Congress, simply "naming names." In order to diffuse the firestorm that the proposed bill had generated, the pattern requirement emerged as a means for distinguishing between the conduct in which Agee engaged and, in the words of one legislative counsel, the conduct of "reputable journalists." House Judiciary Comm. Hearings, 96th Cong., 2nd Sess. 25 (1980) (statement of Frederick P. Hitz, Legislative Counsel, Central Intelligence Agency).

The House Conference Report, for example, states:

> The standard adopted in [section 421(c)] applies criminal penalties only in very limited circumstances to deter those who make it their business to ferret out and publish the identities of agents. At the same time it does not affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs or a private organization's enforcement of its internal rules. . .
>
> In order to fit within the definition of "pattern of activities," a discloser must be in the business, or have made it his practice, to ferret out and then expose undercover officers or agents where the reasonably foreseeable result would be to damage an intelligence agency's effectiveness. Those who republish previous disclosures and critics of U.S. intelligence would all stand beyond the reach of the law if they did not engage in a pattern of activities intended to identify and expose covert agents.

> A journalist writing stories about the CIA would not be engaged in the requisite "pattern of activities," even if the stories he wrote included the names of one or more covert agents unless the government proved that there was an intent to identify and expose agents. To meet the standard of the bill, a discloser must be engaged in a purposeful enterprise of revealing identities. He must, in short, be in the business of "naming names."

House Conference Report 97-580 at 172, 174 (reprinted in 1982 U.S.C.C.A.N. 170 (1982)).

The report went on to give specific examples of activities that would not be covered by the Act:

- "an effort by a newspaper intended to uncover CIA connections with it, including learning the names of its employees who worked for the CIA or an effort by a university or a church to learn if any of its employees had worked for the CIA. (These are activities intended to enforce the internal rules of the organization and not identify and expose CIA agents.)"
- "an investigation by a newspaper of possible CIA connections with the Watergate burglaries. (This would be an activity undertaken to learn about the connections with the burglaries and not to identify and expose CIA agents.)"
- "an investigation by a scholar or reporter of the Phoenix program in Vietnam. (This would be an activity intended to investigate a controversial program and not to name names.)"

Id. at 174.

There have been no reported prosecutions under the IIPA in the close to 20 years that it has been in effect and no decisions of any significance interpreting it. In the end, as is true of so many of these laws, the statute says more on its face than it is said to say. The CIA's disclosures notwithstanding, there can be no serious argument that reporting on the death of Johnny Micheal Spann could trigger liability under the IIPA.

42 U.S.C. § 2011 *et seq*.: The Atomic Energy Act

The Atomic Energy Act of 1954 created a comprehensive scheme to ensure against the disclosure of data concerning atomic weaponry and "special nuclear material." The Act broadly prohibits anyone having possession of "Restricted Data" (whether lawfully or unlawfully) from communicating or disclosing such data to any person "with intent to injure the United States or with intent to secure an advantage to any foreign nation." 42 U.S.C. § 2274(a). The Act also prohibits the communication or disclosure of "Restricted Data" to any person "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation." 42 U.S.C. § 2274(b). Receiving "Restricted Data" or tampering with it is also criminal if done with the "intent to injure the United States or with intent to secure an advantage to any foreign nation." 42 U.S.C. §§ 2275 and 2276. "Restricted Data" is defined as all data concerning

- the design, manufacture, or utilization of atomic weapons
- the production of "special nuclear material" (including plutonium and uranium); or
- the use of "special nuclear material" in the production of energy

but does not include data "declassified" or "remove[d] from the Restricted Data category pursuant to [42 U.S.C. § 2162]." 42 U.S.C. § 2014. On the face of the statute "Restricted Data" is not limited to data generated by or for the government. Whether the legislative history can fairly be read as evidencing Congress' intent to reach private data is a subject of some debate. *See* Mary M. Cheh, *The* Progressive *Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls*, 48 GEO. WASH. L. REV. 163 (1980). The government has consis-

tently taken the position that the Act applies to both government data and private data alike. *Id*. at 176-79.

The Act carries severe criminal penalties. Violators of sections 2274(a), 2275 or 2276 can be imprisoned for life; violators of section 2274(b) can be sentenced to imprisonment for ten years. The Act contains its own provision specifically permitting the entry of injunctions to prevent disclosure of information protected by the Act. 42 U.S.C. § 2280.

According to Edgar and Schmidt, the legislative history sheds no light on the issue of whether Congress intended that the Act could be used to enjoin press publications.[39] In the only reported opinion on the subject, a federal district court concluded that it could. *United States* v. *Progressive, Inc*., 467 F. Supp. 990 (W.D. Wis.), *reh'g denied*, 486 F. Supp. 5 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

The Progressive case involved the efforts of The Progressive magazine to publish an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It." Although the district court declined to characterize the article as a "do it yourself" guide to constructing a hydrogen bomb, it was said to be pretty close. Significantly, the author of the article maintained that all the information on which it was based was in the public domain. The government countered that while some of the data was in the public domain, the article contained a "core of information that had never been published." *Progressive*, 486 F. Supp. at 993.[40] When The Pro-

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39 EDGAR & SCHMIDT I at 1075.

40 The district court's subsequent opinion on rehearing would reveal that much of that "core" of data was contained in two reports that the government had declassified; those reports that had been available in the public reading room at Los Alamos for a number of years. The government insisted that the reports had

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gressive declined the government's request to voluntarily refrain from publishing the article, the United States commenced an action to enjoin the publication urging that it would violate section 2274(b).

The district court reluctantly granted the government's motion for a preliminary injunction and enjoined The Progressive from publishing so much of the article as included the sensitive data. In the course of its decision, the district court specifically found that the Atomic Energy Act was not vague or overbroad "as applied to this case." *Progressive*, 467 F. Supp. at 994. The court was also "[c]onvinced that the terms used in the statute — 'communicates, transmits or discloses' — include publishing in a magazine." *Id*.

The court was fully aware that its injunction was likely "the first instance of prior restraint against a publication in this fashion in the history of this country," *id*. at 996, but concluded that the case fell within the exception envisioned in *Near* v. *Minnesota*, 283 U.S. 697 (1931). The court quoted from *Near*:

> "When a nation is at war many things that might be said in times of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."

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> been "erroneously declassified" and that when the error was discovered, the information was promptly removed from the public reading room. United States v. Progressive, 486 F. Supp 5, 7 (W.D. Wis. 1979).

Progressive, 467 F. Supp. at 992 (quoting *Near*, 283 U.S. at 716). According to the district court because the risk of harm that might be caused by the disclosure was so great and because suppression of the information would not impede the defendants from stimulating public debate about the risks of nuclear armament, the *Near* test had been met. *Progressive*, 467 F. Supp. at 996.

Less than three months later, The Progressive returned to the district court urging that the injunction should be dissolved as ineffective on the ground that the formula had been disclosed in other publications in the interim. The district court declined to do so. But by the time the case made its way to the Seventh Circuit, there was no longer any debate that the "secret" was out. The Court of Appeals dismissed the appeal without opinion; the propriety of the issuance of the injunction was mooted.

The Progressive case was the first and only reported effort by the government to enjoin press publication under the authority of the Atomic Energy Act.[41]

18 U.S. § 641: Theft or conversion of government property

No article about national security statutes and the press would be complete without at least a nod to section 641. Although the statute is not in any way limited to matters of national security, it is often at issue in such cases. Section 641 imposes criminal liability on any

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41 That is not to say that the government has never used its formidable powers of persuasion to stop the publication of information it viewed as too sensitive for print. In 1950, shortly before Scientific American magazine was about to publish an article on the hydrogen bomb, the Atomic Energy Commission obtained and reviewed an advance copy of the article and urged Scientific American to delete certain material addressed in it. Scientific American reluctantly complied. It has been reported that all copies of the original article and the type and printed plates were destroyed. Cheh, *supra*, at 176.

person who "embezzles, steals, purloins or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record . . . or thing of value of the United States or of any department thereof . . .." The statute also criminalizes the receipt or retention of any such record or thing if the recipient intends to "convert it to his use or gain," knowing the same to have been stolen or converted. The statute contains no specific requirement of criminal intent but the Supreme Court has made clear that a conviction under section 641 cannot be sustained unless criminal intent is shown. *Morissette v. United States*, 342 U.S. 246, 263 (1952).[42] Violators may be fined or imprisoned not more than ten years or both unless the record or thing has a value of $1,000 or less, in which case the term of imprisonment can be no more than a year.

Samuel Morison was convicted of violating section 641 (as well as sections 793(d) and (e)). The statute was also at issue in the aborted prosecution of Daniel Ellsberg and Anthony Russo for their alleged theft of The Pentagon Papers.[43] In an *amicus* brief filed by numerous media organizations in the *Morison* case, it was urged that section 641 could not be held to apply to Morison's conduct on the ground that the statute, if properly viewed, required "a permanent or substantial deprivation of identifiable property."[44] The Fourth Circuit rejected the argument (or, more accurately, dodged the argument) on the ground that Morison did take tangible property (the three photographs and two other government reports discovered at his home).

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42 Thus, a disclosure of information that is inadvertent, negligent or reckless would fail to trigger liability under § 641.

43 *See* Nimmer, *supra*, n. 5.

44 *See* Morison, 844 F.2d at 1077.

"Whether pure 'information' constitutes property which may be subject to prosecution under section 641" was therefore "not involved" in *Morison* in the view of the Court of Appeals.

The issue is a troubling one. If information alone is a "thing of value" under section 641, the statute could be invoked to criminalize conduct far beyond that prohibited by any of the statutes discussed above (including sections 793(d) and (e)). Consider the defendant who "conveys" classified information "without authority." Assume the information has nothing to do with communications intelligence systems, that the defendant has no intent to injure the Unites States or advantage a foreign nation and that the information is not reflected in a document. Can liability be sustained under section 641 where it could not be sustained under statutes specifically designed to protect against the disclosure of sensitive security information?

The most articulate answer to this question is found in Judge Winter's opinion in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980):

> [B]ecause the statute was not drawn with the unauthorized disclosure of government information in mind, § 641 is not carefully crafted to specify exactly when disclosure of government information is illegal. The crucial language is "without authority." The precise contours of that phrase are not self-evident. This ambiguity is particularly disturbing because government information forms the basis of much of the discussion of public issues and, as a result, the unclear language of the statute threatens to impinge upon rights protected by the first amendment. Under § 641 as it is written, no precise standard controls the exercise of discretion by upper level government employees when they decide whether to forbid or permit the disclosure of government information. . . . Consequently upper level government employees might use their discretion in an arbitrary fashion to prevent the disclosure of government information; and government employees, newspapers, and others could not be confident in many circumstances that the disclosure of a particular piece of government information was "authorized" within the meaning of § 641. Thus, the vagueness of the without authority standard could pose a serious threat to public debate of national issues, thereby bringing the constitutional validity of § 641 into question because of its chilling effect on the exercise of first amendment rights.

Truong Dinh Hung, 629 F.2d at 924-25 (Winter, J.) (internal citations omitted).[45] For this reason and because section 641 would otherwise "disturb the structure of criminal prohibitions Congress has erected to prevent some, and only some, disclosures of classified information" *id.*, at 927, Judge Winter concluded that section 641 could not be constitutionally be applied to the unauthorized disclosure of classified information. *Id*.[46] To conclude otherwise would transform the statute into an Official Secrets Act so sweeping as to rival Great Britain's.[47]

Apart from *Morison*, section 641 has never been applied in the context of the unauthorized dissemination of information to the press and it has never been applied to punish a member of the press for disseminating "unauthorized" government information to the public. The most closely analogous case in the press context is *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969). There, former members of Senator Thomas Dodd's staff surreptitiously copied documents from the Senator's files and furnished the copies to journalists Drew Pearson and Jack Anderson who wrote a series of articles exposing Senator Dodd's misdeeds. Dodd brought a civil action for invasion of privacy and conversion. On the conversion issue, the Court of Appeals held that the mere copying of the documents did not give rise to liability for conversion as

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45 Judge Winter's views on § 641 were not joined by the other members of the panel who found it unnecessary to consider the § 641 issue. Truong Dinh Hung, 629 F.2d at 931.

46 The majority of the circuit courts that have weighed in on the question of whether information alone is a thing of value under section 641, albeit in other contexts, have not adopted Judge Winter's view. *See* United States v. Fowler, 932 F.2d 306 (4th Cir. 1991); United States v. Jeter, 775 F.2d 670, 679-82 (6th Cir. 1985); United States v. Girard, 601 F.2d 69 (2d Cir. 1979). However, the Ninth Circuit has squarely held that information is not a thing of value under section 641. United States v. Tobias, 836 F.2d 449, 450-51 (9th Cir. 1988).

47 *See* Harold Edgar and Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 401-06 (1986).

Senator Dodd was "not substantially deprived of his use of [the documents]" and that the information contained in the documents was not protectable property. The *Morison* court dismissed the argument that *Pearson* was persuasive on the issue of the applicability of section 641 to Morison's conduct on the ground that *Pearson* was simply a case about "copying."

On the issue of "copying," can liability attach under section 641 if government documents are copied on government-owned copiers? Outside the press context it has been held that the use of a government-owned copying machine to make copies of government documents is itself sufficient to invoke liability under section 641. *See U.S. v. Hubbard*, 474 F. Supp. 64 (D.D.C. 1979). The government, after all, owns the paper.

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