THE WAR ON SPEECH IN THE WAR ON TERROR: AN EXAMINATION OF THE ESPIONAGE ACT APPLIED TO MODERN FIRST AMENDMENT DOCTRINE

INTRODUCTION

In 1999, United States Defense Department analyst Larry Franklin ("Franklin") and political lobbyists Steven Rosen ("Rosen") and Keith Weissman ("Weissman") forged a relationship that has led to their indictment in federal court.[1] Franklin, a specialist on Iran, discovered detailed classified information about United States foreign policy in Iran and conveyed it to Rosen and Weissman, two senior staff members at the American Israel Public Affairs Committee ("AIPAC"), a lobbying organization for issues of interest to Israel, especially United States foreign policy in the Middle East.[2] At the time, Rosen was AIPAC's director of foreign policy issues and Weissman was a senior Middle East analyst.[3]

In August 2004, CBS News reported that the government was investigating AIPAC's activities, specifically the actions of Rosen and Weissman.[4] Rosen and Weissman were subsequently dismissed from their jobs.[5] On January 20, 2006, in *United States v. Franklin,* Franklin pled guilty to a charge of conspiracy to communicate national defense information to those not entitled to receive it.[6] He was sentenced to twelve years and seven months of prison.[7]

Rosen and Weissman were subsequently charged with conspiring to transmit information relating to the national defense to those not lawfully entitled to receive it under Section

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1 U.S. v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. Aug. 9, 2006).

2 *Id.* at 607; *see also* James Traub, *Does Abe Foxman have an Anti-Anti-Semite Problem?* N.Y. TIMES, Jan. 14, 2007, § 6 (Magazine), at 30 (describing AIPAC as "the hard-line and notoriously successful pro-Israel lobby").

3 *Rosen,* 445 F. Supp. 2d at 607-8.

4 Lesley Stahl, *FBI Probes Pentagon Spy Case* (CBS News television broadcast Aug. 27, 2004), *available at* http://www.cbsnews.com/stories/2004/08/27/eveningnews/main639143.shtml.

5 Ron Kampeas & Matthew E. Berger, *A Big Chill in D.C.? Indictment of Ex-AIPAC Staffers Triggers Anxiety Among Lobbyists,* JEWISH WEEK, Aug. 12, 2005, *available at* http://www.thejewishweek.com/news/newscontent.php3?artid=11252 (describing Rosen as "a fearsome legend in Washington for decades as AIPAC's mastermind and chief disciplinarian" and describing Weissman as "one of the capital's most respected Iran experts"); *see also The Forward 50: Law & Order – Jack Abramoff, Steven Rosen & Keith Weissman,* FORWARD, Nov. 10, 2006.

6 U.S. v. Franklin, No. 1:05CR225, 2005 WL 1501600 (E.D. Va. May 26, 2005); Gabriel Schoenfeld, *Has the* New York Times *Violated the Espionage Act?* COMMENT., (Mar. 2006) (Franklin has been promised leniency for cooperating in an FBI investigation against Rosen and Weissman; his sentence will be reviewed after the trial of Rosen and Weissman.).

7 Scott Shane & David Johnston, *Pro-Israel Lobbying Group Roiled by Prosecution of Two Ex-Officials,* N.Y. TIMES, Mar. 5, 2006, at 1.

793 of the Espionage Act of 1917 ("The Act" or "The Espionage Act").[8] The government alleges that Rosen and Weissman unlawfully shared the information with foreign diplomats and a journalist.[9] Judge Thomas Ellis III ("Judge Ellis") of the Eastern District of Virginia is presiding over the case.[10]

On August 9, 2006, in *United States v. Rosen*, Judge Ellis denied Rosen's and Weissman's motions to dismiss the indictment on grounds that the Espionage Act does not abridge their First Amendment right to free speech.[11] His opinion opened the door for the government to use the Espionage Act to prosecute civilians who obtain or transmit access to national-defense information. The trial is scheduled for June 4, 2007.[12]

This case reaches uncharted legal territory because it is the first time a court has held that Section 793 of the Espionage Act applies to private citizens as distinguished from government employees with access to classified government information. In the past, Section 793 of the Espionage Act has been used primarily to prosecute those who had committed classic espionage by providing foreign countries with government secrets.[13] This may no longer be the case. In his January 2006 decision, Judge Ellis wrote, "both common sense and the relevant precedent point

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[8] *Id.* The operative statute at issue in defendant's constitutional challenge is codified at 18 U.S.C. § 793(e) (2007) and provides, in relevant part:

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

[9] *Rosen*, 445 F. Supp. 2d at 608-13. Rosen is also charged with aiding and abetting the transmission of classified information relating to the national defense to one not entitled to receive it.

[10] *Id.* at 602.

[11] *Id.*

[12] Josh Gerstein, *A Clash Looms on Secrecy in AIPAC Spy Case*, N.Y. SUN, Mar. 14, 2007, *available at* http://www.nysun.com/article/50392.

[13] Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. LAW & POLICY 479 (2006).

persuasively to the conclusion that the government can punish those outside of the government for the unauthorized receipt and deliberate retransmission of information relating to the national defense."[14] The outcome of the case could have serious implications for anyone who engages in identical behavior as the AIPAC lobbyists.

This Note analyzes whether it is Constitutional for the government to use the Espionage Act to prosecute private citizens who receive classified information from the government. It also discusses the indeterminacy of today's war on terror and the implications that a favorable outcome for the government in the AIPAC case would have in a war without a clear end in sight. Further, as the Espionage Act was drafted before the Supreme Court had significantly interpreted the First Amendment, this Note reveals that the Act does not incorporate any of the Constitutional safeguards that exist in our modern day doctrine.

Part I discusses the text and legislative history of the Espionage Act, along with the case law that has applied it. Part II characterizes our current situation as an indeterminate war on terror and asserts that if we lose our civil liberties today, we will have lost them for our generation's lifetime. Part III discusses the impact of modern First Amendment doctrine on prosecuting a private citizen for obtaining classified information from the government in a case like the AIPAC case. Part IV makes the critical distinction between a government employee from a private citizen in the context of receipt and transmission of confidential information. Finally, this Note concludes that the Espionage Act should be revised and redrafted because it is unconstitutional as applied to the AIPAC lobbyists in this case.

I. APPLICATION OF THE ESPIONAGE ACT IN THE UNITED STATES

A. *Text and Legislative History of the Espionage Act*

Congress passed Section 793 of the Espionage Act of 1917 shortly after the United States entered World War I.[15] The Act made it a crime for any person to "obtain[] 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."[16] It was

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[14] *Rosen*, 445 F. Supp. 2d at 637.

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

[16] 18 U.S.C. § 793.

punishable by a maximum $10,000 fine and ten years in prison.[17]

President Woodrow Wilson urged Congress to pass the Act because he feared that widespread dissent over the war constituted a palpable threat to American victory.[18] The bill's purpose was "to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, [and] to punish espionage."[19]

There is a stark discrepancy between the Act's text and its legislative intent. Scholars have commented that Section 793, in particular, is "the most confusing and complex of all the federal espionage statutes."[20] The Act has been criticized because of its incomprehensible and vague standards that do not provide the courts with adequate tools to forge new rules around the disclosure of national secrets.[21]

In fact, Congress enacted a version of the Espionage Act that was much less repressive than the one the Wilson administration initially proposed.[22] President Wilson ultimately lost his plea for broad control over information that would give the President full power to restrict the divulgence of government secrets and the public reporting of war-related matters.[23] The Espionage Act's legislative history indicates that Congress did not intend for broad prohibitions on the dissemination of national defense information, even in wartime.[24] One interpretation is that Congress intended Section 793 to punish spies in the classic sense — and not to target lobbyists or journalists engaging in speech that is protected by the First Amendment.

Congress, moreover, did not intend to apply the Act against members of the press.[25] The Department of Justice drafted a "press censorship" provision in the bill that would have declared it unlawful for any person in a time of war to publish any information that the President declared to be "of such character that it is or might be useful to the enemy."[26] The provision added that "nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism of the acts or policies of the

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17 *Id.*

18 Edgar & Schmidt, *supra* note 15, at 997.

19 Espionage Act of 1917, H.R. 65, 65th Cong. (1st Sess. 1917).

20 Edgar & Schmidt, *supra* note 15, at 998.

21 *Id.* at 934.

22 Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 345-54 (2003).

23 *Id.*

24 Edgar & Schmidt, *supra* note 15, at 946.

25 *Id.*

26 As coined in GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 147 (2004) (hereinafter STONE, PERILOUS TIMES).

Government."[27] This provision provoked a hostile response from members of the press, who argued that it gave the President too much authority to control the dissemination of information about the current war.[28] After much Congressional debate, the proposed "press censorship" provision was defeated.[29]

Congress was not only concerned with freedom of the press, but also with the idea that the public should be informed about national defense matters in wartime. One Senator stated that it was important to distinguish:

> between the normal, innocent habits of our people and the designing conduct of the spy. It is a very reprehensible thing to draw a statute in such ways that it can be used to prevent publicity in a republican form of government, that it can be used in such ways to punish a citizen who is doing a patriotic thing in proclaiming that his country is undefended, and pointing out where her defenses should be strengthened.[30]

Congress has repeatedly struggled with a method to protect military secrets from spies without imposing broad prohibitions that would chill the speech and actions of United States citizens who seek information about national security.[31] In 1950, Congress amended Section 793 to cover verbal transmissions.[32] In doing so, Attorney General Clark told Congress that the statute was limited, in that "nobody other than a spy, saboteur or other person who would weaken the internal security of the nation need have any fear of prosecution."[33]

B. *Enforcement of the Espionage Act and the Development of First Amendment Doctrine*

When enforcing the Espionage Act, the Court must be careful not to violate the First Amendment rights of United States citizens. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[34] While the Supreme Court has held that freedom of

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27 H.R. 29, 65th Cong. (1st Sess. 1917), *in* 55 CONG. REC. H1695 (daily ed. May 2, 1917).

28 Edgar & Schmidt, *supra* note 15, at 946.

29 *See House Defeats Censorship Law by 184 to 144*, N.Y. TIMES, June 1, 1917, at A1 (stating that party lines were "shattered" in defeating the bill).

30 54 CONG. REC. H3593 (1917).

31 Edgar & Schmidt, *supra* note 15, at 939.

32 *Id.*

33 95 CONG. REC. H9749 (1949).

34 U.S. CONST. amend. I.

speech is not an absolute right,[35] protected speech is presumptively constitutional; the government may not regulate it absent a compelling state interest.[36]

Two doctrines apply to the question of whether the AIPAC lobbyists' speech is protected. The first is the "clear and present danger" test articulated by the Supreme Court in cases during and immediately after World War I.[37] The second is the "imminent danger test" articulated in 1969 when the United States was not at war.[38]

1. Convictions Upheld Under the Espionage Act: The Clear and *Present Danger Test*

The government first applied the Espionage Act to prosecute World War I dissenters for expressing allegedly disloyal or seditious speech that could incite others to act out against the government. These cases, decided in 1919, upheld the Act and its application to speech that was relatively ineffectual. In doing so, the Court articulated the "clear and present danger" test that stated:

> The question in every case is whether the words are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[39]

In *Schenck v. United States,* the Supreme Court upheld the conviction of the general secretary of the American Socialist Party for distributing 15,000 leaflets asserting that the war draft was unconstitutional.[40] The leaflets urged readers to assert their rights and not submit to intimidation.[41]

Even though the government produced no evidence that anyone actually resisted the draft in response to the dissenter's speech, the Court reasoned that speech must be scrutinized more carefully in wartime even if it would be protected "in ordinary times."[42] Justice Oliver Wendell Holmes believed that "the power [to punish speech] undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist in

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35 *See, e.g.,* Chaplinsky v. N.H., 315 U.S. 568, 571-2 (1942) (fighting words doctrine).
36 Sable Comm. of Cal. v. F.C.C, 492 U.S. 115, 126 (1989).
37 *E.g.,* Schenck v. U.S., 249 U.S. 47 (1919); Frohwerk v. U.S., 249 U.S. 204 (1919); Debs v. U.S., 249 U.S. 211 (1919).
38 Brandenburg v. Ohio, 395 U.S. 444 (1969).
39 *Schenck,* 249 U.S. at 52 (emphasis added).
40 *Id.* at 53.
41 *Id.* at 51.
42 *Id.* at 52.

other times."[43]

One week after *Schenck*, in *Frohwerk v. United States* and *Debs v. United States*, the Court upheld convictions under the Espionage Act for dissenting speech that criticized the war and the draft.[44] In *Frohwerk*, two publishers of a German newspaper were convicted for publishing articles that criticized the war.[45] In *Debs*, Socialist Party leader Eugene V. Debs was convicted for making a speech to a public assembly in Canton, Ohio, that included statements such as, "you need to know that you are fit for something better than slavery and cannon fodder."[46]

In both *Frohwerk* and *Debs*, Justice Holmes again applied the clear and present danger test and upheld the convictions, finding the speech unprotected because its purpose was to criticize war efforts.[47] While no proof was found that the speech in these cases was likely to invoke imminent, significant harm, the Court nonetheless convicted the speakers in the early days of the Espionage Act.[48] In the context of war time, the Court was willing to find that even mild speech without an incendiary purpose would pose a clear and present danger in the United States.

2. The Modernization of First Amendment doctrine: the Marketplace of Ideas

That same year, Justice Holmes famously articulated what became known as the Marketplace of Ideas theory in his dissenting opinion in *Abrams v. United States.* [49] In *Abrams*, he found a case that he reasoned did not meet the clear and present danger test.[50] A group of Russian immigrants circulated leaflets objecting to America sending troops to Europe after the Russian Revolution.[51] The Abrams Court upheld the speakers' convictions even though

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[43] *Id.* at 51. The Court gives great deference to Congress because it is wartime. *See e.g.*, Korematsu v. U.S, 323 U.S. 214 (1944) (upholding constitutionality of internment of Japanese-Americans because government claimed they were serious risk to national security based on their potential disloyalty; there was no evidence that these Japanese-Americans posed a threat to national security, yet the Court accepted the evacuation order because it was wartime.).

[44] *Frohwerk*, 249 U.S. at 210; *Debs*, 249 U.S. at 217.

[45] *Frohwerk*, 249 U.S. at 210.

[46] *Debs*, 249 U.S. at 214.

[47] *Id.* at 217; *Frohwerk*, 249 U.S. at 210.

[48] *Debs*, 249 U.S. at 214; *Frohwerk*, 249 U.S. at 210.

[49] Abrams v. U.S., 250 U.S. 616 (1919); *see also* Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping With Past and Current Threats to the Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 484 (2005). Holmes was in part influenced by correspondence with Judge Learned Hand, whom he met by chance on a train as each was traveling to his summer home in June of 1918. *See also* STONE, PERILOUS TIMES, *supra* note 26, at 198-201.

[50] *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting).

[51] *Id.* at 617.

their speech had nothing to do with the war; rather, they had encouraged resistance to general government operations unrelated to the Executive's war powers.[52]

In his dissent, Justice Holmes reasoned that the clear and present danger test was not met because the immigrants' opinions did not present any *immediate* danger to the American people.[53] He articulated what has become the Marketplace of Ideas theory:

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[54]

As it developed throughout the 20th century, the Marketplace of Ideas theory significantly shaped First Amendment doctrine.[55] This theory has received "prominent treatment in virtually every constitutional law textbook and has served as a clarion call for future courts grappling with important questions regarding the balancing of individual and societal rights."[56]

3. Brandenburg's Speech-Protective Imminent Danger Doctrine

By the 1960s, the Court articulated a more speech-protective approach at a time when the United States was not at war.[57] The Court realized that there are situations where an individual's rights to free speech, even where it incites other people to act illegally, may trump the government's interest in national security.

In *Brandenburg v. Ohio,* decided in 1969, the Court reversed a conviction of a Ku Klux Klan leader who participated in a KKK rally that included racist and anti-Semitic speech.[58] The Court articulated a more speech-protective standard because it required imminent harm and the speaker's intent to cause it.[59] In a per curiam opinion, the Court stated that the government may not use a state law to forbid incitement unless it produces or is likely to

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52 *Id.* at 622.
53 *Id.* at 628 (Holmes, J., dissenting).
54 *Id.*
55 Vincent Blasi, *Holmes and the Marketplace of Ideas,* 2004 SUP. CT. REV. 1.
56 Block, *supra* note 49, at 484.
57 Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine,* 27 STAN. L. REV. 719, 755 (1975).
58 Brandenburg v. Ohio, 395 U.S. 444 (1969).
59 *Id.*

produce *imminent* lawless action.[60]

Brandenburg took place when the United States experienced a time of peace. Thus, it is unclear whether *Brandenburg* overruled the 1919 clear and present danger cases in wartime. The present Court must determine whether *Brandenburg* is the new standard for wartime or whether it applies to give speech more protection only in peacetime.

4. The Pentagon Papers and Prior Restraint of Publishing Classified Information

In *New York Times v. United States*, or the Pentagon Papers case ("*Pentagon Papers*"), the Court in 1973 considered whether to preclude "inciteful" speech where the *New York Times* and the *Washington Post* published excerpts of a top secret Defense Department report about events in the Vietnam War.[61] The government argued that national security was at risk if the newspapers continued to publish the reports that contained classified information.[62]

In a brief per curiam opinion, the Supreme Court held that a court order preventing publication of the government report violated the First Amendment.[63] Prior restraints on speech pose a serious threat to the Constitution and are undesirable because they suppress speech and prevent it from entering the marketplace of ideas. In a decision with more written opinions than Justices on the bench, the Court declined to enforce a judicial order that would prevent publication of the remainder of the report.[64] Its decision rested on the government's failure to pinpoint specific materials in the Defense report that needed to be kept secret to preserve national security.[65]

In separate concurrences, Justices Marshall and White argued that the Court lacked any statutory authority to order an injunction on the press.[66] If Congress did not resolve the issue, the Court would not do so in its place. Justice Marshall reasoned that the Judiciary does not have the power to grant relief on separation of powers grounds because Congress declined to

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60 *Id.* at 447 (per curiam).

61 N.Y. Times v. U.S., 403 U.S. 713 (1973).

62 *Id.* at 718.

63 *Id.* at 714 (per curiam).

64 *Id.* Each Justice also wrote a separate concurrence or dissent for a total of ten opinions on varying grounds, including separation of powers and an individual's right to freedom of speech.

65 *Id.*

66 403 U.S. at 740 (Marshall, J., concurring); 403 U.S. at 730 (White, J., concurring).

prohibit the newspapers' behavior by statute.[67] He wrote: "Either the Government has the power under statutory grant to use traditional criminal law to protect the country, or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from the Court."[68]

Justice White concurred that the government had failed to meet its burden for prior restraint "at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances as these."[69] He reserved judgment on the question of whether the Act should be extended to the receipt of verbal information that relates to the national defense and the oral retransmission of that information by a third party who is not a government official.[70] Recent cases demonstrate that the answer to that question is no.[71]

The dissenting opinions in *Pentagon Papers*, written by Justices Blackmun and Harlan, urged the Court to allow prior restraint on publication until the Court could thoroughly review the material.[72] Both Justices offered strong separation of powers arguments, explaining that the Court owes great deference to the executive branch in foreign affairs matters relating to national security.[73]

5. The Aftermath of Pentagon Papers

The First Amendment doctrine has developed since *Pentagon Papers* in two significant ways. Government employees have fewer speech protections where they leak classified government information or speak about their employment. Where the government makes public delicate information that has value to the public, a newspaper may not be held liable for truthfully reporting that information.

After *Pentagon Papers*, the Court consistently rejected legislative efforts to punish private citizens for transmitting classified information where they were not governmental employees in a position of trust with the government and there was no allegation that they obtained the information through illegal means.[74] The government has not been successful in

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67 403 U.S. at 740 (Marshall, J., concurring).

68 *Id.*

69 *Id.* at 731 (White, J., concurring).

70 *Id.* at 738 n.9.

71 *See infra* Bartnicki v. Vopper, 532 U.S. 514 (2001).

72 403 U.S. at 759 (Blackmun, J., dissenting); 403 U.S. at 752 (Harlan, J., dissenting).

73 403 U.S. at 759 (Blackmun, J., dissenting); 403 U.S. at 752 (Harlan, J., dissenting).

74 *See, e.g.*, Landmark Comm., Inc., v. Va., 435 U.S. 829 (1978) (holding Virginia statute unconstitutional where it creates criminal liability for divulging or publishing

prosecuting alleged leaks by non-governmental employees because private citizens have no contractual or legal obligation to preserve classified information.

In contrast, the government has been successful at prosecuting former and current government employees for leaking information. For example, in *Snepp v. United States*, the Court held that the government could insist that Snepp, a former CIA agent, turn over a book that he wrote about Vietnam for prepublication review where there was a perception of a special need for government oversight of his writings as a government employee and he had signed a binding security agreement.[75] Even if Snepp had not signed an agreement, the Court said that "the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment."[76] The Court made this decision without any evidence that the information in Snepp's book would actually be damaging to national security.

Another example of a Supreme Court case where a government employee received limited First Amendment protections is *Haig v. Agee*.[77] Philip Agee, a former CIA employee, announced a personal campaign "to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where they are operating."[78] When Secretary of State Alexander Haig revoked Agee's passport on the grounds that his activities abroad were causing serious damage to the national security of the United States, Agee filed suit, claiming that Haig's action violated Agee's First Amendment right to criticize government policies and practices and that Haig did not have congressional authorization to revoke Agee's passport.[79]

Giving deference to the executive branch, the *Haig* Court noted Congress' recognition of "executive authority to withhold passports on the basis of substantial reasons of national security and foreign policy."[80] The Court further held that because the

truthful information regarding confidential proceedings of a judicial inquiry board); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (First Amendment bars liability of broadcast reporter who obtained and reported name of rape victim from court records made available to the public).

75 Snepp v. U.S., 444 U.S. 507 (1980).

76 *Id.* at 510; *see also* Garcetti v. Ceballos, 126 S.Ct. 1951 (2006) (speech is not protected by the First Amendment where a government employee makes statements pursuant to his official duties; distinguishing the speech of private citizens as deserving of a greater degree of protection).

77 Haig v. Agee, 453 U.S. 280 (1981).

78 *Id.* at 283.

79 *Id.* at 287.

80 *Id.* at 293.

regulations were limited to cases in which there was a likelihood of "serious damage" to foreign policy, Agee's claims concerning the First Amendment were without merit.[81] Haig's disclosures had the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel; thus they were not protected by the Constitution.[82]

In contrast, the government has been unsuccessful in prosecuting private citizens. For example, in *Bartnicki v. Vopper,* the Court addressed the transmission of information that was illegally obtained by a private citizen.[83] Bartnicki, an employee of the Pennsylvania Educators' Association, engaged in a telephone conversation with the president of the local teachers' union.[84] The conversation was illegally recorded and intercepted, then given to Fred Vopper, a local radio talk show host, who played it on the air.[85] Bartnicki sued for invasion of privacy.[86] The Court held that the speech was protected and that the radio station should not be liable for invasion of privacy because the tape concerned a matter of public importance and the radio station did not participate in the illegal interception of its contents.[87] It found that freedom of speech outweighed Bartnicki's privacy interests.[88]

The Court also has a longstanding policy that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[89] In the leading case on this subject, *Florida Star v. B.J.F.,* a newspaper reporter published the name of a rape victim based on information the reporter obtained from publicly-released police records.[90] A Florida trial court held the newspaper liable for invasion of privacy under a Florida law that prohibits publication of the name of a victim of a sexual offense.[91] The Supreme Court reversed and held that the newspaper was not liable where the information was truthful, lawfully obtained from government records, and concerning a matter of public significance.[92] Where the government releases

81 *Id.* at 300.
82 *Id.* at 308.
83 532 U.S. 514 (2001).
84 *Id.* at 519-20.
85 *Id.*
86 *Id.* at 539.
87 *Id.* at 541.
88 *Id.*
89 Smith v. Daily Mail Pub. Co., 443 U.S. 97, 103 (1979).
90 491 U.S. 524 (1989).
91 *Id.* at 528.
92 *Id.* at 541.

information, it can not hold a reporter liable for publishing it, under the principle that the First Amendment protects the publication of true information.[93]

6. The Current Administration's Relationship with the Press and Freedom of Speech

Recent events during the current administration's tenure have indicated that there are challenges for the media, as the government has attempted to change the role of the press in the name of national security. For example, in *In Re Grand Jury Subpoena, Judith Miller,* the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") repudiated the existence of a First Amendment reporter's privilege to withhold disclosure of anonymous sources of confidential information.[94] Judith Miller, a journalist for the *New York Times,* and other journalists, allegedly received leaked information in 2003 from I. Lewis 'Scooter' Libby, Jr., then Vice President Dick Cheney's Chief of Staff.[95] The leaked information revealed the secret identity of Valerie Plame Wilson, a CIA operative who monitored the proliferation of weapons of mass destruction.[96]

The Department of Justice investigated Miller's story and issued a grand jury subpoena to Miller and other reporters at several publications who had worked on the story.[97] Miller claimed a First Amendment reporter's privilege and moved to quash the subpoena.[98] The District Court denied her motion. Miller appealed to the D.C. Circuit, which held that there is no such thing as a First Amendment reporter's privilege.[99] After the Supreme Court denied review of the District of Columbia Circuit court's decision, Miller was jailed for refusing to divulge her source and to cooperate with the prosecution's investigation.[100]

Miller was jailed for 85 days, until she agreed to testify to a grand jury about Libby's role in the leak.[101] Ten out of the 19 witnesses in Libby's trial were journalists, three of whom played a

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93 *Id; see also* Marc A. Franklin, *Constitutional Libel Law: The Role of Content,* 34 UCLA L. REV. 1657, 1674 n.79 (1987).

94 *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied,* 545 U.S. 1150 (2005) (hereinafter *In re* Judith Miller).

95 *Id.* at 967.

96 *Id.*

97 *Id.* at 964.

98 *Id.* at 967.

99 *Id.*

100 545 U.S. 1150; *see also* Adam Liptak, *Reporter Jailed After Refusing to Name Her Source,* N.Y. TIMES, July 7, 2005, at A1.

101 Adam Liptak, *After Libby Trial, New Era for Government and Press,* N.Y. TIMES, March 8, 2007, at A1.

central role in securing Libby's conviction by testifying about the once-confidential conversations they had with him.[102] Libby's trial commenced on January 16, 2007 and in March 2007, he was found guilty of perjury and obstruction in the investigation into the 2003 leak of classified information to Miller and other reporters.[103]

II. TODAY'S WAR ON TERROR: NO END IN SIGHT

Six years after the September 11th attacks, the question that Americans must ask today is, "To what degree are we willing to give up some liberties in order to fight terrorists who intend to deprive us of life?"[104] In times of crisis, there is a great risk that the government will attempt to suspend civil liberties.[105] If we allow the government to assert its executive wartime powers to limit our freedom of speech with the Espionage Act, then our civil liberties could be restricted for the duration of today's war on terror, which has no determinable end in sight.[106]

In the midst of today's indefinite war, we should be extremely cautious about the use of the Espionage Act to prosecute private citizens for obtaining classified information. First Amendment scholar Geoffrey Stone wrote, "The United States has a long and unfortunate history of overreacting to the dangers of wartime . . . in every instance [of war] the nation went too far in restricting civil liberties."[107] While wartime restraints on free speech do not carry into peace time, President Bush stated after the September 11th attacks that the current war against terror may never end.[108] Statements like this have enabled the Bush administration to assert greater powers afforded to the executive branch in wartime in order to "protect" the country.[109]

Stone writes about wartime history to warn us about the

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102 *Id.*

103 *Id.*

104 Marci Hamilton, *The Supreme Court's Terrorism Cases: What They Held, and Why They Are Important*, FINDLAW, July 1, 2004, http://writ.news.findlaw.com/hamilton/20040701.html.

105 Susan Gellman, *The First Amendment in a Time That Tries Men's Souls*, 65-SPG LAW & CONTEMP. PROBS. 87, 87 (Spring 2002).

106 Adam Liptak, *In Leak Cases, New Pressure on Journalists*, N.Y. TIMES, Apr. 30, 2006 (quoting media lawyer Susan Buckley that the Espionage Act is "at first blush, pretty much one of the scariest statutes around" for this reason).

107 STONE, PERILOUS TIMES, *supra* note 26, at 528.

108 *Id.* at 528; *see also* Liptak, *supra* note 106 (On the ABC News program, "This Week," Attorney General Alberto Gonzales recently said that the government has the legal authority to prosecute journalists, "if you read the language [of some statutes, like the Espionage Act,] carefully.")

109 *See* STONE, PERILOUS TIMES, *supra* note 26, at 554; Marci Hamilton, The *Constitutional Threats We Face Without But Also From Within, a Year After 9/11*, FINDLAW, Sept, 9, 2002, http://writ.news.findlaw.com/hamilton/20020909.html.

current administration's tactic.[110] During World War I, President Woodrow Wilson proposed the Espionage Act and explained that disloyal individuals had sacrificed their right to civil liberties.[111] Stone suggests that Wilson's administration as well as the courts distorted the Act to suppress a broad range of political dissent and disloyal criticism.[112] In a stark contrast to today's political climate, the early twentieth-century Americans did not need to object strongly to relinquishing their free speech rights because they knew the Act's effects were temporary.

In the days immediately following September 11th, Americans were "more than willing to accept significant encroachments on their freedoms in order to forestall further attacks."[113] At the time, the administration repeatedly stated that the government needed to impose new restrictions on civil liberties. Some Americans agreed.[114] But six years later, it is the responsibility of the Judiciary in our constitutional system to correct the wrongs of the legislative and executive branches, which "tend to give inadequate weight to civil liberties in wartime."[115]

But if we give up civil liberties such as freedom of speech in the war on terror, we could be doing so for our lifetime. According to Stone, "A war of indefinite duration . . . increas[es] the risk that 'emergency' restrictions will become a permanent fixture of American life."[116] The late Justice William J. Brennan warned that we need a jurisprudence that would "help guarantee that a nation fighting for its survival does not sacrifice those national values that make the fight worthwhile."[117] First Amendment scholar Marci Hamilton adds, "It will take decades, if not centuries, to judge how much Executive power was actually warranted now" in this war on terror.[118]

Numerous scholars and judges have commented on the diminution of civil liberties in wartime. Judge Richard Posner of

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110 STONE, PERILOUS TIMES, *supra* note 26, at 528.

111 *Id.* at 211.

112 *Id.* at 146. Congress expressly rejected several key provisions that the Wilson administration had proposed.

113 *Id.* at 552; *e.g.*, racial profiling.

114 Some Americans felt that freedom of the press should be restricted in wartime. *See, e.g.*, Schoenfeld, *supra* note 6 ("The press can and should be held to account for publishing military secrets in wartime." He blames leaks as one of the big reasons for defects in our intelligence, "leading us from disaster to disaster.").

115 *See* Geoffrey R. Stone, *War Fever*, 69 MO. L. REV. 1131, 1148 (2004) (hereinafter Stone, *War Fever*).

116 STONE, PERILOUS TIMES, *supra* note 26, at 554-55.

117 William J. Brennan, Jr., Speech at the Law School of Hebrew University, Jerusalem, Israel: The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises, (December 22, 1987) (transcript available at www.brennancenter.org/resources/downloads/nation_security_brennan.pdf).

118 Hamilton, *supra* note 109.

the United States Court of Appeals, Seventh Circuit, stated, "when the country feels very safe the Justices [. . .] can [. . .] plume themselves on their fearless devotion to freedom of speech," but "they are likely to change their tune when next the country feels endangered."[119] Constitutional law scholar Lee Bollinger noted that "just about every time the country has felt seriously threatened, the First Amendment has retreated."[120] Justice Robert Jackson wrote, "It is easy, by giving way to passion, intolerance, and suspicions in wartime, to reduce our liberties to a shadow, often in answer to exaggerated claims of security."[121]

Hamilton provides a solution to the diminution of civil liberties in today's war on terror. She asserts that the Bush administration has the burden to tell the American people why it is taking domestic measures that restrict our civil liberties by presenting evidence that supports an imminent threat of terror to justify the restriction of rights.[122] There are instances where danger to our lives and our security exists, and the government must show that our rights are being curtailed in order to save lives.[123] The government should provide more information about the harm to its citizens before it takes away their civil liberties.

A. *Is the War on Terror a Real War Where the Executive May Invoke Its Wartime Powers?*

The next important question is whether the war on terror should be considered a war like World War I and the Vietnam War, where the executive branch asserted its extraordinary wartime powers. This question is relevant because we do not know whether the Court will employ *Brandenburg*'s speech-protective test only in peace-time or also in war-time.

The Court has given us a hint to this question in a 2004 case, *Hamdi v. Rumsfeld*, where it addressed executive power and declined to give deference to the Executive in the war on terror. In *Hamdi*, the Court held that today's climate does not afford the President a blank check when it comes to the rights of citizens.[124]

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119 Richard A. Posner, *Pragmatism versus Purposivism in First Amendment Analysis*, 54 STAN L. REV. 737, 741 (2002).

120 Lee C. Bollinger, *Epilogue*, in LEE. C. BOLLINGER & GEOFFREY R. STONE, ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 312-13 (2002).

121 Robert H. Jackson, *Wartime Security and Liberty under Law*, 1 BUFF. L. REV. 103, 116 (1951).

122 Hamilton, *supra* note 104.

123 Marci Hamilton, *Where Not To Draw the Line, When It Comes To Constitutional Rights: The Left, Federalism, and the War Against Terror*, FINDLAW, Sept. 26, 2002, http://writ.news.findlaw.com/hamilton/20020926.html.

124 542 U.S. 507 (2004).

Yaser Hamdi, a United States citizen, was arrested by the United States military in Afghanistan as an "enemy combatant," for fighting as part of a Taliban force that engaged in armed conflict with the United States.[125] A few years earlier, Congress had passed a resolution that authorized the President to "use all necessary and appropriate force" against "nations, organizations, or persons" that he determined "planned, authorized, committed, or aided" in the September 11th al Qaeda terrorist attacks.[126] Relying on this authority, the President sent United States troops to Afghanistan to subdue al Qaeda.[127]

Hamdi was subsequently detained for over two years in a United States military prison without access to an attorney or to a trial.[128] Hamdi's father filed a habeas petition, arguing that Hamdi's detention was unconstitutional because the government violated Hamdi's constitutional right to due process.[129]

After an *in camera* review of information related to whether Hamdi contributed to the al Qaeda terrorist attacks, the district court ruled for Hamdi and concluded that the government should release Hamdi from prison.[130] The Fourth Circuit, however, reversed on the grounds that the judiciary should defer to the executive during wartime because "the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not."[131]

The Supreme Court overturned the Fourth Circuit and held that even though Hamdi's detention was proper, the judiciary was not prevented from hearing Hamdi's challenge to his detention because due process guarantees an American citizen held in the United States as an enemy combatant the right to contest that detention before a neutral decision-maker.[132] In a plurality opinion, Justice O'Connor wrote: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for *all three branches* when individual liberties are at stake."[133] Thus, the Supreme Court here did not defer to the Executive branch.

Justice Souter's concurrence aligned with Justice O'Connor's

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125 *Id.* at 510.
126 *Id.*; Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, §2(a) (2001).
127 542 U.S. at 510.
128 *Id.*
129 *Id.*
130 *Id.* at 513.
131 Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. July 12, 2002).
132 542 U.S. at 539.
133 542 U.S. at 536 (emphasis added).

reasoning.[134] Justice Souter explained that, "in a government of separated powers," the Executive branch is not well entrusted to "decid[e] finally on what is a reasonable degree of guaranteed liberty whether in peace or war."[135] He reasoned that the Executive branch was primarily focused on maintaining security as opposed to individual civil liberties.[136]

In *Hamdi*, therefore, the Court set a precedent that in this war on terror, be it a time of war, a time of peace, or something in between, it will not blindly defer to the Executive branch. Following the *Hamdi* Court's reasoning, the Court seems more likely to implement the immediate danger test employed in *Brandenburg* and *Pentagon Papers* and refrain from deferring to the Executive branch like in the World War I cases that used the clear and present danger test.[137]

B. *Adopting the Pentagon Papers Standard as to Whether the Leaked Information Poses an Immediate Danger*

While *Pentagon Papers* clarified the law on prior restraint, it has left some important questions unanswered: it does not resolve questions about whether a reporter or any other person should be criminally prosecuted for possession and subsequent publication of classified material.[138] Today, the Court should apply the *Pentagon Papers* standard in a criminal prosecution for publication of information about government activities because of the longstanding principle that publication of truthful information about government activities is protected by the First Amendment.[139]

Applying this test, it is important to note that the government chose not to prosecute the newspapers or its reporters in *Pentagon Papers*.[140] After the case, no criminal prosecution of the newspapers or its reporters took place. In *Pentagon Papers*, the *New*

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134 542 U.S. at 539 (Souter, J., concurring).

135 *Id.* at 545.

136 *Id.*

137 *Brandenburg*, 395 U.S. 444; N.Y. Times v. U.S., 403 U.S. at 727-28, 730 (Stewart, J., concurring) (capturing the view of the Court, that the disclosure of information, to be actionable, must "surely result in direct, immediate, and irreparable damage to our Nation or its people").

138 *Examining DOJ's Investigation of Journalists Who Publish Classified Information: Lessons from the Jack Anderson Case: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Rodney Smolla, Dean, University of Richmond School of Law).

139 With the exception of special circumstances, such as government employees who leak the information. Rosen, 445 F. Supp. 2d at 638 (stating that the Pentagon Papers case is the most relevant precedent for the AIPAC case); Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 7 FIRST AMENDMENT CENTER 1, Dec. 2006, at 14.

140 DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE (1996).

York Times conceded that the President could use his executive power to seek a prior restraint on publication in limited circumstances. However, it argued that the information published by the *New York Times* was not one of those circumstances.[141] For the President to act without statutory authority from Congress, "the threatened harm [of publication] had to rise to a certain 'magnitude,' it had to be a 'feared event' of sufficient gravity, it had to present 'a mortal danger to the security of the United States.'"[142] It also had to appear that the threatened harm would follow immediately after publication of the information.[143]

The public read excerpts of the classified information that had already been published and found it to be highly valuable and important for understanding the administration's policies in Vietnam. The policy of *Pentagon Papers* is that the press has the freedom to disclose the classified information, but it must be cautious about exposing American soldiers and civilians to grave, immediate dangers.

In *Pentagon Papers*, Justice Stewart and the *New York Times's* General Counsel Alexander Bickel agreed on the standard by which the Court should determine whether a document endangers national security: "a case in which the chain of causation between the act of publication and the feared event . . . is *obvious, direct, immediate*" (emphasis added).[144]

David Rudenstine, a Constitutional Law scholar, wrote that "there is no evidence that the newspapers' publication of the Pentagon Papers [after the case] . . . harmed the U.S. military, defense, intelligence, or international affairs interests."[145] The Court concluded that the government failed to prove detailed and specific evidence that the Pentagon Papers would gravely and immediately harm national security.[146] As time passed, the war reports became outdated; thus, the Justices were not convinced that the information immediately caused danger to the United States. As a policy measure, "the Court decided to risk the dangers inherent in a freer press because the alternative resolution — enhancing government power to censor the press — was even more threatening to a stable and vital democracy."[147]

In cases before federal courts today, like the AIPAC case,

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141 403 U.S at 752.
142 *Id.* at 754.
143 *Id.*
144 RUDENSTINE, *supra* note 140, at 292.
145 RUDENSTINE, *supra* note 140, at 327. Further, of all the memoirs written by President Nixon and members of his administration, none of them say that disclosure of the Pentagon Papers actually resulted in harm to national security. *Id.*
146 *Id.* at 354-55.
147 *Id.* at 355.

courts must scrutinize carefully the leaked information to assess whether it actually poses a national security risk or instead merely causes the government some embarrassment. The AIPAC case is like *Pentagon Papers* because time has not shown that any information leaked to Rosen and Weissman has created a threat to national security. Rather, the case represents the Executive's manipulation of an outdated 1917 statute that needs to be reviewed before it can be incorporated into First Amendment doctrine.

III. MODERN FIRST AMENDMENT DOCTRINE AND THE MARKETPLACE OF IDEAS

First Amendment doctrine is different today than when the Espionage Act was drafted in 1917, before the Supreme Court had ever interpreted the First Amendment in a relevant manner. Times have changed, and the Act, therefore, lacks many safeguards that the Court has embedded into the First Amendment upon modern interpretation of it.[148] The relevant modern day characteristics of freedom of speech include: (1) the complex relationship between journalists and government officials as to exchanging delicate and classified information; and (2) the idea that the people need to be informed to engage in public discourse in a liberal democracy.

Before the Espionage Act, there was little judicial precedent to shed light on the First Amendment. Stone explains that at the time, "There was as yet no deeply rooted commitment to civil liberties within the legal profession, and no well-developed understanding of the freedom of speech."[149] Further, Justice Rehnquist noted that the nation has made progress in its protection of civil liberties in wartime because the First Amendment has "come into its own" and in future wartime situations, it is both "desirable and likely" that courts will look more carefully at "the government's claims of necessity as a basis for curtailing civil liberty."[150]

An example of a modern First Amendment doctrine is the Marketplace of Ideas theory, which holds that the truth or the best

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148 Geoffrey R. Stone, *Scared of Scoops*, N.Y. TIMES, May 8, 2006; for example, Section 793 of the Act is not limited to allowing prosecution of only published information that poses "a clear and present danger" to the United States, as seen in *Schenck*, nor does it have the "imminent danger" language of *Brandenburg*. Moreover, the 1919 cases are distinguishable because there was a clear end in sight to World War I.

149 STONE, PERILOUS TIMES, *supra* note 26, at 159.

150 WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224-5 (1998).

policy arises out of the competition of widely various ideas in a free market of discussion, an important part of democracy. One legal scholar, Vincent Blasi, thoroughly researched the doctrine and concluded that the theory "serves as a cultural force that contributes to the control of abuses of power."[151] Thus, the Courts need to apply the Espionage Act with due consideration of marketplace of ideas principles.

In his decision not to dismiss the AIPAC case on First Amendment grounds, Judge Ellis recognized the global changes that have occurred since the Espionage Act was created. He wrote: "The intervening years [between the Espionage Act's creation and today] have witnessed dramatic changes in the position of the United States in world affairs and the nature of threats to our national security."[152] The changes include technological advances in both modern warfare and in the communication of information.[153] In effect, courts need further direction on how to apply the Espionage Act now that interpretation of the First Amendment has significantly developed.

There are also discrepancies between the Act's text and its legislative history that make it impossible for application today. Two constitutional law scholars, Edgar and Schmidt, conducted the leading and most detailed study of the Espionage Act's legislative history.[154] Their goal was to determine which constitutional principles limit official power to prevent or punish public disclosure of national defense information.[155] In their analysis, the scholars concluded that the Act itself was incomprehensible because of the discrepancies between its text and its legislative history.[156] Another scholar, Stephen Vladeck, examined the Act and said that "the statutory framework provides an unsatisfactory lens through which to understand the background legal issues."[157] The Act needs a revision because it is obscure and it does not incorporate modern First Amendment doctrine.

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151 At the time the Espionage Act was enacted, some believed that the First Amendment was never meant to invalidate the crime of seditious libel, which controlled hostile criticism in order to protect the government's reputation and thereby preserve political stability. Blasi, *supra* note 55, at 34. This provocative argument was set forth in the government's brief in *Abrams*.

152 *Rosen*, 445 F. Supp. 2d at 646.

153 *Id.*

154 Edgar & Schmidt, *supra* note 15.

155 *Id.*

156 *Id.*

157 Stephen I. Vladeck, *The Statutory Framework*, in *Government Secrecy vs. Freedom of the Press*, 7 FIRST AMENDMENT CENTER 1, Dec. 2006, at 43.

A. *The Common Practice of Exchanging Delicate Information Between Journalists and Government Sources*

As the subtle and complex relationships between journalists and government officials, their information sources, have evolved, government employees have anonymously leaked information as an important and recurring part of Washington D.C.'s culture.[158] Journalists, and other private citizens, should not be jailed for receiving leaked information because that would chill speech that is afforded First Amendment protections. There is a wide gray area of information transferred among lobbyists, legislators, journalists and government employees that is "somewhere between the benign inanities of water-cooler gossip and documents stamped "Top Secret."[159]

Until very recently, many have thought the prosecution of reporters for obtaining leaked government information is inconceivable.[160] Floyd Abrams, a noted First Amendment attorney, said: "[Any reporter] who covers the CIA, the Department of Defense, or the Department of Homeland Security is routinely provided classified information by people in and out of government."[161] If American law starts to punish those who receive and pass on privileged information, as in the way that Rosen and Weissman engaged in here, then "a great many government officials" and "much of the Washington press corps" would be in jail because "classified information is the currency of conversation with reporters and lobbyists."[162]

For example, Max Frankel, the Washington, D.C., Bureau Chief for the *New York Times* during the *Pentagon Papers* case and a former foreign correspondent, submitted an affidavit in the *Pentagon Papers* case.[163] He wrote in opposition to the government's motion for an injunction to stop the newspaper from publishing controversial reports that it had obtained. In light of his experience as a distinguished journalist, Frankel

158 *See, e.g.*, Neil Lewis & Scott Shane, *Reporter Who Was Jailed Testifies in Libby Case*, N.Y. TIMES, Jan. 31, 2007; Douglas Jehl, *The Conflict in Iraq: Intelligence; 2 CIA Reports Offer Warnings on Iraq's Path*, N.Y. TIMES, Dec. 7, 2004, at A1 (articles where the media cites classified material that it possesses on national defense and foreign policy topics as a result of meetings with government officials).

159 Kampeas & Berger, *supra* note 5.

160 Liptak, *supra* note 106.

161 Nat Hentoff, *Bush Revives Espionage Act*, VILLAGE VOICE, Nov. 10, 2006, at 16.

162 Jeffrey Goldberg, *Letter from Washington: A Pro-Israel Lobby and an F.B.I. Sting*, NEW YORKER, July 4, 2005.

163 Aff. of Max Frankel, N.Y. Times v. U.S., *supra* note 61, No. 71 Civ. 2662; *see also* Scott Shane, *First, a Leak; Now, a Jam*, N.Y. TIMES, Apr. 8, 2006, at A1.

described a cooperative relationship between a "specialized corps of reporters" and American government officials who "regularly make use of so-called officially classified, secret, and top secret information and documentation . . . . as a mature system of communication between the people and their government."[164]

Frankel explained that everything the government does with respect to its foreign policy is treated as "secret" and then the government may leak it by deliberately exchanging information with the press.[165] The government assesses whether information is "reasonably expected to harm the national security" and tends to over-classify information.[166] The risks are that the government may abuse this power to conceal its mistakes and wrongdoing.[167]

Further, there is a tradition of "selective leaking" that has given the press access to documents and government-controlled information.[168] Frankel postulates that government officials leak information as a means to promote their political, personal, bureaucratic or commercial interests.[169] The press, on the other hand, maintains a check on the government's use and abuse of power.

There is a risk, Frankel explained, that the government could misuse the classification of information to impose secrecy of information in unjustified circumstances, such as to hide embarrassment over its mistakes and to protect its reputation.[170] He then described in detail the reasons that the Pentagon Papers posed no risk to national security because they were instead a historical record of momentous importance to the people.[171]

But the current administration thinks otherwise. After jailing reporter Miller and trying and convicting her informant, Libby, the administration is testing the prosecution of private citizens Rosen and Weissman in the AIPAC case; these recent events have changed the relationship between reporters and their government sources of leaked information.[172]

Rodney A. Smolla, a First Amendment scholar, said the Libby investigation has made insecure the assumption that a reporter

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164 Aff. of Max Frankel, *supra* note 163, at ¶¶ 3, 4.

165 *Id.* at ¶¶ 5-6, 15.

166 Stone, *supra* note 139, at 7.

167 *Id.* at 12.

168 Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN L. REV. 927, 951 (1992).

169 Aff. of Max Frankel, *supra* note 163, at ¶ 17.

170 *Id.*

171 *Id.*

172 *See* U.S. v. Libby, No. 05-394, 2007 WL 1810109 (D. D.C. June 21, 2007); *see also* Lewis & Shane, *supra* note 158 (stating that "the appearance of Ms. Miller as someone forced by the government to testify against a source emphasized how the case has changed the landscape of relations between journalists and government officials").

will uphold his promise of confidentiality.[173] He warns that the current legal system makes both the sources and the reporter vulnerable to broken promises.[174] Libby's conviction means that there is damage "to relationships between journalists and their sources and to the informal but longstanding understanding in Washington, now shattered, that leak investigations should be pressed only so hard."[175]

The courts should not let the Executive suppress speech in light of the First Amendment's evolution since 1917 when the Espionage Act was drafted. Given *Miller* and *Libby*, the laws are unclear as applied to private citizens such as political lobbyists who regularly receive classified information from government employees. Any given United States citizen will not know whether the receipt of information from government officials could subject them to imprisonment or fines just because they received it.

Moreover, given these trends, journalists are changing their behavior and may cease coverage of national security, eliminating a powerful check on the government's reign over national security issues. For example, in the *Libby* trial, reporters of several major news organizations, including Miller of the *New York Times*, agreed to testify for the prosecution about once-confidential conversations they had with Libby.[176] Libby was subsequently convicted of perjury and obstruction based on the investigation against him.[177] Where reporters and government officials now risk going to jail, the administration is slowly encroaching on the rights of any and every citizen.

B. *Democracy, Information and Government Accountability*

Modern First Amendment doctrine strongly supports the commitment to free speech as an integral part of the functioning of democracy.[178] In his concurrence in *Pentagon Papers*, Justice Stewart wrote:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an

173 Neil A. Lewis, *Libby Trial to Display Changed Reporter-Source Relations*, N.Y. TIMES, Jan. 22, 2007, at A16.
174 *Id.*
175 Liptak, *supra* note 101.
176 Lewis, *supra* note 173.
177 *See Libby*, 2007 WL 1810109; *see also* Liptak, *supra* note 101.
178 STONE, PERILOUS TIMES, *supra* note 26, at 532.

> enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government.[179]

Citizens in a democracy need information so they can hold accountable their elected leaders and evaluate their decisions. In wartime, free speech functions "to help the nation make wise decisions about how to conduct the war, whether its leaders are leading well, whether to end the war, and so on."[180] Hamilton said, "Americans are tough; we can handle [the truth]. In fact, we need [it] in order to make an informed judgment as to whether the Administration's tactics are acceptable under perilous circumstances, or unduly threatening to the constitutional order."[181]

The AIPAC lobbyists and members of the press should argue for protection on First Amendment grounds to show that Congress needs to review and revise the Espionage Act to prevent it from being unconstitutionally applied as both a violation of freedom of speech and an usurpation of Congress's lawmaking powers. The information that Rosen and Weissman uncovered about Iran may have informed the American people on whether to accept the administration's foreign policy tactics.

The legislative history of the Espionage Act indicates that Congress believed a vital democracy must be informed. In committee hearings for the Espionage Act, one congressman exclaimed that "anybody who merely publishes matters here at home and does it in the discharge of what seems to him to be a duty by way of criticism ought not to be prosecuted nor punished under any portion of the bill."[182] The people must have freedoms that may give rise to dangers, especially in the United States where "the government broadly defines the national security interests and uses the classification system to keep classified an enormous amount of information in the name of security."[183]

It is important to find a balance between the government's interest in secrecy and the public's interest in holding the administration accountable for its acts. In *Florida Star,* the Court held that a newspaper that published the name of a rape victim was not liable where the information was truthful, lawfully obtained from government records, and concerning a matter of

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179 403 U.S. at 727 (Stewart, J., concurring).
180 Stone, *War Fever, supra* note 115, at 1136.
181 Hamilton, *supra* note 109.
182 55 CONG. REC. 1719 (1917).
183 RUDENSTINE, *supra* note 140, at 355.

public significance.[184] *The reporter obtained the confidential* information from police records made public by the government.[185] Once the press obtained the information, the government had very limited authority to prevent newspapers from publishing it.[186] The Supreme Court has found the same result in a number of decisions where the media was not punished for disseminating information that it obtained after it fell into the public domain.[187]

In *Bartnicki*, the court applied similar reasoning to a different set of facts.[188] It held that a radio commentator could not be held liable for broadcasting a tape recording of an unlawfully intercepted telephone conversation that he received anonymously in the mail.[189] Where the information concerned a matter of public importance and the radio station did not participate in the illegal interception of its contents, the radio host should not be held liable for invasion of privacy.[190]

The AIPAC case is like *Florida Star* and *Bartnicki* where the news media organizations who received privy information were not convicted for publishing it. It is like *Florida Star* because the government has lost exclusive access to information of a confidential matter. The Court's reasoning in these cases is that if the government loses the information, it is the government's problem and the recipient who uses that information should not be punished for it. The AIPAC case is also like *Bartnicki* because the information obtained involved a matter of public concern and the radio commentator who received the information was a private citizen — not a government employee.

IV. THE CRITICAL DISTINCTION BETWEEN GOVERNMENT EMPLOYEES AND PRIVATE CITIZENS IN THE CONTEXT OF TRANSMITTING CONFIDENTIAL INFORMATION

Government employees routinely sign secrecy or nondisclosure agreements to prevent classified information from leaking to the public. In doing so, the employee is consenting to never disclose any classified information through publication or

184 *Fla. Star*, 491 U.S. at 541; *see also* Neb. Press Ass'n v. Stuart., 427 U.S. 539 (1976) (government may not prevent the press from publishing information about a criminal defendant before a trial where it is accessible to the public).

185 491 U.S. at 541.

186 *Id.*

187 Other cases support *Florida Star's* reasoning, *e.g.*, Smith v. Daily Mail Pub., 443 U.S. 97 (publishing name of juvenile offender); *Cox Broad.*, 420 U.S. 469 (1975) (publication of rape victim's name).

188 *Bartnicki*, 532 U.S. at 535.

189 *Id.*

190 *Id.* at 534.

other means to people not authorized to receive it.[191] Thus, the First Amendment interests of government employees warrant lesser protection because they voluntarily agreed beforehand to restrain their speech. Therefore, the Espionage Act should not be applied against anyone other than a government employee, who has notice of the consequences of leaking classified information and a knowledge of whether the information is classified by the government.

Our society for many years had not prosecuted journalists for merely possessing classified material; instead, we chose to prosecute the government employees. In his 2006 decision, Judge Ellis suggested a change in the law where he wrote that "the government can punish those outside of the government for the unauthorized receipt and deliberate retransmission of information relating to the national defense."[192] An interpretation of legislation like the one Judge Ellis suggests would upset the balance between the government and the independent press. If this view prevails, then private citizens will lose their First Amendment rights and their speech will be chilled during the war on terror.

Another example is *Snepp,* where the Supreme Court rejected a former CIA agent's argument that prohibiting him from publishing a book based on his CIA work in Vietnam violated his First Amendment rights to free speech. Snepp had signed a nondisclosure agreement and the Court held that he breached the contract as a government employee.[193] Even though the information that Snepp published was not classified, the Court stated that the government can sue for breach of contract without having to assert that the information contains highly sensitive classified information.[194]

Snepp, and similar cases where government employees were prosecuted, do not stand for the proposition that non-governmental employees like the AIPAC lobbyists should also be prosecuted where they did not sign voluntary agreements to withhold classified information.[195]

Government employees have violated their positions of trust and may be criminally punished without violating the First

191 Matthew Silverman, *National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information,* 78 IND. L.J. 1101, 1110 (2003).

192 *Rosen,* 445 F. Supp. 2d at 637.

193 *Snepp,* 444 U.S. at 510.

194 *Id.*

195 *See also Landmark Comm.*, 435 U.S. 829 (holding that even though government may prohibit its employees from disclosing confidential information, it may not prohibit the press from reporting it).

Amendment.

As private citizens, the AIPAC lobbyists are not like the defendants in *Snepp, Haig,* and *Libby,* government employees who leaked classified information.[196] While government employees are aware of the consequences when they sign employment contracts, lobbyists and journalists do not have the same degree of knowledge that information is classified. In an interview for *The New Yorker,* Rosen said, "Our job at AIPAC was to understand what the government is doing, in order to help form better policies, in the interests of the United States. I never even dreamed of doing anything harmful to the United States."[197]

CONCLUSION

Under the First Amendment, the Espionage Act as it exists today should not apply to the prosecution of private citizens like the AIPAC lobbyists who receive classified information from government officials. It is time for Congress to redraft the statute in compliance with modern First Amendment doctrine applied to today's climate in the war on terror. Congress must ensure that the judiciary can adequately decide whether the AIPAC lobbyists' information is actually harmful to national security or whether it is merely an embarrassment to our administration. The Court and Congress must also apply clear, constitutional rules for the practice of lobbying and newsgathering in times of war and in times of terror.

The AIPAC lobbyists should not be charged under the Espionage Act, and if they are, then in no way should the Act be applied against the press, whom we trust to check on the government's abuse of its broad powers. The administration must not go too far in restricting our civil liberties, especially in a war with no end in sight. Modern First Amendment doctrine like the Marketplace of Ideas should not be thrown out in wartime. Further, the AIPAC lobbyists are not government employees, who should have fewer speech protections than private citizens where they leak classified government information as a breach of their agreement with the government. Applying the Espionage Act against the AIPAC lobbyists will chill speech and it will deter Americans from engaging in dialogue about foreign affairs, which

196 Haig and Snepp were former C.I.A. officers.

197 *Haig,* 453 U.S. at 283; *see also* Goldberg, *supra* note 162.

is a vital component of our democracy.

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