
DEEP BACKGROUND: JOURNALISTS, SOURCES, AND THE PERILS OF LEAKING

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INTRODUCTION

“There can be no excuse for anyone entrusted with vital intelligence to leak it—and no excuse for any newspaper to print it.”

President George W. Bush¹

President Bush’s exasperation with leakers and the press was prompted by the disclosure of a secret banking surveillance program in leading American newspapers in late-June 2006.² The banking story was only one of a string of leaks concerning secret government actions in the war on terror. Seven months before the banking story, the *Washington Post* published a story about the Central Intelligence Agency (CIA) interrogating al Qaeda captives at secret prisons in Eastern Europe.³ And in December 2005, the *New York Times* reported that the National Security Agency (NSA) engaged in

1. Scott Shane, *Behind Bush’s Fury, a Vow Made in 2001*, N.Y. TIMES, June 29, 2006, at A12; see also Peter Baker, *Surveillance Disclosure Denounced*, WASH. POST, June 27, 2006, at A1 (reporting Bush’s anger over the media’s disclosure of the Administration’s secret international banking surveillance program).

2. See, e.g., Eric Lichtblau & James Risen, *Bank Data Is Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1 (describing a banking surveillance program that tracks financial records and transactions for individuals suspected of having links to al Qaeda). The program was also disclosed by the *Wall Street Journal*, *Los Angeles Times*, and *Washington Post*. For an explanation by the editor of the *Los Angeles Times* and the executive editor of the *New York Times* of editorial decisions concerning publication of classified information, see generally Dean Baquet & Bill Keller, *When Do We Publish a Secret?*, N.Y. TIMES, July 1, 2006, at A15. For a discussion of instances where the press did not publish national security information in its possession, see generally Scott Shane, *A History of Publishing, and Not Publishing, Secrets*, N.Y. TIMES, July 2, 2006, § 4, at 4.

3. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1 (exposing a secret internment program coordinated by the CIA and beyond the oversight of Congress).

wiretapping without court authorization.⁴ Each story was based on unnamed sources that had been promised anonymity because they were disclosing classified information; their disclosures were prompted by concerns about the programs' legality and morality.⁵

These leaks provoked the Bush Administration to begin an intense effort to crackdown on unauthorized disclosures of classified information. At the CIA, Director Porter Goss subjected employees to polygraphs;⁶ former employees were warned not to have unauthorized contacts with reporters;⁷ and an employee who had unauthorized contact with the press was fired.⁸ A grand jury also

4. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (reporting the secret authorization given to the NSA by presidential order in 2002 to monitor international phone calls without court-approved warrants).

5. See, e.g., *id.* (stating that “[n]early a dozen current and former officials, who were granted anonymity because of the classified nature of the program, discussed it with reporters for [t]he *New York Times* because of their concerns about the operation’s legality and oversight”). But see *infra* notes 58–61 and accompanying text (describing authorized procedures for intelligence agency employees to disclose illegal activities).

6. See Mark Mazetti & Scott Shane, *C.I.A. Director Has Made Plugging Leaks a Top Priority*, N.Y. TIMES, Apr. 23, 2006, § 1, at 31 (quoting CIA officials who say Goss’s “single issue” polygraphs show how serious he is about strict discipline in his tenure as director). Goss claimed that those who disclose classified information without authorization break the law and should not be termed “whistleblowers.” Porter Goss, Op-Ed, *Loose Lips Sink Spies*, N.Y. TIMES, Feb. 10, 2006, at A25. When Goss was a member of Congress, he sponsored the Intelligence Community Whistleblower Protection Act, see *infra* notes 58–61 and accompanying text, “an appropriate and responsible way” for intelligence agency employees to expose wrongdoing. Goss, *supra*.

7. Demetri Sevastopulo, *THE AMERICAS: CIA Warns Ex-Agents Against Talking to the Media*, FIN. TIMES, Apr. 27, 2006, at 9.

8. David Johnston & Scott Shane, *C.I.A. Fires Senior Officer over Leaks*, N.Y. TIMES, Apr. 22, 2006, at A1. Although the CIA would not publicly identify the officer, several anonymous sources said long-term analyst Mary McCarthy had shared information with Dana Priest of the *Washington Post* who exposed the secret prisons. *Id.*; R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress*, WASH. POST, May 14, 2006, at A1. Sources close to McCarthy acknowledged that while she had contact with Priest, she did not leak classified information about the secret prisons. Mark Hosenball & Michael Isikoff, *Secrets of the CIA*, NEWSWEEK, Oct. 15, 2007, <http://www.newsweek.com/id/47171>; R. Jeffrey Smith & Dafna Linzer, *Dismissed CIA Officer Denies Leak Role*, WASH. POST, Apr. 25, 2006, at A1. McCarthy’s friends and former colleagues, however, revealed that she became convinced that the CIA had been lying to Congress about prisoner treatment and that the invasion of Iraq had “dangerously diverted counterterrorism policy.” Smith, *Fired Officer Believed CIA Lied to Congress*, *supra*. McCarthy’s contact with Priest prompted strong reactions. To some, she “acted in the finest traditions of the republic, helping reveal and reduce terrible violations of international law and human rights by the C.I.A.” Mazetti & Shane, *supra* note 6 (quoting former CIA official Robert Steele). To others, her motives were less than pure. As a former high-level Clinton administration official, McCarthy was a political partisan who sought to undermine the Bush Administration. See, e.g., Editorial, *Our Rotten Intelligence*, WALL ST. J., Apr. 26, 2006, at A16.

began investigating leaks at the NSA.⁹ As part of an ongoing Federal Bureau of Investigation (FBI) investigation into Israeli espionage within the United States, the FBI learned that Lawrence Franklin, a Department of Defense analyst, was leaking classified information to an Israeli diplomat, the press, and two lobbyists for the American Israel Political Affairs Committee (AIPAC). Franklin was convicted of violating the Espionage Act and in an extraordinary move, the two AIPAC lobbyists were also charged as co-conspirators. The pending AIPAC prosecution raises the prospect that journalists can be punished for *receiving* classified information.

Equally extraordinary is former Attorney General Alberto R. Gonzales' recent claim that the government has the legal authority to prosecute journalists for publishing classified information.¹⁰ This runs against the broad consensus among prior congressional and

9. Dan Eggen, *Grand Jury Probes News Leaks at NSA*, WASH. POST, July 29, 2006, at A2.

10. Adam Liptak, *Gonzales Says Prosecutions of Journalists Are Possible*, N.Y. TIMES, May 22, 2006, at A14. There have only been two attempts to invoke the general espionage statutes against press publication of classified information. Both were unsuccessful. During World War II, the *Chicago Tribune* published a story indicating that the United States had broken Japanese naval codes. As summarized by Harold Evans,

President Franklin D. Roosevelt—a bitter enemy of [*Tribune* publisher Robert] McCormick—initially was disposed toward sending Marines in to shut down Tribune Tower. He was talked out of that, then considered trying McCormick for treason, which carried a death penalty in wartime. It ended up with the attorney general taking the *Tribune* men to a grand jury. But there was no cooperation from the Navy, which rightly was concerned that a trial would mean disclosing the code-breaking. The grand jury refused to indict.

Harold Evans, *WAR STORIES: Reporting in the Time of Conflict*, <http://www.newseum.org/warstories/essay/secretcy.htm> (last visited Apr. 30, 2008). For a detailed discussion of how the *Tribune* acquired the information and the Roosevelt Administration's response, see RICHARD NORTON SMITH, *THE COLONEL: THE LIFE AND LEGEND OF ROBERT R. MCCORMICK* 427–40 (1997). During the Vietnam War, the Nixon Administration sought to invoke the Espionage Act as authority for its attempt to enjoin publication of the Pentagon Papers by the *New York Times*. Judge Gurfein ruled that the relevant portion of the Espionage Act applied to clandestine communication, not newspaper publication. See *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 328 (S.D.N.Y.) (interpreting 18 U.S.C. § 793(e) (2000)), *rev'd*, 444 F.2d 544 (2d Cir.), *rev'd*, 403 U.S. 713 (1971). When the case was argued before the Supreme Court, the government claimed the Executive Branch had inherent powers to prevent publication, even in the absence of a specific legislative declaration. *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971). In finding the government's action a violation of the First Amendment, several Justices indicated the absence of a relevant statute was troublesome. See *id.* at 730 (Stewart, J., concurring) (stating the Court was asked “neither to construe specific regulations nor to apply specific laws”).

While he was Director of Central Intelligence in the 1980s, William J. Casey privately threatened the *Washington Post* with an Espionage Act prosecution. JOSEPH E. PERSICO, *CASEY: FROM THE OSS TO THE CIA* 509 (1990). After news of this threat became public, Casey backed off; his biographer wrote that Casey “grudgingly came around to the conclusion that in a democracy the press would usually have the last word. For all practical purposes, it was immune.” *Id.* at 512.

executive branch officials that the general espionage statutes do not apply to press publication.¹¹ Gonzales' claim, along with other Bush Administration efforts to stem leaks, led two congressional committees to hold hearings in 2006 on the issues raised by national security leaks.¹² And in response to press reports of the bank surveillance program used to track terrorist financial transactions, the House of Representatives passed a resolution condemning the unauthorized disclosure of classified information.¹³ In 2006 and 2007, legislative proposals criminalizing the unauthorized disclosure of classified information were introduced in the Senate.¹⁴ Senator Kit Bond, a member of the Senate Intelligence Committee and sponsor of one proposal, said intelligence leaks have increased at an "alarming rate."¹⁵

Yet as the Bush Administration was taking measures to stem leaks, a special counsel was investigating whether White House officials acted illegally by disclosing to reporters Valerie Plame's CIA-affiliation. The investigation and subsequent 2007 trial of I. Lewis "Scooter" Libby offered an inside view of the interactions between high government officials and favored reporters. The investigation revealed a White House effort to counteract claims raised by Plame's husband, an administration critic; this included President Bush's authorization of Libby's disclosure of key sections of the classified

11. As the authors of a leading academic study wrote, "neither the Congresses that wrote the laws nor the Executives who enforced them have behaved in a manner consistent with the belief that the general espionage statutes forbid acts of publication." Harold Edgar & Benno Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1077 (1973).

12. See generally *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); *Media's Role and Responsibilities in Leaks of Classified Information: Hearing Before the H. Permanent Select Comm. on Intelligence*, 109th Cong. (2006).

13. H.R. Res. 895, 109th Cong. (2006); see also Carl Hulse, *House Assails Media Report on Tracking of Finances*, N.Y. TIMES, June 30, 2006, at A4 (reporting bitter debate particularly focused at the *New York Times* and other newspapers).

14. In March 2007, Senator John Kyl introduced an amendment to Senate Bill 4 that would have criminalized the unauthorized disclosure of classified information. See S. Amend. No. 318, 110th Cong., 153 CONG. REC. S2550 (daily ed. Mar. 2, 2007). Senate Bill 4 was passed by the Senate without incorporating Kyl's amendment. S. 4, 110th Cong., 4153 CONG. REC. S3400-3452 (Mar. 20, 2007). In 2006, Senator Kit Bond sponsored a bill criminalizing unauthorized disclosures of classified information. See S. 3774, 109th Cong. (2006). The bill was identical to the legislation vetoed by President Clinton in 2000. See *infra* note 67.

15. 152 CONG. REC. S8613 (daily ed. Aug. 2, 2006) (quoting Sen. Bond). The perception that leaks are reaching alarming levels is frequently expressed in Washington. See H.R. REP. NO. 96-30, at 1 (1981) (stating that leaks are reaching "cascade proportions"). Seasoned Washington observers, however, claim that the number of leaks has been consistent "in the past couple of decades." Victoria Toensing, Op-Ed, *Leak Soup*, WALL ST. J., Apr. 29-30, 2006, at A8.

National Intelligence Estimate (NIE) solely to Judith Miller of the *New York Times*.¹⁶ Miller was viewed favorably within the White House because of her pre-Iraq war reporting on Iraqi weapons of mass destruction. The Bush White House claimed the President was exercising his authority to declassify documents,¹⁷ but Democrats said the selective disclosure was for partisan political reasons and labeled the President “the leaker in chief.”¹⁸

The prosecution of Libby would not have been possible without the testimony of prominent journalists such as Miller, *Time*'s Matt Cooper, and NBC News' Tim Russert. In a bruising confrontation with Special Counsel Patrick Fitzgerald, news organizations found hollow their belief that the First Amendment protected journalists from grand jury testimony about sources.¹⁹ After losing challenges to subpoenas, Cooper and Miller told the grand jury that Libby revealed Valerie Plame's CIA status to them, even as Libby's testimony asserted that the journalists disclosed Plame's status to him.²⁰ Russert testified that he and Libby never discussed Plame, contrary to Libby's claim that Russert told him that “all the reporters” knew of Plame's CIA affiliation.²¹ Following a month-long trial in 2007, a jury convicted

16. President Bush's actions were first disclosed in a filing by the special counsel in Scooter Libby's perjury case. See Government's Response to Defendant's Third Motion to Compel Discovery at 23–24, *United States v. Libby*, 432 F. Supp. 2d 81 (D.D.C. 2006) (Cr. No. 05-394). This prompted significant press coverage. See, e.g., R. Jeffrey Smith, *Bush Authorized Secrets' Release, Libby Testified*, WASH. POST, Apr. 7, 2006, at A1.

17. The President's authority to classify and declassify national security information stems from his power under the Constitution as Commander-in-Chief. See, e.g., *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988). White House spokesperson Scott McClellan defended the action in the following terms:

The President believes the leaking of classified information is a very serious matter. And I think that's why it's important to draw a distinction here. Declassifying information and providing it to the public, when it is in the public interest, is one thing. But leaking classified information that could compromise our national security is something that is very serious. And there is a distinction.

Press Briefing, Scott McClellan, Press Secretary (Apr. 7, 2006), <http://www.whitehouse.gov/news/releases/2006/04/20060407-3.html>. McClellan spent nearly an hour discussing this matter. See generally R. Jeffrey Smith & Jim VandeHei, *Disclosures Are Called Unrelated to Plame Case*, WASH. POST, Apr. 8, 2006, at A1; Anne Marie Squeo, *Libby Prosecutor Outlines Effort at High Levels*, WALL ST. J., Apr. 8, 2006, at A6.

18. David Johnston & David Sanger, *Cheney's Aide Says President Approved Leak*, N.Y. TIMES, Apr. 7, 2006, at A1 (quoting Rep. Jane Harman, senior Democrat on the House Intelligence Committee).

19. *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 966–68 (D.C. Cir. 2005). This aspect of the Libby case is discussed in William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635, 685 (2006).

20. See, e.g., Matthew Cooper, *What I Told the Grand Jury*, TIME, July 17, 2007, <http://www.time.com/time/magazine/article/0,9171,1083899,00.html>.

21. See Transcript of Libby's Grand Jury Testimony at 146–47, *In Re Grand Jury (John Doe)*, No. 03-3 (D.D.C. Mar. 5, 2004) (showing the Libby testified that Tim

Libby of one count of obstruction of justice, one count of making false statements, and two counts of perjury.²² Libby is the first person in our nation's history to be convicted for lying about confidential conversations with journalists.²³ Although Libby was not charged with violating the Intelligence Identities Protection Act or the Espionage Act, prosecuting him for perjury and related crimes was "tantamount to punishing the leak."²⁴

The Libby investigation and prosecution upset longstanding Washington expectations that leak investigations would be pursued with limited vigor and would not involve questioning journalists about their sources.²⁵ Largely as a result of rulings in favor of Fitzgerald's pursuit of journalists,²⁶ Congress, for the first time in more than thirty-five years, is seriously considering enacting a federal shield law. A bill approved by the House of Representatives on October 16, 2007, protects the identity of confidential sources who leak classified information to journalists unless the government can show, among other things, that the leak has caused "significant and articulable harm to the national security"²⁷ and that the public interest in disclosure of the source's identity outweighs the interest in

Russert told him that "all the reporters" knew that Joseph Wilson's wife works at the CIA). *But see Tim Russert Contradicts Libby's Testimony*, CBS NEWS, Feb. 7, 2007, <http://www.cbsnews.com/stories/2007/02/07/politics/main2443275.shtml> (reporting that Russert testified that he "never discussed a CIA operative" with Libby).

22. Carol Leonnig & Amy Goldstein, *Libby Found Guilty in CIA Leak Case*, WASH. POST, Mar. 7, 2007, at A1.

23. *E.g.*, Adam Liptak, *After Libby Trial, New Era for Government and Press*, N.Y. TIMES, Mar. 8, 2007, at A18 (reporting that over the last thirty-five years, "press protections against Justice Department subpoenas have existed largely as a matter of prosecutorial grace" and that "[e]very tenet and every pact that existed between the government and the press has been broken").

24. *In re Grand Jury Subpoena (Miller)*, 438 F.3d 1141, 1182 (D.C. Cir. 2006) (Tatel, J., concurring).

25. *See* Liptak, *supra* note 23 (referring to the longstanding understanding in Washington that leak investigations should be pressed "only so hard"); Toensing, *supra* note 15 (stating that during her tenure in government, "everyone knew when it got down to the nitty-gritty of subpoenaing the reporter the investigation would grind to a halt").

26. *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964 (D.C. Cir. 2005).

27. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. § 2(a)(3)(D)(ii) (2007). Writing in the *Washington Post*, Patrick Fitzgerald said that this provision would have the "unintended but profound effect of handcuffing" leak investigations because the government would be required to disclose in a hearing the specific damage caused by a leak, "information often more sensitive than the leak itself." Patrick Fitzgerald, *Shield Law Perils . . . : Bill Would Wreak Havoc on a System that Isn't Broken*, WASH. POST, Oct. 4, 2007, at A25. Similar concerns were expressed by the White House. *See* Executive Office of the President, Statement of Administration Policy (Oct. 16, 2007) (on file with author) (discussing the difficulty of prosecuting cases involving leaked classified information and the heavy evidentiary burden prosecutors would face because of H.R. 2102).

the free flow of information.²⁸ A similar bill was approved by the Senate Judiciary Committee on October 4, 2007.²⁹ These proposals have drawn significant opposition from top Bush administration officials such as Attorney General Michael B. Mukasey and Director of National Intelligence J.M. McConnell due to the heavy burdens placed on tracing sources of national security leaks.³⁰ Most strikingly, the legislative proposals promote two distinct views of leaking. To the Bush Administration, which has threatened a veto, “[t]here is no virtue in leaking; it reflects a profound breach of public trust and is wrong and criminal.”³¹ To sponsors of the legislation, such as Senator Arlen Specter, the public’s interest in the free flow of information about the government is facilitated by protecting confidential relations between sources and government officials.³²

In this Article, I explore a set of questions that courts have only recently begun to analyze. First, assuming there are circumstances in which the source of a leak can be identified, is the source’s disclosure of classified information protected under the First Amendment? Second, under well-established precedent, the press may publish confidential information so long as it is lawfully acquired.³³ Recent cases, though, raise questions about the contours of the phrase “lawfully acquired.” For example, if a reporter receives information from a source with knowledge that the source is violating the law, is the reporter a co-conspirator? To treat a reporter as a co-conspirator, based on mere knowledge of a source’s illegal action, collapses a

28. H.R. 2102, at § 2(a)(4). I have previously criticized such ad hoc evaluation of journalist-source relationships. See Lee, *supra* note 19, at 666–70.

29. Free Flow of Information Act of 2007, S. 2035, 110th Cong. (2007).

30. See, e.g., Letter from Michael B. Mukasey, Attorney General, and J.M. McConnell, Director of National Intelligence, to Harry Reid, Senate Majority Leader, and Mitch McConnell, Senate Minority Leader (Apr. 2, 2008) (stating that the proposed legislation would have “dramatic consequences for our ability to protect the national security”); see also *Reporters’ Privilege Shield Legislation: Preserving Effective Federal Law Enforcement: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [Hereinafter *McNulty Hearings*] (statement of Paul McNulty, Deputy Att’y Gen.), available at <http://www.usdoj.gov/opa/mediashield/dag-testimony-mediashield-law092006.pdf> (stating that our national security is “too important” to be subjected to these burdens).

31. *Id.*

32. 153 CONG. REC. S11330 (daily ed. Sept. 10, 2007) (remarks of Sen. Specter); see also Elizabeth Williamson, *House Passes Bill to Protect Confidentiality of Reporters’ Sources*, WASH. POST, Oct. 17, 2007, at A3 (quoting Rep. Mike Pence who stated that “[w]ithout the promise of confidentiality, many important conduits of information about our government will be shut down”).

33. See, e.g., *Landmark Commc’ns v. Virginia*, 435 U.S. 829, 837–38 (1978) (concluding that Virginia’s interests advanced by criminal prosecution does not outweigh the encroachment on the freedom of speech and press).

critical First Amendment distinction between nongovernmental actors (outsiders) and government employees (insiders).³⁴

As this Article will show, our political culture largely tolerates leaks and recognizes the importance of leaks in the democratic dialogue. Leakers are rarely identified and even more rarely criminally prosecuted. Arguments for a constitutional right of government employees to leak have not yet been, nor are they likely to become, persuasive to the judiciary largely because of a duty of nondisclosure applicable to government employees in positions of trust. Also, courts are hesitant to micromanage the internal affairs of other branches of government, especially concerning delicate matters such as the treatment of classified information. Nonetheless, courts should vigorously protect the right of the press to publish confidential information. In actions against leakers, courts and legislatures must be sensitive to the impact of their decisions on the practice of journalism and the flow of information to the public.

Part I of this Article describes leaking,³⁵ leak investigations, and the

34. The terms insiders and outsiders are borrowed from earlier articles on leaking. See Bruce E. Methven, Comment, *First Amendment Standards for Subsequent Punishment of Dissemination of Confidential Government Information*, 68 CAL. L. REV. 83, 84 n.6 (1980) (describing insiders as those who have legitimate access to confidential government information; outsiders do not have such access); accord Susan D. Charkes, Note, *The Constitutionality of the Intelligence Identities Protection Act*, 83 COLUM. L. REV. 727, 730 (1983) (providing the same definitions).

35. In this Article, leaking refers to the unauthorized disclosure by a government employee or contractor of classified information, or information protected by a duty of non-disclosure, to an unauthorized recipient. See, e.g., Department of Defense Directive No. 5210.50, *Unauthorized Disclosure of Classified Information to the Public* (July 22, 2005) [hereinafter DODD]; Department of Defense Directive No. 5210.50, *Unauthorized Disclosure of Classified Information to the Public*, Attachment E (Department of Justice Media Leak Questionnaire) (July 22, 2005) [hereinafter DOJ Questionnaire]; see also *United States v. Rosen*, 445 F. Supp. 2d 602, 628 (E.D. Va. 2006) (stating that in the context of an Espionage Act prosecution, the term leak connotes an “unpermitted or unauthorized transfer” of national defense information). Other commentators use similar definitions, see, e.g., Note, *Plugging the Leak: The Case for a Legislative Resolution of the Conflict Between the Demands of Secrecy and the Need for an Open Government*, 71 VA. L. REV. 801, 803 n.12 (1985) (noting that leaks are “the unauthorized disclosure of government information by a government official”), and often add that the information was provided to journalists with an expectation of anonymity. See, e.g., MARTIN LINSKY, *IMPACT: HOW THE PRESS AFFECTS FEDERAL POLICYMAKING* 171 (1986) (writing that there are two essential elements of a leak: the information is considered confidential and the leaker does not want to be identified); Richard Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists’ Confidentiality*, 43 SAN DIEGO L. REV. 425, 426 n.1 (2006) (defining leaks as information released to the press by a government source with an expectation of anonymity).

Outside of the government context, individuals acquire information under a variety of obligations of confidentiality, such as contracts governing trade secrets. Thus, in its broadest sense, leaking may refer to the unauthorized disclosure of any information protected by a duty of nondisclosure. One of the most noteworthy leaks of confidential business information occurred in 2005 when the *Wall Street Journal*,

Court's belief that insiders are bound by a duty of confidentiality. Part II focuses on cases involving insiders; it explores the enforcement of the Espionage Act, the recent investigation and prosecution of Scooter Libby, and the latest opinion in the long-running *Boehner v. McDermott*³⁶ case. Part III discusses cases resting on theories that expose the press to liability for seeking and receiving confidential information. For example, the early opinions in *Boehner* ruled that Representative James McDermott, who leaked a tape recording to newspapers, acted illegally because he knew the recording was unlawfully recorded by another party.³⁷ This theory exposes the press to liability because journalists frequently know that sources have disclosed information illegally. The theory of the AIPAC lobbyist case is also discussed. If the conspiracy charge in that case is valid, reporters are in widespread violation of the Espionage Act.

I. LEAKING, LEAK INVESTIGATIONS, AND THE DUTY OF NONDISCLOSURE

A. *The Transaction*

"[C]onfidentiality is the lubricant of journalism."

Karen Tumulty, national political correspondent for *Time*³⁸

Washington-based journalists commonly claim that government insiders offer newsworthy information only on the condition that their identities will not be published. As Matt Cooper of *Time* stated, "Many newsworthy stories come to me from people—some connected with the Administration, some not—who make it clear to me that they will not offer the information to me unless I can promise them

citing anonymous sources, published details from a Hewlett-Packard board meeting. Pui-Wing Tam, *Hewlett-Packard Board Considers a Reorganization*, WALL ST. J., Jan. 24, 2005, at A1. This prompted an extraordinary leak investigation involving methods such as improperly obtaining phone records for Hewlett-Packard directors and others. See James Stewart, *The Kona Files: How an Obsession with Leaks Brought Scandal to Hewlett-Packard*, NEW YORKER, Feb. 19, 2007, at 152. Most recently, Hewlett-Packard paid \$14.5 million to settle charges related to methods it employed to identify sources of leaks. Christopher Lawton, *H-P Settles Civil Charges in 'Pretexting' Scandal*, WALL ST. J., Dec. 8, 2006, at A3.

36. *Boehner v. McDermott (Boehner III)*, 484 F.3d 573 (D.C. Cir. 2007) (en banc), cert. denied, 128 S. Ct. 712 (2007).

37. *Boehner v. McDermott (Boehner II)*, 441 F.3d 1010, 1016–17 (D.C. Cir. 2006), vacated and reh'g en banc granted, No. 04-7203, 2006 U.S. App. LEXIS 32570 (D.C. Cir. June 23, 2006), aff'd en banc, 484 F.3d 573 (D.C. Cir. 2007).

38. Lorne Manley, *Editors and Time Inc. Offer Reassurances to Reporters*, N.Y. TIMES, July 13, 2005, at A18.

that their identities will remain secret.”³⁹ Reporters covering national security issues observe that sensitive topics involving classified information can only be confirmed and placed into context through confidential sources. Scott Armstrong, former national security correspondent for the *Washington Post*, states that “the vast majority of high-level government officials become confidential sources. In my experience, they understand that the efficient operation of government and minimal standards of accountability to the public require that they provide confidential briefings to journalists covering daily stories.”⁴⁰ Hence, national security coverage frequently attributes information to “senior administration officials” and adds that these officials declined to be named because they were divulging classified information.⁴¹

To facilitate the transactions between journalists and sources, a set of terms has emerged to describe how information may be used and how a source may be identified.⁴² For example, material that is “on the record” can be used in a direct quotation and the source can be identified.⁴³ Material that is “on background” can be used in a quotation provided the source is not identified by name, but is identified by terms such as a “senior White House official.”⁴⁴ Material that is “deep background” can be published provided there is no identification of the source or how the material was obtained.⁴⁵ Material that is “off the record” may not be published.⁴⁶

39. Brief of Appellants Judith Miller, Matthew Cooper and Time Inc. at 15, *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964 (D.C. Cir. 2005) (No. 04-3138) (quoting affidavit of Matthew Cooper).

40. *Id.* at 13 (quoting affidavit of Scott Armstrong).

41. See, e.g., Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. TIMES, Dec. 7, 2007, at A1 (stating that several “current and former intelligence officials” provided information for this story and all requested anonymity); Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1 (reporting that more than two dozen current and former officials involved in counterterrorism were interviewed for the story; most would speak only on the condition of anonymity “because of the secrecy of the documents and the C.I.A. operations they govern”).

42. Norman Pearlstine, former editor-in-chief of Time Inc., acknowledges there is not complete agreement among journalists about the meaning of these terms. NORMAN PEARLSTINE, *OFF THE RECORD* 166–67 (2007). For example, reporters and sources “frequently confuse *off the record* with other terms that disguise the source but allow use of the information.” *Id.* at 167. Nonetheless, the terms as defined by Pearlstine are presented here as a guide to reporter-source understandings.

43. *Id.* at 167, 261.

44. MAX FRANKEL, *THE TIMES OF MY LIFE AND MY LIFE WITH THE TIMES* 224–26 (1999).

45. PEARLSTINE, *supra* note 42, at 168, 261.

46. *Id.* at 261. For a description of the utility of background, deep background, and off-the-record briefings by government officials, see FRANKEL, *supra* note 44, at 222–26.

Relations between reporters and sources often are the result of intricate negotiations. Information can be offered to a reporter with an express set of limitations as to how it is used and how the source is identified. For example, testimony in the Libby case revealed that during a breakfast meeting with Judith Miller of the *New York Times*, Libby asked that the information he was about to provide to her be attributed to a “former Hill staffer” rather than to a “senior administration official,” as had been their prior agreement.⁴⁷ Or, the reporter can offer anonymity as a means of getting the source to divulge information. As the *New York Times* policy on confidential sources states, there are occasions when “we may use an offer of anonymity as a wedge to make telephone contact, get an interview or learn a fact.”⁴⁸ The *New York Times* policy also states that “[w]henver anonymity is granted, it should be the subject of energetic negotiation to arrive at phrasing that will tell the reader as much as possible about the placement and motivation of the source—in particular, whether the source has firsthand knowledge of the facts.”⁴⁹

Journalists generally do not believe that seeking or receiving classified information is illegal or unethical. For example, the *New York Times* policy on ethics in journalism states that in the newsgathering process, journalists must not engage in activities such as theft, wiretapping, or breaking and entering.⁵⁰ The policy statement, however, omits any mention of the impropriety of asking for or receiving confidential information. Journalists commonly work under the premise that they are free to ask for information and those with access to it are free to say no.⁵¹ Stated differently, the press is not the guardian of the morals of its sources.⁵² A robust theory of press

47. See MICHAEL ISIKOFF & DAVID CORN, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR 260–62 (2006). Howard Kurtz, who covers the press for the *Washington Post*, wrote that few journalists would dispute that practices revealed at the Libby trial “gave their profession a black eye.” Howard Kurtz, *A Case of Bad Ink: Portrait of Media Is Not So Flattering*, WASH. POST, Mar. 7, 2007, at C1; see also PEARLSTINE, *supra* note 42, at 243 (stating that the Libby trial showed “a symbiosis between reporters and sources in which the reporters think it is their first job to protect sources and that informing the public comes second”).

48. N.Y. Times, Confidential News Sources Policy, http://nytco.com/company/business_units/sources.html (last visited Apr. 8, 2008).

49. *Id.*

50. N.Y. TIMES, ETHICAL JOURNALISM: A HANDBOOK OF VALUES AND PRACTICES FOR THE NEWS AND EDITORIAL DEPARTMENTS 9 (Sept. 2004), available at http://nytco.com/pdf/NYT_Ethical_Journalism_0904.pdf.

51. See William E. Lee, *The Unusual Suspects: Journalists as Thieves*, 8 WM. & MARY BILL RTS. J. 53, 54–55 (1999) (describing the journalistic practice of asking for confidential information).

52. See ALEXANDER BICKEL, THE MORALITY OF CONSENT 81 (1975) (stating that the duty of the press is to publish, “not to guard security or be concerned with the morals of its sources”).

freedom means that reporters may aggressively probe the government's secrets, short of bribery, blackmail, other forms of coercion, and theft. As Justice Stewart wrote, "[s]o far as the Constitution goes, the autonomous press may publish what it knows and may seek to learn what it can."⁵³

B. Security Indoctrination

The government employs an array of internal measures to guard its secrets. Prior to gaining access to classified information, government employees and contractors receive training on "basic security policies, principles, practices, and criminal, civil, and administrative penalties."⁵⁴ In particular, they are taught the proper procedures for safeguarding classified information, the definition of unauthorized disclosure, and the penalties associated with unauthorized disclosures. These principles are reinforced through periodic refresher training and termination briefings emphasizing the continuing obligation not to disclose any classified information and the potential penalties for non-compliance.⁵⁵

Government officials and contractors with classified information clearances⁵⁶ also sign agreements acknowledging their duty to safeguard classified information. One such agreement, formally known as a Classified Information Nondisclosure Agreement, and informally referred to as a Standard Form 312, specifies that signers agree to never disclose classified information without verifying that

53. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975) (emphasis added). Or, as stated by journalist Max Frankel, "Where secrets are concerned, it's for the government to keep them if it can, and for us to learn them, if we can." FRANKEL, *supra* note 44, at 222.

54. 32 C.F.R. § 2001.71(b) (2007).

55. *Id.* § (d)–(e). While he was head of the CIA, William Casey became enraged about leaks and personally delivered lectures to senior Reagan administration officials on the damage caused by leaks. One such lecture, delivered at the White House, included instructions to the attendees that the information "they would hear was classified and must be treated as such. . . . The secret White House meeting on leaking was leaked. Within days, Lou Cannon had the story in the *Washington Post*." PERSICO, *supra* note 10, at 344.

56. Under Executive Order 13,292, information owned, produced by or for, or under the control of the United States Government is classified as either "Confidential," "Secret," or "Top Secret." 68 Fed. Reg. 15315 (Mar. 28, 2003). Access to classified information at any level may be further restricted through compartmentation. See 28 C.F.R. § 17.18(a) (2007) (stating that Sensitive Compartmented Information is "information that not only is classified for national security reasons as Top Secret, Secret, or Confidential, but also is subject to special access and handling requirements because it involves or derives from particularly sensitive intelligence sources and methods"). This means that only a limited number of individuals working on a project are authorized to gain access to SCI materials.

the recipient is authorized to receive it or that the signer has been given written authorization to disclose the information.⁵⁷

While employees of intelligence agencies, such as the CIA, are excluded from the protections of the Whistleblower Protection Act,⁵⁸ those who want to disclose “a serious or flagrant problem, abuse, [or] violation of law”⁵⁹ are authorized to report their concerns to the agency’s Inspector General or to the congressional intelligence committees.⁶⁰ Disclosure of classified information to unauthorized recipients, though, is grounds for removal from any position of trust, revocation of security clearances, termination,⁶¹ and in exceptionally rare cases, criminal prosecution.

Despite the belief of officials, such as current CIA Director Michael Hayden, that leaks cause serious damage,⁶² currently there is no general criminal statute penalizing the unauthorized disclosure of classified information, akin to the Official Secrets Act in England.⁶³

57. Classified Information Nondisclosure Agreement, Standard Form 312 ¶ 3, available at [http://contacts.gsa.gov/webforms.nsf/0/03A78F16A522716785256A69004E23F6/\\$file/SF312.pdf](http://contacts.gsa.gov/webforms.nsf/0/03A78F16A522716785256A69004E23F6/$file/SF312.pdf).

58. 5 U.S.C. § 2302(a)(C)(ii) (2000) (excluding employees of agencies such as the CIA and the NSA). See generally Louis Fisher, CONG. RESEARCH. SERV., NATIONAL SECURITY WHISTLEBLOWERS (2005), available at <http://www.fas.org/sgp/crs/natsec/RL33215.pdf>.

59. 50 U.S.C. § 403q(d)(5)(G)(i)(I) (Supp. IV 2004).

60. 50 U.S.C. § 403q(d)(5)(A–E) (prescribing procedures for CIA employee disclosure of serious problems); see also 5 U.S.C. app. § 8H(a)(1)(A) (Supp. II 2002) (describing procedures for employees of the Defense Intelligence Agency, National Imagery and Mapping Agency, National Reconnaissance Office, and National Security Agency to report serious problems). For a discussion of the legislative history of these provisions, see Thomas Newcomb, *In from the Cold: The Intelligence Community Whistleblower Protection Act of 1998*, 53 ADMIN. L. REV. 1235 (2001). For criticism of the whistleblower protections for intelligence agency employees, see PROJECT ON GOV’T OVERSIGHT, HOMELAND AND NATIONAL SECURITY WHISTLEBLOWER PROTECTIONS: THE UNFINISHED AGENDA (2005), <http://www.pogo.org/p/government/go-050402-whistleblower.html>.

61. See, e.g., 5 U.S.C. § 7532 (2000) (providing for suspension and removal of employees considered to be a threat to national security).

62. Recently, CIA Director Hayden delivered a speech in which he gave specific illustrations of how leaks have harmed the CIA’s relations with sources. General Michael V. Hayden, Cent. Intelligence Agency Dir., Remarks at the Council on Foreign Relations (Sept. 7, 2007), available at <https://www.cia.gov/news-information/speeches-testimony/2007/general-haydens-remarks-at-the-council-on-foreign-relations.html>. In 2006, then CIA Director Porter Goss told a Senate committee that leaks have caused “severe damage” to the CIA’s operations. Spencer Hsu & Walter Pincus, *Goss Says Leaks Have Hurt CIA’s Work, Urges Probe: NSA Eavesdropping Defended at Briefing*, WASH. POST, Feb. 3, 2006, at A3. The Robb-Silberman Commission reported in 2005 that leaks “are now beginning to rival espionage in frequency, scope, and cumulative damage.” THE COMM’N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT 545 (Mar. 31, 2005), available at http://www.wmd.gov/report/wmd_report.pdf.

63. *Concerning Unauthorized Disclosure of Classified Information: Hearing Before the S. Select Comm. on Intelligence*, 106th Cong. 10 (2000) [hereinafter *Reno Hearings*]

The espionage statutes have been applied to leakers, albeit rarely, but critics argue that the existing espionage statutes are more appropriate to the problem of classic espionage—the transfer of information to foreign governments—than leaking to the press.⁶⁴ In addition to the espionage statutes, Congress has enacted a patchwork of statutes, such as the Intelligence Identities Protection Act of 1982 (“IIPA”),⁶⁵ that in theory applies to leaking but has not been invoked. The tacit understanding in Washington is that leaks are seldom subject to criminal action.

C. *Leaking*

Despite the security indoctrination of government employees, leaking classified information occurs so regularly in Washington that it is often described as a routine method of communication about government.⁶⁶ For example, in 2000, the chief executives of CNN, the *Washington Post*, the Newspaper Association of America, and the *New York Times* asked President Clinton to veto legislation that would have made it a felony for a government official to disclose classified information. The news executives wrote that any “effort to impose criminal sanctions for disclosing classified information must confront the reality that the ‘leak’ is an important instrument of communication that is employed on a routine basis by officials at every level of government.”⁶⁷ Senator Daniel Patrick Moynihan wrote

(statement of Janet Reno, Att’y Gen.), *available at* <http://ftp.fas.org/sgp/othergov/renoleaks.pdf>. Because of the patchwork of statutes possibly applicable to leaking, critics charge that “Congress has not constructed a principled and consistent scheme of criminal sanctions to punish the disclosure of vital government secrets.” Note, *Plugging the Leak*, *supra* note 35, at 815.

64. See *United States v. Morison*, 844 F.2d 1057, 1085 (4th Cir. 1988) (Phillips, C.J., concurring) (stating that the espionage statutes are “unwieldy and imprecise instruments for prosecuting government ‘leakers’ to the press as opposed to government ‘moles’ in the service of other countries”). In fact, scholars claim that Congress never intended the espionage statutes to apply to leaking. Edgar & Schmidt, *supra* note 11, at 1077.

65. 50 U.S.C. §§ 421–426 (2000 & Supp. IV 2004).

66. A 1982 study by representatives of various departments and agencies, such as the CIA and the Department of Defense, concluded that “the unauthorized publication of classified information is a routine daily occurrence in the United States.” REPORT OF THE INTERDEPARTMENTAL GROUP ON UNAUTHORIZED DISCLOSURES OF CLASSIFIED INFORMATION B-1 (Mar. 31, 1982) [hereinafter WILLARD REPORT]. One study of senior federal officials found that forty-two percent of those responding said they leaked. LINSKY, *supra* note 35, at 172. For a discussion of the motivation for leaks and the different types of leaks, see STEPHEN HESS, THE GOVERNMENT/PRESS CONNECTION 77–78 (1984); Kielbowicz, *supra* note 35, at 468–83.

67. Raymond Bonner, *News Organizations Ask White House to Veto Secrecy Measure*, N.Y. TIMES, Nov. 1, 2000, at A32. President Clinton vetoed the measure because it was “overbroad and may unnecessarily chill legitimate activities that are at the heart of a democracy.” President’s Message on Returning Without Approval to the House of Representatives the “Intelligence Authorization Act for Fiscal Year 2001,” 36

that an “evenhanded prosecution of leakers could imperil an entire administration.”⁶⁸

The image of the leaker as a brave soul exposing corruption—an image deeply embedded in our popular culture and vividly illustrated by Watergate’s “Deep Throat”⁶⁹—is incomplete and misleading.⁷⁰ Leakers have a variety of motives; as Patrick Fitzgerald argued before the Libby jury, leaking can be a form of retribution against an administration’s critics.⁷¹ Journalist Michael Kinsley correctly wrote, sometimes anonymous sources “are truth-tellers exposing institutional lies. Sometimes they are promoting an institutional agenda and want anonymity because they are spreading lies.”⁷²

Presidents customarily decry leaks; Ronald Reagan most colorfully expressed this position when he stated he was “up to my keister” in leaks.⁷³ This public posture, though, belies the fact that presidents and other top officials frequently disclose classified information to the press. John F. Kennedy famously remarked that the “Ship of State is the only ship that leaks at the top.”⁷⁴ Richard Nixon’s obsession with leaks led to the establishment of the infamous White House Plumbers; the Plumbers were responsible for preventing leaks and gathering and leaking of information about Nixon’s enemies. Even as the Nixon Administration was fighting in court against publication of the Pentagon Papers, which had been leaked to the press by Daniel Ellsberg, Nixon was instructing his aides to leak information adverse to Ellsberg and prior Democratic

WEEKLY COMP. PRES. DOC. 2784 (Nov. 4, 2000). See generally Walter Pincus, *Clinton Vetoes Bill Targeting Leaks of Classified Information*, WASH. POST, Nov. 5, 2000, at A5 (summarizing the debate over the legislation and President Clinton’s justifications for vetoing it).

68. Letter from Daniel Patrick Moynihan, U.S. Senator, to William J. Clinton, President (Sept. 29, 1998), available at <http://www.fas.org/sgp/news/2001/04/moynihan.html>. Journalist Richard Halloran described leaks as “oil in the machinery of government.” ELIE ABEL, *LEAKING* 35 (1987).

69. See John D. O’Connor, *I’m the Guy They Called Deep Throat*, VANITY FAIR, July 2005, at 86–88 (describing W. Mark Felt, who revealed in 2005 he was “Deep Throat,” as “one of American democracy’s heroes”).

70. Michael Kinsley refers to the “cult of the anonymous source” where “worshippers visualize the object of their adoration as a noble dissident, courageously revealing malfeasance by a powerful institution that will wreak a horrible revenge if the source is uncovered.” Michael Kinsley, *Sources Worth Protecting?*, WASH. POST, Oct. 10, 2004, at B7.

71. Fitzgerald told the jury that Libby viewed Valerie Plame’s CIA-affiliation as “an argument, a fact to use against Joe Wilson,” who had been a critic of the Bush Administration. Carol Leonnig & Amy Goldstein, *Libby ‘Told a Dumb Lie,’ Prosecutor Says in Closing Argument*, WASH. POST, Feb. 21, 2007, at A4.

72. Kinsley, *supra* note 70.

73. Dan Eggen, *White House Trains Efforts on Media Leaks*, WASH. POST, Mar. 5, 2006, at A1.

74. ABEL, *supra* note 68, at 17.

administrations. Nixon told an aide, “We have to develop now a program, a program for leaking out information. We’re destroying these people in the papers. . . . This is a game. It’s got to be played in the press.”⁷⁵ The misconduct of the Plumbers led to dismissal of the criminal charges brought against Ellsberg.⁷⁶

Similarly, as the Bush Administration was taking measures to stem leaks, a special counsel was investigating whether White House officials acted illegally by disclosing Valerie Plame’s CIA-affiliation. The investigation and subsequent trial of Scooter Libby revealed that President Bush authorized Libby’s disclosure of key sections of the classified NIE solely to Judith Miller.⁷⁷

Bush’s action lifts the curtain on an important aspect of the disclosure of classified information. Sometimes classified information is authorized by higher-ups to be disclosed to selected reporters. Among Washington insiders, this is known as “planting.”⁷⁸ Although information can be declassified and publicly released,⁷⁹ the selective release of classified information to favored reporters is a deeply established Washington practice. The best description of this process was provided by the *New York Times*’ Max Frankel during the Pentagon Papers litigation. To help judges understand the flow of secrets from top officials to favored reporters, Frankel wrote an affidavit recounting numerous instances during the 1960s in which presidents and cabinet officials provided secret information to him on background or deep background. Frankel concluded,

I know how strange all this must sound. We have been taught, particularly in the past generation of spy scares and Cold War, to think of secrets as *secrets*—varying in their “sensitivity” but uniformly essential to the private conduct of diplomatic and military affairs and somehow detrimental to the national interest if prematurely disclosed. By the standards of official Washington—government and press alike—this is an antiquated, quaint and romantic view. For practically everything that our Government does, plans, thinks, hears and contemplates in the realms of foreign policy is treated as secret—and then unraveled by that same Government, by Congress and by the press in one continuing

75. DANIEL ELLSBERG, *SECRETS* 438 (2002).

76. *See id.* at 444–57 (discussing burglary of office of Ellsberg’s psychiatrist and illegal electronic surveillance); *infra* note 133 and accompanying text.

77. *See* Government’s Response to Defendant’s Third Motion to Compel Discovery, *supra* note 16, at 19–20.

78. HESS, *supra* note 66, at 75 (distinguishing between leaks and plants); ABEL, *supra* note 68, at 2 (same).

79. *See, e.g.,* *Bush Declassifies Alert on Al-Qaeda*, WASH. POST, May 23, 2007, at A11.

round of professional and social contacts and cooperative and competitive exchanges of information.⁸⁰

Planting also partly explains why prosecutions for leaking classified information to the press are so rare;⁸¹ as a high-level interagency group examining leaks found, “Sometimes a time-consuming leak investigation is undertaken, only to reveal that the source of the leak was a White House or Cabinet official who was authorized to disclose the information.”⁸²

D. Leak Investigations

Just as leaking is a deeply embedded Washington ritual, so too is the leak investigation.⁸³ Government agencies, such as the Department of Defense, have policies for reporting and investigating unauthorized disclosures of classified information,⁸⁴ and the Department of Justice requires that these agencies fill out a detailed questionnaire before it will consider opening a criminal investigation into a leak.⁸⁵ The majority of requests for criminal investigations of unauthorized disclosures are submitted by the CIA and NSA.⁸⁶ Due to the FBI’s limited resources in its Washington field office, only a small number of leaks are investigated.⁸⁷

In conducting leak investigations, the Department of Justice’s longstanding practice is to focus on “the universe of potential leakers” rather than on the press.⁸⁸ This is a significant policy

80. 1 *THE NEW YORK TIMES COMPANY V. UNITED STATES* 397–98 (James C. Goodale, compiler, 1971) (reprinting the affidavit of Max Frankel). Frankel’s memoir recounts that the *Times*’ lawyers in the initial stages of the Pentagon Papers case were having difficulty comprehending the routine disclosure of secrets to the press. Frankel wrote a memo to “educate our attorneys in the facts of Washington life” and the lawyers decided to have it retyped in the form of an affidavit. FRANKEL, *supra* note 44, at 338–39.

81. The rarity of criminal prosecutions for leaking creates a climate of “permissive neglect. The unofficial message seems to be: Leak all you want, and no matter how much, or how serious, nothing will happen to you.” James Bruce, *The Consequences of Permissive Neglect*, 47 *STUD. INTELLIGENCE* No. 1 (2003), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol47no1/article04.html>.

82. WILLARD REPORT, *supra* note 66, at A-4; see also *Reno Hearings*, *supra* note 63, at 13–14 (statement of Janet Reno) (stating that leak prosecutions face the prospect of defense such as “apparent authority”).

83. For information about leak investigations conducted since World War II, see Kielbowicz, *supra* note 35, at 493 n.431.

84. See, e.g., DODD, *supra* note 35.

85. DOJ Questionnaire, *supra* note 35.

86. *Reno Hearings*, *supra* note 63, at 4 (statement of Janet Reno) (stating that intelligence agencies request around twenty to twenty-five investigations a year).

87. WILLARD REPORT, *supra* note 66, at A-5 & E-7.

88. *Reno Hearings*, *supra* note 63, at 7 (statement of Janet Reno). Congress also conducts leak investigations, but generally does not seek the identity of journalists’ confidential sources. For example, the special counsel appointed to investigate leaks

judgment that “takes into account concerns that a free press not be unduly chilled in the exercise of its newsgathering functions.”⁸⁹ Since there are usually no witnesses to a leak other than the government official and the reporter, the policy of not questioning reporters about their sources means that almost all leak investigations are closed without identification of the leaker.⁹⁰ Seasoned Washington observers describe leak investigations as a “waste of time.”⁹¹

The atmosphere for the Valerie Plame leak investigation changed dramatically on December 30, 2003, when Patrick Fitzgerald was appointed as a special prosecutor. Fitzgerald’s appointment letter stated that his authority as special counsel was “independent of the supervision or control of any officer of the Department.”⁹² This meant that Fitzgerald was not obligated to submit his requests for subpoenas of journalists through normal Department of Justice channels.⁹³ Fitzgerald’s decision to question journalists led to the most significant confrontation between the government and the press in a generation.

Prior to Fitzgerald’s investigation, government officials had an expectation that leak investigations would be pursued with limited

relating to Clarence Thomas’ confirmation and leaks concerning relations between five senators and a savings and loan company complained when the Senate refused to compel journalists to testify. The special counsel said the Senate did not really want to affect “the continued ability and perhaps even the right of senators and staff persons to disclose confidential information with a certainty that their anonymity will be secure.” S. DOC. NO. 102-20, pt. 1, at 80 (1992).

89. *Reno Hearings*, *supra* note 63, at 7 (statement of Janet Reno).

90. *Id.* at 8–9. Leak investigations are also complicated by the fact that a large number of government officials have authorized access to the classified information. Because of the difficulty of identifying leakers, and the problems of prosecuting leak cases, Reno claimed the problem of leaks should be addressed through measures such as stricter personnel security practices “including prohibitions on unauthorized contacts with the press.” *Id.* at 14. The Willard Report also recommended a series of internal measures to combat leaking. WILLARD REPORT, *supra* note 66, at D1–4.

91. Bruce Sanford & Bruce Brown, *The Futility of Chasing Leaks*, WASH. POST, July 20, 2006, at A23; *see also* WILLARD REPORT, *supra* note 66, at E-10 (finding that “past experience with leak investigations has been largely unsuccessful and uniformly frustrating for all concerned”).

92. Letter from James B. Comey, Acting Att’y Gen., to Patrick J. Fitzgerald, U.S. Att’y (Dec. 30, 2003), *available at* http://www.usdoj.gov/usao/iln/osc/documents/ag_letter_december_30_2003.pdf.

93. *See* 28 C.F.R. § 50.10 (2007) (codifying the Department of Justice policy on issuing subpoenas to reporters). Mark Corallo, who was responsible for approving subpoena requests under former Attorney General John Ashcroft, stated that if Fitzgerald had submitted requests for subpoenas, Corallo would have refused them. Anne Marie Squeo & Gary Fields, *Journalists’ Case Baffles Fans of Fitzgerald*, WALL ST. J., July 1, 2005, at A4. However, Judge Hogan found, based on an affidavit filed by Fitzgerald, that the guidelines had been fully satisfied. *In Re* Special Counsel Investigation, 332 F. Supp. 2d 26, 32 (D.D.C. 2004). The court of appeals held that the guidelines were not enforceable, therefore it did not reach the question of whether Fitzgerald was in compliance. *In Re* Grand Jury Subpoena (*Miller*), 397 F.3d 964, 974–76 (D.C. Cir. 2005).

vigor and would not involve the questioning of journalists.⁹⁴ Journalists also believed, based on Department of Justice policy and lower court rulings recognizing a First Amendment-based journalists' privilege, that they would not be forced to testify about their confidential sources. Fitzgerald shredded the expectations of both sources and journalists. First, Fitzgerald got government officials to sign statements waiving any promise of confidentiality made by members of the press regarding the disclosure of classified information about Valerie Plame.⁹⁵ Second, Fitzgerald subpoenaed reporters. When the reporters and press organizations balked, Fitzgerald prevailed in court.⁹⁶ One of the most remarkable aspects of the Libby trial was the testimony of reporters discussing their conversations with confidential sources. While some claim that as a result of Fitzgerald's zealous pursuit of reporters, "the kid gloves are off regarding the government's treatment of reporters,"⁹⁷ Justice Department officials assert that only in extraordinary circumstances will the questioning of reporters be approved.⁹⁸

Civil litigants, however, are not subject to Justice Department policy and recently those litigants who claim to have been damaged by leaks in violation of the Privacy Act have been increasingly willing to take on the press. Wen Ho Lee, identified by anonymous government sources as the target of an investigation into security breaches at the Los Alamos nuclear research facility,⁹⁹ and Steven Hatfill, branded a "person of interest" in the investigation of the 2001 anthrax attacks,¹⁰⁰ claim that the identity of journalists' confidential sources is critical to proving the elements of their Privacy Act claims. In ruling for Lee, United States District Court Judge Thomas Penfield Jackson questioned whether a "truly worthy First Amendment interest resides in protecting the identity of government personnel who disclose to the press information that the Privacy Act says they may not reveal."¹⁰¹

94. Liptak, *supra* note 23; Toensing, *supra* note 15.

95. See, e.g., Lewis Libby's Statement and Waiver, Gov't Exhibit 11, United States v. Libby, Cr. No. 05-394 (D.D.C. Feb. 1, 2007), available at <http://www.usdoj.gov/usao/iln/osc/exhibits/0201/gx01101.pdf>.

96. *Miller*, 397 F.3d at 965 (requiring several reporters and news organizations to comply with grand jury subpoenas).

97. Toensing, *supra* note 15.

98. See *McNulty Hearings*, *supra* note 30 (statement of Paul McNulty) (describing the Justice Department's approach to balance First Amendment rights and illegal leaks).

99. See, e.g., James Risen, *U.S. Fires Scientist Suspected of Giving China Bomb Data*, N.Y. TIMES, Mar. 9, 1999, at A1.

100. See, e.g., Marilyn Thompson, *The Pursuit of Steven Hatfill*, WASH. POST, Sept. 14, 2003 (Mag.), at W6.

101. *Lee v. Dep't of Justice*, 287 F. Supp. 2d 15, 23 (D.D.C. 2003).

Rather than reveal their confidential sources, five media organizations paid Lee \$750,000 in a June 2006 settlement.¹⁰² Hatfill only recently obtained judicial authorization to question reporters.¹⁰³ The piercing of the confidential relationship between reporters and sources makes leaking an increasingly dangerous endeavor.

E. The Duty of Nondisclosure

For more than forty years the Court's First Amendment jurisprudence has recognized the right of government employees to participate in public dialogue,¹⁰⁴ while also acknowledging that the government as employer has far broader powers than the government as sovereign.¹⁰⁵ In particular, the government as employer has "wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation"¹⁰⁶ Although the Court has never addressed a case where an employee was punished for leaking information to the press, it has addressed circumstances where the press was punished for publishing leaked information. And it has discussed circumstances where employees violated a duty of nondisclosure. Read together, these cases rest on two principles: first, violation of a duty of nondisclosure by government employees is simply outside the scope of First Amendment coverage, and second, the press has a nearly absolute right to publish leaked information. Stated differently, how information is acquired affects one's liability for disclosing or publishing that information. Government employees may not disclose confidential or classified information that they acquire through their employment. However, the press—and other outsiders—are not bound by any duty of nondisclosure when they acquire information via leaks.

1. The distinction between insiders and outsiders

In *Landmark Communications v. Virginia*,¹⁰⁷ the state sought to punish the publication of information concerning a judicial conduct

102. Adam Liptak, *News Media Pay in Scientist Suit*, N.Y. TIMES, June 3, 2006, at A1.

103. *Hatfill v. Gonzales*, 505 F. Supp. 2d 33, 51 (D.D.C. 2007) (requiring five reporters to submit to questioning by Hatfill in connection with his civil suit).

104. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (reiterating that a public employee does not relinquish the right to comment on matters of public interest by virtue of public employment); *see also Connick v. Myers*, 461 U.S. 138, 143–44 (1983) (contrasting the Court's early employee speech cases with later cases).

105. *Waters v. Churchill*, 511 U.S. 661, 671–72 (1994).

106. *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring).

107. 435 U.S. 829 (1978).

investigation that was improperly disclosed to the *Virginian Pilot* newspaper. Noting the constitutional standards protecting commentary about the judiciary, the Court offered a straightforward message about leaking: Much of the risk of improper disclosures could be eliminated through “careful internal procedures to protect the confidentiality” of information.¹⁰⁸ That is, the constitutionally preferred method is to punish government officials who leak; punishing those outsiders who receive and further disseminate leaks is unconstitutional in almost all instances.¹⁰⁹

The protections of *Landmark* are not confined to the press. In framing the case, the Court said the question was whether the right to divulge or publish truthful information about judicial conduct inquiries applied to all “strangers to the inquiry,” that is all non-participants.¹¹⁰ The affirmative answer to this question, as will be shown in the discussion of the AIPAC lobbyist case, has great importance in cases where there is an intermediary between the government employee and the press. A close reading of *Landmark* imposes a significant limitation on all non-participants who divulge or publish information acquired from insiders; they must acquire the information legally. Although the record was silent on the manner in which the *Virginian Pilot* acquired the information,¹¹¹ the Court presumed the newspaper acted lawfully.¹¹² The contours of “lawfully acquired” information are uncertain, as we shall see, and interesting questions are presented in cases where reporters receive confidential information from insiders, knowing that the disclosure is illegal.

Even though the *Landmark* Court did not explicitly address the power of the state to punish insiders who violate confidentiality

108. *Id.* at 845. In support of its preference for “internal measures,” the Court cited several state laws imposing confidentiality obligations on those who participate in judicial conduct inquiries, such as commission members and employees. *Id.* at 841 n.12.

109. In a series of cases after *Landmark*, the Court emphasized that “state action to punish the publication of truthful information seldom can satisfy constitutional standards.” *Smith v. Daily Mail Publ’g. Co.*, 443 U.S. 97, 102 (1979). The *Daily Mail* Court added that even a post-publication penalty “requires the highest form of state interest to sustain its validity.” *Id.*; see also *Bartnicki v. Vopper*, 532 U.S. 514, 527–28 (2001) (quoting *Daily Mail* and reiterating that publishing lawfully obtained information should not be punished); *Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (“[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.”).

110. *Landmark*, 435 U.S. at 837.

111. *Landmark Commc’ns v. Commonwealth*, 233 S.E.2d 120, 123 n.4 (Va. 1977), *rev’d*, 435 U.S. 829 (1978).

112. In subsequent cases, the Court referred to *Landmark* as involving “lawfully obtained” information. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

obligations, the case rests on the premise that there is a critical First Amendment distinction between insiders and outsiders. More explicit development of that idea would appear in *Snepp v. United States*¹¹³ and *United States v. Aguilar*.¹¹⁴

2. *Trust relationships*

Former CIA agent Frank Snepp violated his employment agreement with the CIA by publishing *Decent Interval*, a book about the CIA's activities in South Vietnam, without submitting the manuscript to the CIA.¹¹⁵ To enforce the agreement, a district court issued an injunction requiring Snepp to submit future writings for pre-publication review and a constructive trust was also imposed on Snepp's earnings from the book.¹¹⁶ The Supreme Court affirmed the injunction.¹¹⁷

In a cursory per curiam opinion, the Court noted that Snepp voluntarily entered into a "trust relationship."¹¹⁸ By gaining access to highly classified information through his job, Snepp assumed special obligations. While the Court found the pre-publication review agreement was a reasonable means of protecting the government's compelling interest in protecting secrets,¹¹⁹ the pre-publication agreement is not the key to understanding *Snepp*. In an especially powerful statement, the Court noted that the CIA could have acted to protect its interests even in the absence of an express agreement.¹²⁰ As support, the Court drew upon its employee speech cases for the proposition that activities by employees may be restricted even though in other contexts those activities might be protected by the First Amendment.¹²¹ In essence, the nature of Snepp's job—and the type of information he acquired through his employment—created fiduciary obligations.

Snepp was mirrored in *Aguilar*, in which the Court held that the First Amendment did not apply to a federal judge who disclosed to an acquaintance that a wiretap on the acquaintance's telephone had been authorized by another judge.¹²² Rejecting Judge Aguilar's claim

113. 444 U.S. 507 (1980) (per curiam).

114. 515 U.S. 593 (1995).

115. *Snepp*, 444 U.S. at 507.

116. *Id.* at 508–09.

117. *Id.* at 516.

118. *Id.* at 510.

119. *Id.* at 509 n.3.

120. *Id.*

121. *Id.* (citing *Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

122. 515 U.S. 593, 595, 605–06 (1995).

that the First Amendment required a narrow interpretation of a statute prohibiting disclosure of wiretaps, the Court observed the judge was not

simply a member of the public who happened to lawfully acquire possession of information about the wiretap; he was a Federal District Judge who learned of a confidential wiretap application from the judge who had authorized the interception Government officials in sensitive confidential positions may have special duties of nondisclosure.¹²³

Drawing upon *Snepp*, Chief Justice Rehnquist wrote, “[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public.”¹²⁴

The fact that *Snepp* and *Aguilar* involved no First Amendment scrutiny is striking. Notice, for example, that there was no effort in *Snepp* to assess, à la *Pickering v. Board of Education*¹²⁵ or *Connick v. Myers*,¹²⁶ whether his speech was of public concern and its impact on the agency’s mission and operations.¹²⁷ In effect, the Court was saying that an insider’s violation of a valid rule is insubordination and is punishable irrespective of whether the disclosure involves a matter of public interest.

Deference to the legislature is a key aspect of both *Snepp* and *Aguilar*. This deference anticipates the dangers that would occur if judges were to micromanage the internal affairs of other branches of government. The fear of judicial micromanagement is an important aspect of the Supreme Court’s most recent employee speech case,

123. *Id.*

124. *Id.* at 606 (citing *Snepp*, 444 U.S. at 507).

125. 391 U.S. 563 (1968).

126. 461 U.S. 138 (1983).

127. In *Jurgensen v. Fairfax County*, the Fourth Circuit rejected the First Amendment claims of a Fairfax, Virginia, police officer who was demoted because he leaked to the *Washington Post* a confidential internal review of the department’s emergency operations center. 745 F.2d 868, 882 (4th Cir. 1984). Applying the Supreme Court’s ruling in *Connick v. Myers*, which favors employers, the U.S. Court of Appeals for the Fourth Circuit ruled the plaintiff’s demotion was not in retaliation for whistleblowing, but for the unlawful act of releasing a confidential report “in knowing defiance of a valid departmental regulation. Such a situation does not pose a violation of the employee’s right of free speech.” *Id.* at 882–83 n.23. The police department never sought to prevent Jurgensen from voicing his opinions about conditions in the department; it merely prescribed the “procedure to be followed in seeking documents in the files of an agency.” *Id.* at 887 n.30. Also, the appellate court feared that a right to leak would create a “disorderly procedure.” *Id.* at 886 n.29; see also *Barnard v. Jackson County*, 43 F.3d 1218, 1224 (8th Cir. 1995) (concluding that an employee’s leaking was an act of insubordination and was outweighed by his employer’s right to demand that its employees follow its procedures).

Garcetti v. Ceballos.¹²⁸ An additional aspect of *Garcetti* is also relevant to the leaking context; the *Garcetti* Court noted the “powerful network of legislative enactments” such as whistleblower protection laws, available to those seeking to expose wrongdoing.¹²⁹ While courts in leak cases have not referred to the statutorily prescribed methods of exposing wrongdoing, their overall deference to the legislature indicates they would not be inclined to override these methods with a constitutionally based right to leak.

Moreover, judicial deference to the legislature is also an acknowledgement that complex policy judgments are best left to the legislature. It is noteworthy that in refusing to create a First Amendment-based reporter’s privilege, the Court stated that such a privilege would “embroil” courts in difficult policy determinations, such as defining who may invoke the privilege and the circumstances under which the privilege may be pierced.¹³⁰ At the same time, the Court invited Congress and state legislatures to “fashion standards and rules as narrow or broad as deemed necessary.”¹³¹ Determining policy toward leaking also involves difficult policy choices. These determinations often involve the interplay of a variety of laws and, as I wrote in a previous article, legislatures are uniquely situated to examine and adjust the interplay among laws to create a comprehensive approach to the flow of information.¹³²

II. THE PROSECUTIONS OF INSIDERS

As previously mentioned, criminal prosecutions for leaking are exceedingly rare. Only three cases have been brought under the Espionage Act against those in positions of trust who leaked information to the press. The first, against Daniel Ellsberg, came to

128. 547 U.S. 410 (2006). In *Garcetti*, the Court ruled that a memo prepared by a government employee was not protected speech. The Court feared, in part, that a ruling in favor of the employee would “commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors.” *Id.* at 423. This judicial intervention would be “inconsistent with sound principles of federalism and the separation of powers.” *Id.* For commentary on the impact of *Garcetti* on the employees of national security agencies, see generally Steven I. Vladeck, *The Espionage Act and National Security Whistleblowing After Ceballos*, 57 AM. U. L. REV. 1531 (2008); Jamie Sasser, Comment, *The Silenced Citizens: The Post-Garcetti Landscape for Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759 (2007).

129. *Garcetti*, 547 U.S. at 425 (citing, for example, federal whistleblower protections at 5 U.S.C. § 2302(b)(8) (2000)).

130. *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972).

131. *Id.* at 706.

132. Lee, *supra* note 19, at 677–78.

an inconclusive end due to government misconduct.¹³³ Although Samuel Morison and Lawrence Franklin were convicted of violating the Espionage Act, the actions against them appear capricious. The Libby case began as an investigation of possible Espionage Act and Intelligence Identity Protection Act violations, but the subsequent prosecution for perjury and obstruction of justice did not involve any First Amendment defenses. The concept of a duty of nondisclosure, however, would have an important role to play in the Libby prosecution. In the civil action against Representative James McDermott, the court of appeals found McDermott's duty of nondisclosure overrode any First Amendment defenses.

A. *The Espionage Act Prosecutions*

"To permit the thief thus to misuse the Amendment would be to prostitute the salutary purposes of the First Amendment."

Judge Donald S. Russell¹³⁴

In the two instances in which individuals have been convicted for leaking to the press classified information in violation of the Espionage Act, courts have been dismissive of First Amendment claims. Both individuals, Samuel Morison and Lawrence Franklin, were government employees with Top Secret/SCI (Sensitive Compartmented Information) clearances who had signed nondisclosure agreements and were well familiar with the procedures for handling classified information; the judicial hostility to First Amendment claims in these cases is tellingly revealed by the Fourth Circuit's reference to Morison's leak as "sordid."¹³⁵ Under the relevant portion of the Espionage Act, section 793(d), a leaker's

133. Before surrendering to federal officials in Boston on June 28, 1971, Ellsberg made a brief statement to the press explaining that his leak of the Pentagon Papers was an act of civil disobedience. Ellsberg acknowledged his actions

contradicted the secrecy regulations and, even more, the information practice of the Department of Defense. However, as a responsible citizen I felt I could no longer cooperate in concealing this information from the American public. I acted of course at my own jeopardy, and am ready to answer to all the consequences of my decisions.

ELLSBERG, *supra* note 75, at 408. Ellsberg never learned if his leaking was criminal. The government's case against Ellsberg and his associate Anthony Russo was dismissed because of government misconduct. *See supra* notes 75-76 and accompanying text. This was only a partial victory because federal Judge Mathew Byrne, Jr., refused to rule on the defendants' motion for judgment of acquittal, which would have clarified the scope of the government's power to criminally punish those who leak. *See* Melville Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 311 (1974).

134. *United States v. Morison*, 844 F.2d 1057, 1069-70 (4th Cir. 1988).

135. *Id.* at 1077.

desire to contribute to public discourse is irrelevant, and the *Morison* and *Franklin* courts were wholly uninterested in creating a First Amendment-based exception for leaks intended to affect policy debates.¹³⁶ Nor have these courts shown any interest in balancing the value of a leak against its harmfulness. The *Morison* opinion by the Fourth Circuit was relied upon heavily in the *Franklin* case.

1. Morison

Samuel Morison was an “experienced intelligence officer”¹³⁷ who worked at the Naval Intelligence Support Center in a vaulted area closed to all persons without a Top Secret clearance. Morison also worked part-time for the British publisher of *Jane’s Fighting Ships* and *Jane’s Defence Weekly*.¹³⁸ The Navy initially approved Morison’s relationship with *Jane’s*, subject to Morison’s agreement that he would not supply classified information to the publications.¹³⁹ When Navy officials began questioning Morison’s activities, he sought full-time employment with *Jane’s*.¹⁴⁰ To advance his employment prospects, Morison wrote a summary of a secret report on an explosion at a Soviet naval base and sent it to Derek Wood, editor of *Defence Weekly*.¹⁴¹ Morison also saw on the desk of a co-worker a series of photographs of a Soviet aircraft carrier under construction.¹⁴² The photographs, taken with a KH-11 reconnaissance satellite, were marked on their borders “Secret” and “Warning Notice: Intelligence Sources or Methods Involved.” Morison took the photographs, cut off the borders and mailed them to Wood.¹⁴³ *Defence Weekly* published the photographs and made them available to other media, such as the *Washington Post*.¹⁴⁴ Morison was paid for providing this material to *Defence Weekly*.¹⁴⁵

136. See 18 U.S.C. 793(d) (2000) (providing for criminal penalties—without exception—for anyone who leaks information relating to national security to unauthorized recipients).

137. *Morison*, 844 F.2d at 1073. Morison’s familiarity with security regulations would be critical to the Fourth Circuit’s treatment of his case.

138. *Id.* at 1060.

139. *Id.*

140. See *id.* at 1060–61 (noting that although Navy officials initially approved Morison’s relationship with *Jane’s*, Morison became dissatisfied with the Navy when his “off-duty services with *Jane’s* had become a subject of some controversy between him and the Navy”).

141. *Id.* at 1061.

142. *Id.*

143. *Id.*

144. *Id.*

145. See *id.* (pointing out that even though Morison and Wood had no formal compensation arrangement at the time, Morison was accustomed to being paid after delivering material to *Jane’s*).

The FBI obtained the photographs from *Defence Weekly* and discovered Morison's fingerprints on them; an examination of Morison's typewriter ribbon at work revealed the summary of the secret report on the Soviet naval base explosion.¹⁴⁶ When confronted by the FBI, Morison denied having anything to do with the security breach.¹⁴⁷ In a post-arrest interrogation, one of the arresting officers suggested to Morison that perhaps he "felt that publicizing the progress the Soviets were making in developing a naval force would enable the Navy to obtain greater appropriations."¹⁴⁸ Morison "seemed to jump at this suggestion."¹⁴⁹ At trial, though, the government showed that Morison "was making available secret material to Wood and *Jane's* as a means of furthering his application for employment by *Jane's* and for payment."¹⁵⁰

Morison was sentenced to two years in prison for violating (1) section 793(d) of the Espionage Act that proscribes the willful disclosure of national defense information (NDI) to "any person not entitled to receive it;"¹⁵¹ (2) section 793(e) that prohibits the unauthorized possession and retention of classified information;¹⁵² and (3) a statute that punishes the theft of government property.¹⁵³

Morison claimed sections 793(d) and (e) applied only to classic espionage, which is giving information to agents of a foreign government with intent to harm the United States.¹⁵⁴ The Fourth Circuit rejected this line of reasoning, noting that the statutes were not limited to spies or to agents of a foreign government, "and they declare no exemption in favor of one who leaks to the press."¹⁵⁵ The court of appeals also rejected Morison's vagueness challenge; as an

146. *Id.* at 1062.

147. *See id.* (explaining that Morison denied stealing the photographs from the start and maintained his denial after the FBI discovered his fingerprints and retrieved his typewriter, despite the weight of the evidence against him).

148. *Id.*

149. *Id.*

150. *Id.*

151. 18 U.S.C. § 793(d) (2000). Professors Edgar and Schmidt regard § 793(d) and (e) as "undoubtedly the most confusing and complex of all the federal espionage statutes." Edgar & Schmidt, *supra* note 11, at 998.

152. 18 U.S.C. § 793(e); *see* United States v. Morison, 604 F. Supp. 655, 658 (D. Md. 1985), *aff'd*, 844 F.2d 1057 (4th Cir. 1988) (noting that Morison was charged under § 793(e) because he kept classified reports at his home).

153. 18 U.S.C. § 641 (Supp. IV 2004).

154. Morison cited an "impressive wealth" of legislative history in support of this position, but the district court concluded that if Congress wanted to limit the statute to classic espionage, it could have said so. *Morison*, 604 F. Supp. at 659-60. The Fourth Circuit examined the legislative history and concluded that Congress intended the law to apply to disclosures to anyone not entitled to receive classified information. *Morison*, 844 F.2d at 1066.

155. *Morison*, 844 F.2d at 1063.

experienced intelligence officer, Morison was aware that classified information was not to be transmitted to outsiders, and the documents and photographs were plainly marked “Secret.”¹⁵⁶ Similarly, his overbreadth challenge was rejected because his behavior was not “pure speech” but was “conduct in the shadow of the First Amendment.”¹⁵⁷ Although the appellate court did not explain this distinction, it apparently is an assessment of the impropriety of Morison’s actions, rather than an evaluation of the expressive qualities of Morison’s actions. If, for example, a *Washington Post* reporter had prepared a summary of a secret report, it would be hard to understand how that would be defined as anything other than “pure speech.” But journalists are not in positions of trust, and a key to understanding *Morison* is the appellate court’s overriding belief that Morison violated his trust relationship.¹⁵⁸ In short, Morison acquired the information as a government employee, not as a journalist.

Writing for the appellate court, Judge Russell was dismissive of Morison’s First Amendment claims, bluntly stating that it was “beyond controversy that a recreant intelligence department employee” who acted as Morison did “is not entitled to invoke the First Amendment as a shield to immunize his act of thievery.”¹⁵⁹ If reporters may not violate valid criminal laws in the course of newsgathering, neither may news sources.¹⁶⁰

156. *Id.* at 1073–74.

157. *Id.* at 1075 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 614 (1973)). It is also unclear what the Supreme Court meant by “conduct in the shadow of the First Amendment.” See, e.g., Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 Nw. U. L. REV. 1031, 1061 (1984) (observing that lower courts have been troubled by the Court’s failure in *Broadrick* to clearly define activity that may be classified as “conduct in the shadow of the First Amendment”).

158. See *Morison*, 844 F.2d at 1070 (“[T]here is no basis in the legislative record for finding that Congress intended to . . . exempt transmittal by a governmental employee, who entrusted with secret national defense material, had in violation of the rules of his intelligence unit, leaked to the press.”).

159. *Id.* at 1069.

160. See *id.* at 1068–70 (finding that reporters and sources are both subject to valid criminal laws).

2. Franklin

“So, the real significance of this case is that we have a rule of law. There is a law that says that if you have authorized possession of national defense information, you can’t disclose it to unauthorized people It doesn’t matter that you think that you were really helping. That’s arrogating to yourself the decision of whether to adhere to a statute passed by Congress or not. And we can’t do that in this country.”

Judge T.S. Ellis, III¹⁶¹

AIPAC is widely regarded as one of the most influential lobbying groups in Washington.¹⁶² Two senior AIPAC officials, Steven Rosen and Keith Weissman, like other lobbyists, cultivated close relationships with government officials, journalists, think-tank analysts, and foreign diplomats.¹⁶³ In 2003, Rosen and Weissman began a relationship with Lawrence Franklin, an expert on Iran working in the Office of the Secretary of Defense.¹⁶⁴ With Top Secret/SCI clearance, Franklin was regarded by the AIPAC officials as a “real insider.”¹⁶⁵ Within the Pentagon, though, Franklin was described as a “midlevel policy ‘wonk.’”¹⁶⁶

Franklin was “frustrated” with American foreign policy in the Middle East, especially the National Security Council’s (NSC) lack of concern with the threat posed by Iran.¹⁶⁷ Franklin believed that leaking classified information to Rosen and Weissman, and their subsequent disclosures to the press and others, would cause the NSC

161. Transcript of Sentencing Hearing at 16–17, *United States v. Franklin*, Cr. No. 05-225, Cr. No. 05-421 (E.D. Va. Jan. 20, 2006).

162. See, e.g., Thomas B. Edsall & Molly Moore, *Pro-Israel Lobby Has Strong Voice; AIPAC Is Embroiled in Investigation of Pentagon Leaks*, WASH. POST, Sept. 5, 2004, at A10 (describing AIPAC as “the most powerful pro-Israel lobbying organization in the United States”).

163. Dorothy Rabinowitz, Op-Ed, *First They Came for the Jews*, WALL ST. J., Apr. 2, 2007, at A17 (characterizing the lobbying activities of Rosen and Weissman as “activities that go on every day in Washington”).

164. See, e.g., Jerry Markon, *FBI Tapped Talks About Possible Secrets*, WASH. POST, June 3, 2005, at A7 (stating that the FBI monitored meetings between Franklin, Rosen, and Weissman since 2003).

165. Superseding Indictment at 1, 10, *United States v. Franklin*, Cr. No. 05-225 (E.D. Va. Aug. 4, 2005).

166. Michael Isikoff & Mark Hosenball, *And Now a Mole? In the Pentagon, a Suspected Spy Allegedly Passes Secrets About Iran to Israel*, NEWSWEEK, Sept. 6, 2004, at 50; see David Johnston & Eric Schmitt, *Pentagon Analyst Was Cooperating when Israel Spy Case Became Public, Officials Say*, WASH. POST, Aug. 30, 2004, at A12 (quoting unnamed Department of Defense officials who described Franklin as “at the bottom of the food chain, at the grunt level,” and as having “access to things, but he wasn’t a policymaker”).

167. Jerry Markon, *Pentagon Analyst Given 12½ Years in Secrets Case*, WASH. POST, Jan. 21, 2006, at A1.

to take more serious action.¹⁶⁸ He also hoped that Rosen and Weissman could use their contacts to help him get a job at the NSC.¹⁶⁹

The FBI learned of Franklin's leaks by happenstance. As part of a wide-ranging investigation into possible Israeli espionage within the United States, the FBI was monitoring a lunch between Rosen, Weissman, and an Israeli diplomat when Franklin unexpectedly joined the group.¹⁷⁰ Franklin later met several times with Rosen and Weissman in Washington-area restaurants. For example, at a lunch held on June 26, 2003, Franklin orally disclosed classified information about potential attacks on American forces in Iraq, stating that the information was "highly classified."¹⁷¹ Later that day, Rosen told Weissman that Franklin's information was "quite a story" and that "this channel is one to keep wide open insofar as possible."¹⁷²

The FBI interviewed Franklin on June 30, 2004, and conducted a search of his Pentagon office and his home where eighty-three classified documents were found to be improperly stored.¹⁷³ During the interview, Franklin admitted to providing classified information to Rosen and Weissman, a foreign official, and the press.¹⁷⁴ Franklin agreed to cooperate with FBI agents in a "sting" operation against Rosen and Weissman. Franklin called Weissman and told him that they urgently needed to meet.¹⁷⁵ Wearing a hidden microphone and following the FBI's instructions,¹⁷⁶ Franklin met with Weissman on July 21, 2004, and warned that the information he was about to disclose about Iran's covert actions in Iraq was "Agency stuff" and

168. Eric Lichtblau, *Pentagon Analyst Admits He Shared Secret Information*, N.Y. TIMES, Oct. 6, 2005, at A21; Jerry Markon, *Defense Analyst Guilty in Israeli Espionage Case*, WASH. POST, Oct. 6, 2005, at A2.

169. See Superseding Indictment, *supra* note 165, at 10–11 (asserting that Franklin and Rosen discussed Franklin's job prospects with NSC, and that Franklin went so far as to ask Rosen to "put in a good word" for him).

170. Isikoff & Hosenball, *supra* note 166, at 50; see Susan Schmidt & Robin Wright, *Leak Probe More Than 2 Years Old; Pro-Israel Group's Possible Role at Issue*, WASH. POST, Sept. 2, 2004, at A6 (stating that the investigation of Franklin was coincidental to a broader FBI counterintelligence probe).

171. See Affidavit in Support of Criminal Complaint and Arrest Warrant at 8, United States v. Franklin, Cr. No. 05-309 (E.D. Va. May 3, 2005) (stating that the information Franklin orally disclosed at the lunch was contained in a June 25, 2003 document classified and marked as Top Secret/SCI).

172. Superseding Indictment, *supra* note 165, at 14.

173. Affidavit in Support of Criminal Complaint and Arrest Warrant, *supra* note 171, at 8–9.

174. *Id.* at 8.

175. See Gary Wasserman, *Plugging Leaks, Chilling Debate*, WASH. POST, Feb. 16, 2006, at A27 (explaining that Franklin was directed to call Rosen and Weissman with a life-or-death story about Iran planning attacks against Americans and Israelis in Iraq).

176. Markon, *FBI Tapped Talks*, *supra* note 164.

Weissman could “get into trouble” by receiving the information.¹⁷⁷ Later that day, Weissman shared the information with Rosen, other AIPAC colleagues, and an Israeli diplomat.¹⁷⁸ Weissman and Rosen also shared this information with Glenn Kessler of the *Washington Post*; an FBI wiretap of their phone call to Kessler would lead to an indictment against them.¹⁷⁹

Franklin was charged in early-May 2005;¹⁸⁰ the initial indictment claimed that he conspired with two unnamed and unindicted co-conspirators to communicate NDI (information relating to the national defense) to “persons not entitled to receive such information.”¹⁸¹ The indictment also charged Franklin with communicating classified information to an unnamed diplomatic officer of the Embassy of “Foreign Nation A,”¹⁸² soon identified in the press as Israeli diplomat Naor Gilon.¹⁸³ Franklin engaged in these actions to “advance his own career, advance his own personal foreign policy agenda, and influence persons within and outside the United States government.”¹⁸⁴ One Washington insider, upon hearing this, “tartly noted that if all government officials who leaked material to effect policy changes were charged and convicted, the prisons would soon be packed.”¹⁸⁵

177. Superseding Indictment, *supra* note 165, at 15. The indictment adds that Franklin was authorized to disclose this information to Rosen and Weissman. *Id.* at 3.

178. See Wasserman, *supra* note 175 (stating that Rosen and Weissman “fell for the appeal to save lives” by acting on the false information provided by Franklin).

179. Howard Kurtz, *Media Tangled in Lobbyist Case; Press Freedoms Debated After Wiretapping of Call to Reporter*, WASH. POST, Nov. 12, 2005, at A10; see Dana Milbank, *Amid AIPAC’s Big Show, Straight Talk With a Noticeable Silence*, WASH. POST, Mar. 7, 2006, at A2 (noting that the wiretap revealed that Rosen offered Kessler a line he frequently used when talking with journalists: “at least we have no Official Secrets Act”).

180. Jerry Markon, *Defense Analyst Charged With Sharing Secrets*, WASH. POST, May 5, 2005, at A1.

181. Indictment at 5, *United States v. Franklin*, Cr. No. 05-225 (E.D. Va. May 26, 2005). Press accounts of the arrest named Rosen and Weissman as recipients of information from Franklin. See, e.g., David Johnston & Eric Lichtblau, *Analyst Charged with Disclosing Military Secrets*, N.Y. TIMES, May 5, 2005, at A1 (noting that the complaint did not indicate who Franklin had divulged secret information to, but maintaining that officials identified the persons as Rosen and Weissman).

182. Indictment, *supra* note 181, at 15.

183. See, e.g., David Johnston, *Ex-Analyst Is Facing New Charges*, N.Y. TIMES, June 14, 2005, at A15 (identifying Gilon as a political officer at the Israeli Embassy in Washington and pointing out that he was not accused of any wrongdoing). Franklin also disclosed Gilon’s name in court. See Markon, *supra* note 168 (affirming that Franklin told a U.S. District Court Judge that he had met with Gilon numerous times).

184. Indictment, *supra* note 181, at 6.

185. Rabinowitz, *supra* note 163; see Edgar & Schmidt, *supra* note 11, at 1000 (stating that if § 793(d) and (e) “mean what they seem to say and are constitutional, public speech in this country since World War II has been rife with criminality”).

A superseding indictment, filed in early-August 2005, claimed Franklin conspired with Rosen and Weissman to communicate NDI to those unauthorized to receive it.¹⁸⁶ Interestingly, the superseding indictment claimed Rosen and Weissman had been receiving classified information from government officials other than Franklin and had disclosed this information to journalists and foreign officials. For example, the superseding indictment claimed Rosen received classified information from an unnamed government official (USGO-2) on two occasions in 2002.¹⁸⁷ USGO-2 was later identified by journalists as David Satterfield, the State Department's second ranking official for the Middle East at the time he spoke with Rosen.¹⁸⁸ Satterfield was not charged with any wrongdoing. The superseding indictment also claimed that Franklin had leaked Top Secret/SCI information to reporters in May of 2004.¹⁸⁹ Yet no journalists were indicted for unauthorized receipt of classified information.

In late 2005, Franklin pleaded guilty to conspiracy to communicate national defense information, conspiracy to communicate classified information to an agent of a foreign government, and unlawful retention of national security information.¹⁹⁰ In January 2006, he was

186. Superseding Indictment, *supra* note 165, at 6. Count I of the Superseding Indictment charged Franklin, Rosen and Weissman under 18 U.S.C. § 793(g) for conspiracy to violate 18 U.S.C. § 793(d) and (e). *Id.* Rosen was separately charged in Count III with aiding and abetting Franklin's violation of 18 U.S.C. § 793(d) and for receiving a fax from Franklin in violation of 18 U.S.C. § 2; the document was prepared by Franklin and was based on the classified appendix to a classified document. *Id.* at 12, 19. When Franklin entered his guilty plea, he disputed that the document he prepared was classified. *See* Government's Supplemental Response to Defendants' Motion to Dismiss the Superseding Indictment at 52, United States v. Rosen, Cr. No. 05-225 (E.D. Va. Mar. 31, 2006) (providing an excerpt of Franklin's statement); Rabinowitz, *supra* note 163 (quoting Franklin's in-court statement on the faxed document: "[i]t was unclassified, and it is unclassified"). Judge Ellis refused to dismiss this count of the superseding indictment against Rosen, finding that Franklin's comments at the plea colloquy were "not arguments about the legal sufficiency of the indictment, but rather arguments about the sufficiency of the government's proof." United States v. Rosen, 445 F. Supp. 2d 602, 645 (E.D. Va. 2006).

Interestingly, the superseding indictment never charged that Rosen and Weissman ever sought a copy of a classified document from Franklin. The only document Weissman sought from Franklin was not classified. The government later sought to prove that the document Weissman sought was classified, but Judge Ellis ruled that this would unconstitutionally broaden the indictment. *Id.* at 644-45.

187. Superseding Indictment, *supra* note 165, at 8-9.

188. David Johnston & James Risen, *U.S. Diplomat Is Named in Secrets Case*, N.Y. TIMES, Aug. 18, 2005, at A22.

189. Superseding Indictment, *supra* note 165, at 14. The *Washington Post* later identified *60 Minutes* producer Richard Bonin as a recipient of information from Franklin. Kurtz, *supra* note 179.

190. Plea Agreement at 1-2, United States v. Franklin, Cr. No. 05-225 (E.D. Va. Oct. 5, 2005); *see also* Transcript of Sentencing Hearing, *supra* note 161, at 5. The

provisionally sentenced to more than twelve years in prison.¹⁹¹ Franklin is cooperating in the government's prosecution of Rosen and Weissman, and his sentence will likely be reduced at the conclusion of their upcoming trial.¹⁹²

At Franklin's sentencing hearing, Judge T.S. Ellis III, known for making wide-ranging remarks from the bench, warned leakers that their belief that a leak is in the public interest is not justification for the unauthorized disclosure of classified information.¹⁹³ "Congress has decided how this classified information should be treated. . . . The rule of law applies, and we are all subject to it, and we must also obey it."¹⁹⁴ Finally, Judge Ellis raised the prospect that the press and others could be prosecuted for *receiving* classified information:

So, all persons who have authorized possession of classified information, and persons who have unauthorized possession, who come into possession in an unauthorized way of classified information, must abide by the law. They have no privilege to estimate that they can do more good with it. So, that applies to academics, lawyers, journalists, professors, whatever. They are not privileged to disobey the laws, because we are a country that respects the rule of law, and that's the real significance.¹⁹⁵

The prosecution of Franklin, who was a government employee, raises distinct issues from the prosecution of Rosen and Weissman,

relevant statutory provisions are 18 U.S.C. § 793(d), (e), (g), and 18 U.S.C. § 371. *See* United States v. Rosen, 240 F.R.D. 204, 206 n.3 (E.D. Va. 2007) (noting that Franklin was originally a named defendant and co-conspirator in the indictment, but had pled guilty to violations of 18 U.S.C. § 793(d), (e), (g), and 18 U.S.C. § 371).

191. Markon, *supra* note 167.

192. *See id.* (explaining that Franklin will likely give testimony against Rosen and Weissman); *see also* Transcript of Sentencing Hearing, *supra* note 161, at 22 (recording Judge Ellis' statement to Franklin that his prison sentence would be postponed until he was finished cooperating with the government).

193. That Franklin did not intend to hurt the United States was a factor considered by Judge Ellis in determining the sentence. Transcript of Sentencing Hearing, *supra* note 161, at 22. However, as emphasized in *Morison*, proof of laudable motives is irrelevant under section 793(d). United States v. Morison, 844 F.2d 1057, 1073 n.26 (4th Cir. 1988).

194. Transcript of Sentencing Hearing, *supra* note 161, at 17. Nor did it matter to whom classified information was leaked: "It doesn't matter whether you disclose it to a newspaper. It doesn't matter whether you disclose it to people who are fierce American patriots, or anything else. It doesn't matter. It can't be disclosed. That's the rule of law." *Id.* at 18. Judge Ellis did, however, indicate that he viewed this case differently than a Cold War-era leak of information to the Soviet Union. *Id.*

195. *Id.* at 23-24. The implications of Judge Ellis' comments were not lost on press organizations. The Reporter's Committee for Freedom of the Press sought to file an amicus brief in the Rosen and Weissman case, claiming the indictments "raise issues that could well affect the very nature of how journalism can be practiced." Motion for Leave to File Brief Amicus Curiae of the Reporters Committee for Freedom of the Press at 2, United States v. Franklin, Cr. No. 05-225 (E.D. Va. Oct. 12, 2005). This motion was denied by Judge Ellis. Order, United States v. Rosen, Cr. No. 05-225 (E.D. Va. Feb. 27, 2006).

who had no employment or contractual relationship with the government. Franklin held Top Secret/SCI clearances and during his lengthy government employment repeatedly signed agreements acknowledging his duty to safeguard classified information.¹⁹⁶ Judge Ellis believed that there “can be little doubt” that the First Amendment permits the prosecution of those in a position of trust who disclose national defense information “when that person knew that the information is the type which could be used to threaten the nation’s security, and that person acted in bad faith, i.e., with reason to believe the disclosure could harm the United States or aid a foreign government.”¹⁹⁷

3. *Explicating Morison and Franklin*

Like the Fourth Circuit in *Morison*, Judge Ellis showed no interest in engaging in a First Amendment analysis of leaks by those in a position of trust. The concept of employee rights expressed in these cases is in line with other national security cases, such as *United States v. Marchetti*,¹⁹⁸ which held that enforcement of a CIA secrecy contract does not interfere with freedom of speech: “Thus, Marchetti retains the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain.”¹⁹⁹ The views of Judge Ellis and the Fourth Circuit in *Morison* also reflect an important aspect of government employment law, the need for workforce compliance with valid regulations concerning the handling of information.²⁰⁰ To craft a First Amendment-based exception for government employees to leak classified information “would install every government worker with access to classified information as a veritable satrap.”²⁰¹ As Judge

196. See Affidavit in Support of Criminal Complaint and Arrest Warrant, *supra* note 171, at 3–4 (describing the different non-disclosure agreements Franklin signed).

197. *United States v. Rosen*, 445 F. Supp. 2d 602, 635 (E.D. Va. 2006); see *infra* note 207 (emphasizing the importance of potential harm in section 793 cases).

198. 466 F.2d 1309, 1309 (4th Cir. 1972) (finding CIA secrecy agreement to be constitutional).

199. *United States v. Morison*, 844 F.2d 1057, 1069 (4th Cir. 1988) (quoting *Marchetti*, 466 F.2d at 1317).

200. See *supra* note 127 and accompanying text.

201. *Morison*, 844 F.2d at 1083 (Wilkinson, J., concurring). A few years before *Morison*, the Fourth Circuit rejected the First Amendment claims of a police officer who was demoted because he leaked to the *Washington Post* a confidential internal review of the police department’s emergency operations center. *Jurgensen v. Fairfax County*, 745 F.2d 868 (4th Cir. 1984). The court feared the “administrative chaos” that would occur if it encouraged leaking. *Id.* at 887. Rejecting Jurgensen’s claims

Ellis repeatedly emphasized at Franklin's sentencing hearing, "Congress has decided how this classified information should be treated."²⁰² Moreover, as discussed earlier, deference to a legislative scheme avoids the problem of judicial micromanagement of the internal affairs of the political branches. The message is straightforward: Information policy is properly developed and implemented by the political branches.

Some commentators have suggested that criminal prosecutions of leaks should involve a balancing test.²⁰³ These proposals involve highly subjective assessments of factors such as the news value of a leak.²⁰⁴ This balancing is unlikely to accomplish much because courts are likely to defer to the expertise of intelligence agencies on matters such as the harmfulness of a leak.²⁰⁵ Moreover, the prospect of such

that in *his* opinion the report needed to be publicized, the court of appeals emphasized the dangers of a constitutional right to leak:

This is an important case in the precedent it establishes. If the judgment in this case is to be affirmed, disgruntled public employees will be encouraged to purloin and publish public records of every type under the claim that the document was one which, *in the opinion of the employee*, was of public interest and should be published. . . . It was to prevent this disorderly procedure that both the federal and the state Freedom of Information or "Sunshine," acts, to which we refer later, were enacted. . . . Should we not follow this Act in preference to establishing the disorganizing precedent of investing every public employee with the constitutional right to ferret out surreptitiously public documents and to distribute them at will?

Id. at 886 n.29; *see also* *Barnard v. Jackson County*, 43 F.3d 1218, 1224 (8th Cir. 1995) (stating that a "right to leak" is not tenable).

202. Transcript of Sentencing Hearing, *supra* note 161, at 17.

203. *See, e.g.*, James A. Goldston, Jennifer M. Granholm & Robert J. Robinson, Comment, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409, 457-58 (1986) (advocating an assessment of a leak's contribution to public discourse); Alan M. Katz, Comment, *Government Information Leaks and the First Amendment*, 64 CAL. L. REV. 108, 130-32 (1976) (suggesting a balancing test that weighs the interest of the government in confidentiality against the public interest in gaining access to information, and advocating a standard that punishes leaks that are made in reckless disregard of the government's interest in secrecy); Methven, *supra* note 34, at 92-94 (proposing a substantial abuse test that would protect leaks if a reasonable person believed the leaked information demonstrated substantial abuse of government power).

204. The looseness of an assessment of news value is illustrated in Judge Tatel's balancing approach in the reporter's privilege context; he balances the harmfulness of a leak against its news value. *See In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 997-98 (D.C. Cir. 2005) (Tatel, J., concurring) ("Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value."). According to Judge Tatel, the disclosure of Valerie Plame's CIA affiliation was harmful and lacked news value, but these conclusions were merely announced, rather than supported by any analysis. *Id.* at 998; *see Lee, supra* note 19, at 666-69 (criticizing ad hoc determinations of a reporter's privilege).

205. *See, e.g.*, *Snapp v. United States*, 444 U.S. 507, 512-13 (1980) (referring to the expertise of the CIA and its understanding of material harmful to vital national interests); *Morison*, 844 F.2d at 1082-83 (Wilkinson, J., concurring) (courts lack the expertise to evaluate the national security implications of a leak); *United States v.*

balancing would provide very limited guidance to employees who are considering whether to leak; employees could only guess as to how a court would later assess their action. This uncertainty contrasts with the categorical approach by the *Morison* and *Franklin* courts; employees must follow the statutes and rules concerning the handling of classified information, which were well-known to the defendants, and they had agreed in writing to abide by them.²⁰⁶

The *Morison* and *Franklin* cases indicate that courts are unlikely to do much more to infuse the First Amendment into these types of cases than to impose a judicial gloss on § 793, limiting prosecutions to cases involving potential harm to the United States.²⁰⁷ As Judges Wilkinson and Phillips argued in concurring opinions in *Morison*, the broad language of § 793 must be judicially confined to prevent the statute from being “used as a means of punishing mere criticism of incompetence and corruption in the government.”²⁰⁸ This position is

Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972) (stating that courts are ill-equipped to “become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications”).

206. See *Morison*, 844 F.2d at 1060 (detailing the Non-Disclosure Agreement that Morison signed upon his employment with the Navy, demonstrating his acknowledgment that he could be subject to criminal punishment for disclosing SCI without authorization); Affidavit in Support of Criminal Complaint and Arrest Warrant, *supra* note 171, at 3–4 (stating that Franklin signed in connection with his employment with the Defense Intelligence Agency a Secrecy Agreement and a Classified Information Nondisclosure Agreement, acknowledging that he read and understood the applicable law and was obligated to not disclose classified information without permission).

207. Of course, the information must also be closely held. See, e.g., *United States v. Heine*, 151 F.2d 813, 817 (2d Cir. 1945) (overturning convictions for disclosing publicly available information to Germany).

Despite the language of § 793(d) and (e) punishing disclosures of NDI that “could be used to the injury of the United States or to the advantage of any foreign nation,” 18 U.S.C. § 793(d) (emphasis added), the judicial gloss imposed on the statute disallows punishing disclosures to an ally that would not potentially harm the United States. See *United States v. Rosen*, 445 F. Supp. 2d 602, 640–41 (E.D. Va. 2006) (interpreting *Heine*, 151 F.2d at 815, as limiting Espionage Act prosecutions to cases involving potential harm to the United States). Restricting enforcement of the statute to those cases involving potential harm to the United States was particularly important to Judges Wilkinson and Phillips in *Morison*. See *Morison*, 844 F.2d at 1071–72 (citing the district judge’s jury instructions and definition of information relating to the national defense, which is first, information that if disclosed, is potentially damaging to the United States or could be used by an enemy of the United States; and second, information that is closely held by the government); *id.* at 1084 (Wilkinson, J., concurring) (agreeing with the district court’s instructions to limit prosecution to the disclosure of information that is potentially harmful to the United States); *id.* at 1086 (Phillips, J., concurring) (asserting that the limiting instruction requiring proof of a leak’s potential harm to the United States was necessary to prevent the statute from crossing over to territory protected by the First Amendment).

208. *Morison*, 844 F.2d at 1084 (Wilkinson, J., concurring). Professors Edgar and Schmidt, however, believe that the standard articulated in *Morison* will always be met if the information is classified and is secret. Harold Edgar & Benno C. Schmidt, Jr.,

not premised on the First Amendment rights of employees. Rather, it acknowledges the significant First Amendment *interests* at stake, especially the way “in which the press gathers and reports the news, and the way in which the public learns about its government.”²⁰⁹

4. *Post script*

Given the frequency of leaking in Washington, the prosecutions of Morison and Franklin seem anomalous. In effect, there is a de facto agreement within Washington that the Espionage Act is poorly suited for the prosecution of leaking. Stated differently, there is a political consensus that leaking is so rampant that more aggressive criminal enforcement would not be practical. As Senator Daniel Patrick Moynihan, chair of the bipartisan Commission on Protecting and Reducing Government Secrecy,²¹⁰ wrote in a letter urging President Clinton to pardon Morison, “What is remarkable is not the crime, but that he is the only one convicted of an activity which has become a routine aspect of government life”²¹¹ Moreover, Senator Moynihan believed widespread prosecution of leakers would significantly hamper the ability of the press to function. President Clinton pardoned Morison in one of his final acts in office.²¹²

Another anomalous case involves Scooter Libby. Although Libby was not prosecuted for violating the Espionage Act or the Intelligence Identities Protection Act, the premise that Libby had a duty to protect Valerie Plame’s CIA-affiliation would play an important role in the case.

B. *Scooter Libby*

Question: The indictment describes Lewis Libby using classified information concerning the identity of a CIA agent to some individuals who are not eligible to receive that information. Can you explain why that does not, in and of itself, constitute a crime?

Special Counsel Patrick J. Fitzgerald: That’s a good question and I think, knowing that he gave the information to someone who was

Curtiss-Wright *Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 398–99 (1986).

209. *Morison*, 844 F.2d at 1081.

210. For the Commission’s report on government secrecy recommending protecting, as well as reducing secrecy, see S. DOC. NO. 105-2 (1997).

211. Letter from Daniel Patrick Moynihan, *supra* note 68.

212. Valerie Strauss, *Navy Analyst Morison Receives a Pardon*, WASH. POST, Jan. 21, 2001, at A17. The U.S. attorney who handled Morison’s case on appeal claimed the pardon was “inexplicable.” Breckinridge L. Wilcox, *Speaking of Pardons . . .*, WASH. POST, Feb. 24, 2001, at A23.

outside the government not entitled to receive it, and knowing that the information was classified is not enough.²¹³

In the 1970s, as part of an anti-CIA campaign, ex-CIA agent Philip Agee publicly identified over 1,000 alleged CIA officers. Agee's disclosures violated his contract with the CIA, harmed the agency's intelligence gathering, and were followed by violence against some of those identified.²¹⁴ The Supreme Court upheld the Secretary of State's revocation of Agee's passport,²¹⁵ and Congress responded by enacting the IIPA, punishing the intentional disclosure of the identity of a covert agent to individuals not authorized to receive classified information.²¹⁶ Due to the concept of breach of trust,²¹⁷ the penalties of the IIPA against insiders—that is, those with authorized access to classified information²¹⁸—are more severe than the penalties imposed on outsiders.²¹⁹

Congress announced that the law applied in only limited circumstances. The provision applicable to outsiders, for example, was designed to apply only to those “who make it their business to ferret out and publish the identities of agents.”²²⁰ Congress claimed that the law “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”²²¹

213. Press Conference, U.S. Department of Justice, Special Counsel Patrick Fitzgerald On the Indictment of I. Lewis Libby (Oct. 28, 2005).

214. *Haig v. Agee*, 453 U.S. 280, 283–85 (1981).

215. *See id.* at 304–10 (rejecting claims that the revocation violated the First Amendment).

216. 50 U.S.C. §§ 421–426 (2000 & Supp. IV 2004).

217. *See* H.R. REP. NO. 97-221, at 12 (1981) (“The greater the degree of . . . access, the greater is the duty of trust assumed by the defendant and the greater is the penalty for breach of such duty.”); S. REP. NO. 97-201, at 18 (1981) (mirroring the language of the House report verbatim).

218. 50 U.S.C. § 421(a)–(b). Subsection (a) applies to those who have access to classified information that identifies a covert agent, and authorizes a fine of not more than \$50,000 and/or imprisonment for not more than ten years. Subsection (b) applies to those who have access to classified information and as a result learn the identity of a covert agent, and authorizes a fine of not more than \$25,000 and/or five years imprisonment.

219. 50 U.S.C. § 421(c) applies to those who do not have access to classified information. It imposes a fine of not more than \$15,000 and/or three years imprisonment. *See* Charkes, *supra* note 34 (commenting on the difference in treatment of insiders compared to outsiders by the IIPA); Lawrence Gottesman, Note, *The Intelligence Identities Protection Act of 1982: An Assessment of the Constitutionality of Section 601(c)*, 49 BROOK. L. REV. 479, 482–83 (1983) (noting the relative leniency of the IIPA on outsiders).

220. H.R. REP. NO. 97-580, at 7–8 (1982) (Conf. Rep.).

221. *Id.*

The IIPA lay dormant²²² until 2003, when the Bush White House allegedly outed a CIA agent as a way of discrediting her husband.

1. *The leak*

During his 2003 State of the Union address, President Bush claimed that British intelligence had learned that Saddam Hussein “recently sought significant quantities of uranium from Africa.”²²³ In May and June of 2003, the press began reporting that an unnamed, former American diplomat had traveled to Niger before the President’s address and found that the reports of alleged Iraqi activities were unfounded.²²⁴ On July 6, 2003, in a media blitz, Joseph Wilson authored a *New York Times* op-ed article,²²⁵ appeared on *Meet the Press*,²²⁶ and was the subject of a *Washington Post* article.²²⁷ Wilson disclosed that he was the diplomat who investigated the alleged Iraqi activities and claimed the Bush Administration “twisted” intelligence reports to exaggerate the Iraqi threat.²²⁸

Wilson’s disclosures prompted columnist Robert Novak to investigate why Wilson, who served under President Clinton on the NSC, had been selected for the trip.²²⁹ Novak’s column of July 14, 2003, revealed that Wilson’s wife, Valerie Plame, who worked at the CIA on weapons of mass destruction, suggested sending him to

222. There are no published cases involving prosecution under the IIPA. Elizabeth B. Bazan, CONG. RESEARCH SERV., INTELLIGENCE IDENTITIES PROTECTION ACT 5 (2003). The only conviction under the IIPA came in 1985, when a CIA employee stationed in Ghana pleaded guilty when she told her boyfriend the identity of two agents. Stephen Engelberg, *Ex-Clerk for C.I.A. Pleads Guilty to 2 Charges*, N.Y. TIMES, Aug. 13, 1985, at A16.

223. Press Release, White House Office of the Press Secretary, President Delivers “State of the Union,” (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

224. See, e.g., Nicholas D. Kristof, Op-Ed, *Missing In Action: Truth*, N.Y. TIMES, May 6, 2003, at A31; Walter Pincus, *CIA Did Not Share Doubt on Iraq Data; Bush Used Report of Uranium Bid*, WASH. POST, June 12, 2003, at A1.

225. Joseph C. Wilson IV, *What I Didn’t Find in Africa*, N.Y. TIMES, July 6, 2003, § 4, at 9.

226. *Meet the Press* (NBC television broadcast July 6, 2003).

227. Richard Leiby & Walter Pincus, *Retired Envoy: Nuclear Report Ignored; Bush Cited Alleged Iraqi Purchases, Even Though CIA Raised Doubts in 2002*, WASH. POST, July 6, 2003, at A13.

228. Wilson, *supra* note 225.

229. Novak told the Libby jury that he met Wilson on July 6, 2003 while they were waiting to go on *Meet the Press*. Carol D. Leonnig & Amy Goldstein, *Journalists Testify that Libby Never Mentioned CIA Officer; Some Say They Learned of Plame’s Identity from Other Sources*, WASH. POST, Feb. 13, 2007, at A3. Novak found Wilson’s comments about how things had been done in the NSC under Clinton to be “obnoxious” and thought he was a “questionable choice” to investigate the Niger-Iraq connection. *Id.* (internal quotation marks omitted). Novak’s memoir is more candid. He recounts that Wilson’s behavior in the *Meet the Press* green room caused Novak to think, “What an asshole!” ROBERT D. NOVAK, *THE PRINCE OF DARKNESS: 50 YEARS REPORTING IN WASHINGTON I* (2007).

Africa.²³⁰ Novak attributed this information to two unnamed “senior administration officials.”²³¹ Investigators would later learn that Richard Armitage, Deputy Secretary of State and an opponent of the Iraq war, was Novak’s primary source, and White House political guru Karl Rove was the confirming source.²³²

Novak’s column was soon followed by other news accounts suggesting that the Bush Administration was retaliating against Joseph Wilson by disclosing his wife’s CIA affiliation and her role in his trip to Niger.²³³ This prompted prominent Democrats, such as New York Senator Charles Schumer, to ask for an FBI investigation.²³⁴ News that the FBI had commenced a leak investigation was leaked to the *Washington Post* in late-September 2003.²³⁵ The *Post* quoted an unnamed “senior administration official” who said that “before Novak’s column ran, two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson’s wife “simply for revenge.”²³⁶ The *Post* article provoked Senator Schumer to ask Attorney General John Ashcroft to appoint a special counsel to avoid the appearance of a conflict of interest.²³⁷

Novak responded to the *Post* story by asserting that he was not a willing pawn in a White House smear campaign. Without identifying his primary source, Novak wrote in his October 1, 2003 column that, “[d]uring a long conversation,” a “senior administration official” revealed that “Wilson had been sent by the CIA’s counterproliferation section at the suggestion of one of its employees, his wife. It was an offhand revelation from this official, who is no partisan gunslinger.”²³⁸ Novak’s October 1, 2003 column,

230. Robert D. Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31.

231. *Id.*

232. See, e.g., R. Jeffrey Smith, *Novak Accuses Plame Source of Distortion; Armitage Minimizes Role in Leak; Columnist Differs*, WASH. POST, Sept. 14, 2006, at A12.

233. See, e.g., Matthew Cooper, Massimo Calabresi, & John F. Dickerson, *A War on Wilson?*, TIME, July 17, 2003, <http://www.time.com/time/nation/article/0,8599,465270,00.html>. Joseph Wilson also publicly claimed that he and his wife were targets of a smear campaign designed to intimidate critics of the Bush Administration. Edward Alden & Guy Dinmore, *Uranium Allegation: Second U.S. Official Takes Blame for Bush’s Iraq Claim*, FIN. TIMES, July 23, 2003, at 8.

234. Letter from Charles E. Schumer, U.S. Senator, to Robert S. Mueller III, Dir., Fed. Bureau of Investigation (July 24, 2003), available at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01888.html.

235. Mike Allen & Dana Priest, *Bush Administration Is Focus of Inquiry; CIA Agent’s Identity Was Leaked to Media*, WASH. POST, Sept. 28, 2003, at A1.

236. *Id.*

237. Letter from Charles E. Schumer, U.S. Senator, to John D. Ashcroft, Att’y Gen. of the United States (Sept. 29, 2003), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/cia/schumash92903ltr.pdf>.

238. Robert D. Novak, *Columnist Wasn’t Pawn for Leak*, CHI. SUN-TIMES, Oct. 1, 2003, at 49. Novak added on *Meet the Press* that the disclosure was not a plant. “I have

along with the *Post's* earlier revelation of the Justice Department inquiry, caused Armitage to disclose to Secretary of State Colin Powell that he was Novak's primary source.²³⁹ An interview with the FBI was arranged and Armitage told investigators that he had passed information about Valerie Plame to Novak.²⁴⁰ When Fitzgerald was appointed Special Counsel on December 30, 2003,²⁴¹ investigators already knew who leaked Wilson's identity to Novak.

Despite that Novak learned of Valerie Plame's CIA affiliation from a source outside of the White House, Fitzgerald's investigation revealed that, within the White House, there was a concerted effort to counter Joseph Wilson's claims. Evidence and testimony presented at Libby's trial showed that Vice President Cheney was "irritated because he thought that Wilson had alleged that the vice president had sent him on the fact-finding trip to Niger, but rejected the investigation's conclusions."²⁴² Vice President Cheney's annotated copy of Joseph Wilson's July 6, 2003, *New York Times* op-ed piece was entered as evidence²⁴³ along with talking points Cheney dictated for his staff to use in countering Wilson's claims.²⁴⁴ Further, Cheney carefully

been a planter in this town for over 40 years. I know when somebody's trying to plant a story. This thing—this came up almost offhandedly" *Meet the Press* (NBC television broadcast Oct. 5, 2003), <http://www.msnbc.msn.com/id/3131258/>. Novak's interview with Armitage was arranged before Wilson's July 6, 2003 media barrage. NOVAK, *supra* note 229, at 4.

239. ISIKOFF & CORN, *supra* note 47, at 325; R. Jeffrey Smith, *Ex-Colleague Says Armitage Was Source of CIA Leak*, WASH. POST, Aug. 29, 2006, at A6.

240. Armitage's role was not publicly revealed until late August 2006, nearly a year after Libby was indicted. Victoria Toensing claims that by remaining silent about his role in the case, Armitage was "responsible for one of the most factually distorted investigations in history." Victoria Toensing, Op-Ed, *What a Load of Armitage!*, WALL ST. J., Sept. 15, 2006, at A12. Novak added that Bush administration critics "cannot fit Armitage into the left-wing fantasy of a well-crafted White House conspiracy to destroy Joe and Valerie Wilson." Robert D. Novak, *The Real Story Behind the Armitage Story*, CHI. SUN-TIMES, Sept. 14, 2006, at 33; *see also* Michael Isikoff, *The Man Who Said Too Much*, NEWSWEEK, Sept. 4, 2006, at 41 (stating that one of the ironies of the investigation is that "the initial leak, seized on by administration critics as evidence of how far the White House was willing to go to smear an opponent, came from a man who had no apparent intention of harming anyone").

241. *E.g.*, Charlie Savage, *Ashcroft Steps Aside in Probe into CIA Leak*, BOSTON GLOBE, Dec. 31, 2003, at A12.

242. R. Jeffrey Smith & Carol D. Leonnig, *Vice President's Shadow Hangs Over Trial; Testimony Points Out Cheney's Role in Trying to Dampen Joseph Wilson's Criticism*, WASH. POST, Feb. 4, 2007, at A5; *see also* Government Exhibit 1, testimony of I. Lewis Libby, at 79–82, United States v. Libby, Cr. No. 05-394 (D.D.C. Feb. 7, 2007), *available at* <http://www.usdoj.gov/usao/iln/osc/exhibits/0207/GX1.pdf> (showing that Libby stated twice during his March 5, 2004 grand jury testimony that Vice President Cheney was upset after Wilson's July 6, 2003 *New York Times* op-ed piece).

243. Government Exhibit 402, United States v. Libby, Cr. No. 05-394 (D.D.C. Feb. 14, 2007), *available at* <http://www.usdoj.gov/usao/iln/osc/exhibits/0214/GX40201.PDF>.

244. Government Exhibit 523, United States v. Libby, Cr. No. 05-394 (D.D.C. Jan. 25, 2007), *available at* <http://www.usdoj.gov/usao/iln/osc/exhibits/0125/>

selected reporters, such as Judith Miller, for Libby to talk with, and Cheney went so far as to get President Bush to declassify a portion of the NIE so that Libby could lawfully disclose to Miller information about Iraq's attempts to purchase uranium.²⁴⁵ As Libby told the grand jury,

[I]t was pretty definitive against what Ambassador Wilson was saying [T]he Vice President instructed me to go talk to Judy Miller, to lay this out for her. And I said, that's a problem, Mr. Vice President, because the NIE is a classified document. And the Vice President said he would talk to the President and get the President's approval for us to use the document.²⁴⁶

Although Cheney disclosed to Libby "in sort of an off-hand manner, as a curiosity," that Joseph Wilson's wife worked at the CIA,²⁴⁷ there was no evidence that Cheney instructed Libby to refer to Valerie Plame in his conversations with reporters.²⁴⁸ Nonetheless, two reporters, Judith Miller and Matt Cooper, testified that Libby referred to her in conversations with them prior to Novak's column.²⁴⁹

2. *The inapplicability of the Intelligence Identities Protection Act*

When Special Counsel Patrick Fitzgerald announced Libby's indictment, he was confronted by reporters asking why Libby was not also indicted for leaking Wilson's CIA affiliation. As one reporter commented, "There's a saying in Washington that it's not the crime,

GX52301.PDF; *see also, e.g.*, Government Exhibit 1, *supra* note 242, at 30–32 (showing that Cheney told Libby what to say to Walter Pincus of the *Washington Post*); *id.* at 177 (showing that Cheney dictated what Libby was to say to *Time*); Carol D. Leonnig & Amy Goldstein, *Ex-Aide Says Cheney Led Rebuttal Effort*, WASH. POST, Jan. 26, 2007, at A3 (describing testimony of Cathie Martin recounting Cheney's role in dictating talking points).

245. *See* Government Exhibit 1, *supra* note 242, at 117.

246. *Id.*

247. *Id.* at 30.

248. In a post-verdict interview, one juror revealed that the jurors believed that Libby had been following Cheney's directive to talk with reporters, but said "jurors stopped short of discussing whether the vice president specifically urged Libby to tell journalists about Plame's CIA job." Amy Goldstein & Elizabeth Williamson, *Libby 'Pilloried' for Leak, Panel Members Believed*, WASH. POST, Mar. 7, 2007, at A8. Cathie Martin, Cheney's former press secretary, testified that Cheney never indicated that he wanted disclosure of Valerie Plame's identity. *See, e.g.*, Smith & Leonnig, *supra* note 242.

249. *See, e.g.*, Amy Goldstein & Carol D. Leonnig, *Ex-Time Reporter Testifies in Libby Trial; Cooper Tells of Aide Unmasking Plame*, WASH. POST, Feb. 1, 2007, at A3 (writing that Cooper testified that Libby discussed Plame during a July 12, 2003 conversation); Carol D. Leonnig & Amy Goldstein, *Reporter's Account Hurts Libby Defense; Miller Testifies of White House Aide's Unmasking of Agent*, WASH. POST, Jan. 31, 2007, at A1 (reporting that Miller testified that Libby discussed Plame during a June 23, 2003 conversation).

it's the cover up."²⁵⁰ Fitzgerald observed that the "average American may not appreciate that there's no law that specifically just says if you give classified information to somebody else it is a crime."²⁵¹ According to Fitzgerald, section 793 of the Espionage Act "is a difficult statute to interpret. It's a statute you want to carefully apply."²⁵² And, Fitzgerald said, the IIPA requires a number of elements, such as knowledge that the information was classified.²⁵³ "You need to know at the time he transmitted the information, he appreciated that it was classified information"²⁵⁴

The provisions of the IIPA relevant to government insiders, such as Libby, Armitage, and Rove, punish the intentional disclosure of a covert agent to individuals not authorized to receive classified information, "knowing that the information disclosed so identifies such covert agent."²⁵⁵ "Covert agent" is narrowly defined; the agent's status must be classified, *and* the agent must currently serve outside the United States or within the last five years have served outside the United States.²⁵⁶ It must also be shown that the defendant made the disclosure knowing "that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship."²⁵⁷

There are significant questions about whether Valerie Plame was a covert agent under the IIPA. These questions were not answered during Libby's trial because Judge Reggie B. Walton ruled this issue was irrelevant to determining whether Libby made false statements or sought to obstruct justice.²⁵⁸ Fitzgerald went in two directions on this issue. At his press conference announcing Libby's indictment, Fitzgerald was asked if Libby knew whether Valerie Plame was covert. His measured response stated,

250. Press Release, U.S. Dep't of Justice, Office of the Spokesman, Press Conference: Special Counsel Patrick Fitzgerald on the Indictment of I. Lewis Libby 18 (Oct. 28, 2005).

251. *Id.*

252. *Id.* He added that prosecutors should be cautious in applying § 793 "because there are a lot of interests that could be implicated in making sure that you pick the right case to charge that statute." *Id.* at 18–19.

253. *See id.* at 15 (noting elements of the Espionage Act).

254. *Id.*

255. *E.g.*, 50 U.S.C. § 421(a)–(b) (2000).

256. 50 U.S.C. § 426(4)(A)(i)–(ii) (2000). The definition relevant to Valerie Plame, an employee of an intelligence agency, is also 50 U.S.C. § 426(4)(A)(i)–(ii).

257. 50 U.S.C. § 421(a).

258. Government's Memorandum of Law in Support of Its Proposed Sentencing Guidelines Calculations at 5 n.3, *United States v. Libby*, Cr. No. 05-394 (D.D.C. May 25, 2007). For an example of Judge Walton's instructions to the jury on the irrelevance of Valerie Plame's status, see Defendant I. Lewis Libby's Opposition to the Government's Memorandum of Law in Support of Its Proposed Sentencing Guidelines Calculations at 7, *United States v. Libby*, Cr. No. 05-394 (D.D.C. May 31, 2007).

I am not speaking to whether or not Valerie Wilson was covert and anything I say is not intended to say anything beyond this: that she was a CIA officer from January 1st, 2002 forward, I will confirm; that her association with the CIA was classified at that time through July 2003; and all I'll say is that, look, we have not made any allegation that Mr. Libby knowingly, intentionally outted [sic] a covert agent.²⁵⁹

Nonetheless, in a post-verdict sentencing memorandum, the government sought enhanced penalties against Libby due to the seriousness of the alleged crimes that triggered the investigation. In the memorandum, Valerie Plame was repeatedly described as a covert agent.²⁶⁰

Attached to the government's sentencing memorandum²⁶¹ was a CIA-prepared, unclassified summary of Valerie Plame's CIA employment, asserting that, at the time of Novak's column, she was a "covert CIA employee for whom the CIA was taking affirmative measures to conceal her intelligence relationship to the United States."²⁶² The unclassified summary added that while Wilson was assigned to the Counterproliferation Division, she engaged in temporary duty travel to ten countries, each time traveling under a cover identity.²⁶³ The CIA's summary, though, did not indicate if Plame's overseas assignments had taken place within the previous five years.²⁶⁴ Moreover, since the terms of the IIPA have never been litigated, it is unclear whether temporary assignments met the definition of "served outside" the United States.²⁶⁵

259. Press Release, U.S. Dep't of Justice, Office of the Spokesman, Press Conference: Special Counsel Patrick Fitzgerald on the Indictment of I. Lewis Libby, *supra* note 250, at 11.

260. Government's Sentencing Memorandum at 2, 12, 13, 16, *United States v. Libby*, Cr. No. 05-394 (D.D.C. May 25, 2007).

261. Government's Memorandum of Law in Support of Its Proposed Sentencing Guidelines Calculations, *supra* note 258, at Exhibit A.

262. *Id.*, Exhibit A at 2. In October 2005, the CIA declassified the fact of Plame's employment status from January 1, 2002 to the end of her employment in 2005. *Id.* at 2. Plame, however, sought to reveal her pre-2002 CIA employment in her memoir, but the CIA's publication review board regarded this as classified information. A federal judge recently ruled that the information was properly classified. *Wilson v. McConnell*, 501 F. Supp. 2d 545, 548-49, 552 (S.D.N.Y. 2007).

263. Government's Memorandum of Law in Support of Its Proposed Sentencing Guidelines Calculations, *supra* note 258, Exhibit A at 2.

264. Defendant I. Lewis Libby's Opposition to the Government's Memorandum of Law in Support of Its Proposed Sentencing Guidelines Calculations, *supra* note 258, at 9.

265. *Id.* Two Washington lawyers who participated in drafting the IIPA claim that the law requires a permanent assignment in a foreign country. Victoria Toensing & Bruce W. Sanford, *The Plame Game: Was This a Crime?*, WASH. POST, Jan. 12, 2005, at A21.

Libby's defense responded that the government was making a "brazen attempt" to convince the court that "Libby should be punished as if he outed a covert CIA official or mishandled classified information—a position it carefully avoided taking before or at trial."²⁶⁶ During the discovery process, the defense was precluded from gaining access to classified information about Valerie Plame's status at the CIA.²⁶⁷ Also, the defense had not been allowed to challenge the "conclusory assertions" in the CIA-prepared, unclassified summary of Plame's employment.²⁶⁸

Claims that Valerie Plame was a covert agent in 2003, and that the CIA was undertaking "affirmative measures" to conceal her employment are not persuasive. First, prior to Novak's July 14, 2003, column, the CIA recalled Plame from Europe in 1997, fearing that her identity had been disclosed to the Russians.²⁶⁹ Second, her domestic cover was easily penetrated by anyone willing to scratch the surface.²⁷⁰ For example, the *Boston Globe* reported that the firm Plame listed as her employer when she made a publicly documented campaign donation in 1999 had a listed address in Boston, but no

266. Defendant I. Lewis Libby's Opposition to the Government's Memorandum of Law in Support of Its Proposed Sentencing Guidelines Calculations, *supra* note 258, at 7.

267. *Id.* at 6–7. The Special Counsel's investigators, though, were given access to Plame's classified file. Government's Memorandum of Law in Support of Its Proposed Sentencing Guidelines Calculations, *supra* note 258, at 5 n.2. The defense stated that the government's assertions concerning Plame's status were "tantamount to asking the Court and Mr. Libby to take the government's word on Ms. Wilson's status, based on secret evidence, without affording Mr. Libby an opportunity to rebut it." Defendant I. Lewis Libby's Opposition to the Government's Memorandum of Law in Support of Its Proposed Sentencing Guidelines Calculations, *supra* note 258, at 8.

268. Defendant I. Lewis Libby's Opposition to the Government's Memorandum of Law in Support of Its Proposed Sentencing Guidelines Calculations, *supra* note 258, at 8.

269. Laura Rozen, *Afterword* to VALERIE PLAME WILSON, FAIR GAME 307, 349, (2007); see NOVAK, *supra* note 229, at 10, 602 (stating that Valerie Plame had not been involved in covert operations since she had been "outed" by spy Aldrich Ames). Prior to Novak's column, Plame's CIA affiliation had also been compromised to Cubans. Bill Gertz, *CIA Officer Named Prior to Column*, WASH. TIMES, July 23, 2004, at A4.

270. At the time of Novak's column, Plame worked at CIA headquarters. Toensing & Sanford, *supra* note 265 (stating that "working at a desk job in Langley" is "a no-no for a person with a need for cover"). Plame, however, claimed she had an "airtight cover" while living in Washington and she took different routes to headquarters each day. VALERIE PLAME WILSON, FAIR GAME 71 (2007). Moreover, she said that while stationed at Langley, she traveled overseas using alias passports and disguises. *Id.* at 292. Novak indicated that he found Valerie Plame's name in Joe Wilson's WHO'S WHO IN AMERICA entry. NOVAK, *supra* note 229, at 10. He wrote that "Wilson's putting that name in *Who's Who* was either an act of recklessness or a sign that his wife was not now engaged in covert operations." *Id.*

physical presence.²⁷¹ Also, as the Senate Select Committee on Intelligence discovered, Joseph Wilson was free to write his July 6, 2003, *New York Times* op-ed piece because he was not asked by the CIA to sign a confidentiality agreement.²⁷² As two seasoned Washington observers commented, “Did it not occur to our super sleuths of spycraft that a nationally distributed piece about the incendiary topic of weapons of mass destruction—which happens to be Wilson’s wife’s expertise—could result in her involvement being raised?”²⁷³

Most significantly, prior to his July 14, 2003, column, Novak received confirmation of Plame’s CIA employment from Bill Harlow, the CIA’s public information officer. Novak reported that his CIA source said Plame was unlikely to be stationed overseas again,

but that exposure of her name might cause “difficulties” if she travels abroad. He never suggested to me that Wilson’s wife or anybody else would be endangered. If he had, I would not have used her name. I used it in the sixth paragraph of my column because it looked like the missing explanation of an otherwise incredible choice by the CIA for its mission.²⁷⁴

In addition, Novak asserted that Plame’s CIA status was well-known in Washington, a position supported by other journalists.²⁷⁵ The

271. Ross Kerber & Bryan Bender, *Apparent CIA Front Didn’t Offer Much Cover*, BOSTON GLOBE, Oct. 10, 2003, at D1.

272. S. REP. NO. 108-301, at 41 (2004).

273. Toensing & Sanford, *supra* note 265. Apparently, this prospect did not occur to Plame or her husband. WILSON, *supra* note 270, at 139.

274. Novak, *Columnist Wasn’t Pawn*, *supra* note 238. Novak later publicly identified Harlow as his CIA source. Robert D. Novak, *My Role in the Plame Leak Probe*, CHI. SUN-TIMES, July 12, 2006, at 14. For another version of the Novak-Harlow interaction, see ISIKOFF & CORN, *supra* note 47, at 270–71. Novak reiterated that he would not have published Plame’s name if someone at the CIA had indicated that this would endanger her:

They never said she was endangered. If they were really strong about this and competent, they would have done at least that. I know George Tenet, the director. They would have put him on, and he would have said, “Novak, don’t write this,” and I would not if this woman is in danger.

Meet the Press (NBC television broadcast Oct. 5, 2003), <http://www.msnbc.msn.com/id/3131258/>. In his memoir, Novak added that he “had enough experience with CIA jargon to infer from what Harlow told [him] that Mrs. Wilson at one time had been engaged in covert activities abroad but was not now and never would be again.” NOVAK, *supra* note 229, at 10.

275. Novak, *Columnist Wasn’t Pawn*, *supra* note 238. When Novak’s column identified Valerie Plame, Clifford May, a National Review Online contributor, wrote,

That wasn’t news to me. I had been told that—but not by anyone working in the White House. Rather, I learned it from someone who formerly worked in the government and he mentioned it in an offhand manner, leading me to infer it was something that insiders were well aware of.

Clifford D. May, *Spy Games: Was it Really a Secret that Joe Wilson’s Wife Worked for the CIA?*, NAT’L REV. ONLINE, Sept. 29, 2003, <http://www.nationalreview.com/may/may200309291022.asp>; see also Toensing, *What a Load of Armitage!*, *supra* note 240 (stating that columnist Hugh Sidey claimed Valerie Plame’s name was “knocking

“everybody knows” aspect was emphasized at the trial by Libby’s defense when a tape recording of Bob Woodward’s confidential interview with Richard Armitage was played for the jury. In that conversation in June 2003, nearly a month before Novak’s fateful interview with Armitage, Woodward disclosed that he had learned that Joseph Wilson was the unnamed ambassador discussed by the press in May and June 2003:

WOODWARD: But it was Joe Wilson who was sent by the agency. I mean that’s just—

ARMITAGE: His wife works in the agency.

WOODWARD: —Why doesn’t that come out? Why does—

ARMITAGE: Everyone knows it.

WOODWARD: —that have to be a big secret? Everyone knows.

ARMITAGE: Yeah.²⁷⁶

Armitage explained that Joseph Wilson was selected for the Niger mission because his wife was a weapons of mass destruction analyst at the CIA.²⁷⁷ Armitage concluded by saying: “How about that [expletive deleted]?”²⁷⁸

Even if Valerie Plame fit within the narrow definition of a covert agent, there was no evidence that Libby was aware of this.²⁷⁹ The

around in the sub rosa world . . . for a long time”). Plame, though, asserts that her CIA affiliation was not common knowledge on the “Georgetown cocktail circuit.” WILSON, *supra* note 270, at 300.

276. Defense Exhibit 511T.1, United States v. Libby, Cr. No. 05-394 (D.D.C. Feb. 12, 2007), *available at* http://media.washingtonpost.com/wp-srv/politics/special/plame/woodward_armitage_interview.pdf.

277. *Id.*

278. *Id.* The dispute about Plame’s status turned into high theatre after the trial, with a televised hearing featuring Representative Henry Waxman’s assertions that CIA Director Michael Hayden authorized him to state that Plame was covert at the time of Novak’s July 14, 2003 column. See *White House Procedures for Safeguarding Classified Information: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 2, 93 (2007) (statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight and Government Reform), *available at* http://frwebgate.access.gpo.gov/cgi-in/getdoc.cgi?dbname=110_house_hearings&docid=f:38579.pdf. Novak reported that after this hearing, Hayden told Novak that he had not authorized Waxman’s use of the term “covert.” Instead, Hayden told Novak that Plame was “undercover.” Robert D. Novak, *‘Covert’ Confusion at the CIA*, WASH. POST, Apr. 12, 2007, at A27. For Plame’s claim that she was a covert officer whose affiliation with the CIA was classified, see WILSON, *supra* note 270, at 300.

279. Or, for that matter, that Armitage or Rove were. Armitage most likely learned of Plame’s CIA affiliation from a State Department document in which a paragraph mentioning Plame was marked “S/NF,” which meant the information was classified and was not to be shared with foreigners. See ISIKOFF & CORN, *supra* note 47, at 236. Armitage, however, told investigators that he had not noticed the marking and could not recall how he learned of Plame. *Id.* at 327. Rove probably learned of Plame from Libby, *id.* at 265, but told investigators that he could not remember where and from whom he learned of Plame, *id.* at 333. Fitzgerald would not comment on his decisions not to charge people such as Rove and Armitage. Press

government tried to finesse this issue in a post-verdict memorandum, stating that Libby learned of Wilson's CIA affiliation "from multiple government officials under circumstances that, at a bare minimum, warranted inquiry before the information was publicly disseminated."²⁸⁰ But consider the evidence in the case. For example, Libby testified that when Vice President Cheney orally disclosed Plame's CIA affiliation to him, "[m]y understanding . . . was that it wasn't classified information."²⁸¹ In addition to Cheney's disclosure to Libby, three other government officials testified that they also told Libby that Wilson worked at the CIA, yet "[n]one of them testified that he or she had told Mr. Libby that Ms. Wilson was covert or classified."²⁸² And, in a telling revelation, the government admitted that one of the reasons that it did not charge Libby with violating the IIPA was that neither Miller nor Cooper, or their notes, provided any evidence "specifically proving" that Libby knew Wilson was a covert agent.²⁸³

3. *Post script*

With a "sense of sadness," Judge Reggie B. Walton sentenced Libby on June 5, 2007, to 30 months in prison, two years of probation, and

Release, U.S. Dep't of Justice, Office of the Spokesman, Press Conference: Special Counsel Patrick Fitzgerald on the Indictment of I. Lewis Libby *supra* note 250, at 7. However, journalists Isikoff and Corn obtained information from confidential sources about the discussions within Fitzgerald's investigation. *See* ISIKOFF & CORN, *supra* note 47, at 444. They report that Fitzgerald "never seriously considered" bringing charges against Rove under the IIPA, and after considering charges under the Espionage Act, decided against charges under that statute as well. *Id.* at 403-04. As to Armitage, Isikoff and Corn report that Fitzgerald never considered charging him under the IIPA. He also decided against bringing charges under the Espionage Act even though "as the original leaker to Novak," Armitage was the "closest candidate for prosecution under the law." *Id.* at 405.

280. Government's Memorandum of Law in Support of Its Proposed Sentencing Guidelines Calculations, *supra* note 258, at 7.

281. Government Exhibit 2 at 177, United States v. Libby, Cr. No. 05-394 (D.D.C. Feb. 7, 2007), available at <http://media.washingtonpost.com/wp-srv/politics/special/plame/GX2.pdf>; *see also id.* at 179 (showing that Libby stated the information about Wilson "was not presented to me in any way that it was a classified fact, and I didn't take it that way"). Further, Libby's notes of this conversation do not indicate anything about classified information.

282. Defendant I. Lewis Libby's Opposition to the Government's Memorandum of Law in Support of Its Proposed Sentencing Guidelines Calculations, *supra* note 258, at 10; *see also* Government's Memorandum of Law in Support of Its Proposed Sentencing Guidelines Calculations, *supra* note 258, at 8 n.7 (admitting that Libby learned of Wilson's CIA employment in an oral conversation "in which Ms. Wilson was not expressly identified as a covert agent").

283. Government's Sentencing Memorandum in Support of Its Proposed Sentencing Guidelines Calculations, *supra* note 258, at 15. The government added that Libby was not prosecuted because his false testimony "obscured a confident determination of what in fact occurred." *Id.*

a \$250,000 fine.²⁸⁴ The prison term was in line with the government's recommendation. Further, Walton agreed with the government's argument that Libby should have shown caution when discussing Valerie Plame with reporters.²⁸⁵ Walton remarked that the trial did not prove that Libby knew that Valerie Plame worked in an undercover capacity when he discussed her with reporters. Still, "anybody at that high-level position had a unique and special obligation before they said anything" about someone "associated with a national security agency [to] make every conceivable effort to verify their status before releasing information about them."²⁸⁶

When the Court of Appeals for the District of Columbia Circuit denied Libby's motion to remain free on bail while pursuing his appeal,²⁸⁷ President Bush promptly commuted the prison portion of Libby's sentence.²⁸⁸ Noting the great controversy the case provoked, President Bush stated that he "carefully weighed" the arguments and circumstances surrounding the case, and concluded that the prison sentence given to Libby was "excessive."²⁸⁹

C. *Boehner v. McDermott: The "Politics of Personal Destruction"*²⁹⁰

"I came into politics in the Vietnam era. . . . And I knew about the Pentagon Papers. And there are some things the people are entitled to know, one of which is what the person who's third in line to be President of the United States, how he deals with issues."

Representative James McDermott²⁹¹

"[T]he Investigative Subcommittee did not give weight to Representative McDermott's stated excuse for his conduct: the public's entitlement to be informed. This is not a justification for potentially undermining the House ethics process."

House Committee on Standards of Official Conduct²⁹²

284. Carol D. Leonnig & Amy Goldstein, *Libby Given 2 1/2-Year Prison Term; Former White House Aide 'Got Off Course,' Judge Says*, WASH. POST, June 6, 2007, at A1; see also, e.g., Amy Goldstein, *Bush Commutes Libby's Prison Sentence*, WASH. POST, July 3, 2007, at A1 (noting the length of the probation portion of Libby's sentence).

285. Leonnig & Goldstein, *supra* note 284.

286. *Id.* (alteration in original).

287. *United States v. Libby*, No. 07-3068, 2007 U.S. App. LEXIS 16090, at *1 (D.C. Cir. July 2, 2007) (per curiam).

288. Press Release, White House Office of the Press Secretary, Statement by the President on Executive Clemency for Lewis Libby (July 2, 2007), <http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html>; Goldstein, *supra* note 284.

289. Press Release, White House Office of the Press Secretary, Statement by the President on Executive Clemency for Lewis Libby, *supra* note 288.

290. *Boehner v. McDermott (Boehner I)*, 191 F.3d 463, 481 (D.C. Cir. 1999) (Sentelle, J., dissenting), *vacated*, 532 U.S. 1050 (2001).

291. H.R. REP. NO. 109-732, at 10 (2006).

292. *Id.* at 17.

The House of Representatives Committee on Standards of Official Conduct, commonly known as the Ethics Committee, is the only standing committee in the House with membership divided evenly by party.²⁹³ To eliminate the appearance of bias, Ethics Committee members are bound by rules preventing the leaking of evidence and information received by the Ethics Committee.²⁹⁴ However, in 1997, James McDermott, the ranking Democrat on the Ethics Committee, leaked to the press an illegal tape recording of a telephone conversation between leading House Republicans, including then-Speaker of the House Newt Gingrich.²⁹⁵ The leak prompted a lawsuit which has taken nearly a decade to wind through the federal judiciary.²⁹⁶ The case, aptly described by Judge Thomas F. Hogan, “arises out of the unfortunate acrimony, absence of civility, and shortage of honor, that pervades the partisan sniping between some members of Congress and their supporters.”²⁹⁷

The case has produced three opinions by the Court of Appeals for the District of Columbia Circuit. The first and second opinions found that McDermott illegally received the tape, thus his leak was unprotected by the First Amendment.²⁹⁸ The third opinion, issued in May 2007, ruled that McDermott was bound by House rules, therefore he had no First Amendment right to pass the tape recording to the press.²⁹⁹ In reaching this conclusion, the appellate court relied heavily upon Ethics Committee findings that McDermott’s actions violated House rules.³⁰⁰ This is an ironic twist in a case that begins amidst ethics charges against Newt Gingrich.

293. See, e.g., U.S. House of Representatives Committee on Standards of Official Conduct, Members, <http://www.house.gov/ethics/CommitteeMembers.htm> (last visited Apr. 3, 2008).

294. H.R. REP. NO. 109-732, at 13–14.

295. *Id.* at 8.

296. *Id.* at 10–12.

297. *Boehner v. McDermott*, Civ. No. 98-594, 1998 U.S. Dist. LEXIS 11509, at *1 (D.D.C. July 27, 1998), *rev’d and remanded*, 191 F.3d 463 (D.C. Cir. 1999).

298. See *Boehner v. McDermott (Boehner II)*, 441 F.3d 1010, 1015, *vacated and reh’g en banc granted*, No. 04-7203, 2006 U.S. App. LEXIS 32570 (June 23, 2006), *aff’d en banc*, 484 F.3d 573 (D.C. Cir. 2007); *Boehner v. McDermott (Boehner I)*, 191 F.3d 463, 474 (D.C. Cir. 1999), *vacated*, 532 U.S. 1050 (2001).

299. *Boehner v. McDermott (Boehner III)*, 484 F.3d 573, 580–81 (D.C. Cir.) (en banc), *cert. denied*, 128 S. Ct. 712 (2007).

300. *Id.* at 579–80; see H.R. REP. NO. 109-732, at 16–17. (summarizing the applicable rules and finding that McDermott’s conduct was not consistent with those rules and represented a failure to meet his obligations as Ranking Minority Member of the Ethics Committee).

1. *The leak*

While the Republicans were in the minority in the House in the 1980s and early 1990s, Representative Newt Gingrich frequently filed ethics charges against Democrats, including Speaker Jim Wright. After Republicans gained control of the House in the 1994 elections, the tables were turned against Gingrich. In early 1995, a special subcommittee of the House Ethics Committee was created to examine charges that a college course taught by Gingrich, sponsored by tax-exempt § 501(c)(3) organizations, violated the Internal Revenue Code because it served political, not educational objectives.³⁰¹ Throughout the two-year inquiry, Gingrich and his allies characterized the charges as “a political vendetta by Democrats unwilling to accept the Republican majority Mr. Gingrich engineered in the 1994 elections.”³⁰²

At the conclusion of the subcommittee’s investigation in early-December 1996, the subcommittee’s counsel and Gingrich’s counsel negotiated a settlement that resolved the matter without lengthy public hearings.³⁰³ In this deal, Gingrich admitted to bringing discredit upon the House and agreed to pay a fine.³⁰⁴ Gingrich also promised not to use his office and his allies to undermine the subcommittee’s findings.³⁰⁵ On the morning of December 21, 1996, the date the subcommittee was to vote on the deal and announce its findings, Gingrich took part in a telephone conference call with other House Republican leaders to discuss how Republicans would respond to the news.³⁰⁶

301. Adam Clymer, *Panel Concludes Gingrich Violated Rules on Ethics*, N.Y. TIMES, Dec. 22, 1996, at A1.

302. *Id.*

303. H.R. REP. NO. 105-1, at 93–96 (1997).

304. *Id.*

305. As a result of the deal, on December 21, 1996, the subcommittee adopted a Statement of Alleged Violation, concluding that Gingrich engaged in activity involving 501(c)(3) organizations that was substantially motivated by partisan goals and that Gingrich also provided the subcommittee with inaccurate, incomplete, and unreliable information. *Id.* at 4, 9. Gingrich and the subcommittee agreed that other than public announcement of the Statement of Alleged Violation, and brief press releases, neither party would make public comment about this matter. *Id.* at 95. Later, the House Ethics Committee concluded Gingrich violated the agreement, but did not specify the conduct that violated the agreement. *Id.* at 96.

306. For a transcript of the telephone call, see *Excerpts from Republican Leaders’ Conference Call*, N.Y. TIMES, Jan. 10, 1997, at A20. When the news of the Statement of Alleged Violation broke in the afternoon of December 21, Republicans “were ready with positive comments, frequently choosing the word ‘arcane’ to describe the tax laws prohibiting the use of tax-exempt money for political purposes.” Clymer, *supra* note 301, at A1.

One participant, Representative John Boehner, was driving through northern Florida and used his cellular telephone.³⁰⁷ Unbeknownst to the Republican leaders, two Floridians, John and Alice Martin, who coincidentally were active in the executive committee of their county's Democratic party, intercepted the cellular transmission via a police scanner. When they recognized Gingrich's voice, they recorded the conversation.³⁰⁸ After they determined that the conversation could be damaging to House Republicans, they delivered the tape to their representative, Karen Thurman, a Democrat.³⁰⁹ Thurman and her chief of staff sought legal advice from two aides to Minority Whip David Bonior, who was also "Gingrich's principal tormentor on ethics matters."³¹⁰ Thurman was advised that the tape should be turned over to the Ethics Committee.³¹¹

While in Washington, D.C., on January 8, 1997, the Martins met with Thurman and she advised them to give the tape to McDermott and helped draft a cover letter.³¹² Later that day, the Martins briefly met with McDermott outside of the Ethics Committee hearing room and gave him the tape.³¹³ A letter taped to the outside of the envelope containing the tape stated that the tape was a "conference call heard over a scanner," and added, "We felt the information included were [sic] of importance to the committee. . . . We pray that [the] committee will consider our sincerity in placing it in your hands."³¹⁴ Finally, the Martins wrote that "[w]e also understand that we will be granted immunity."³¹⁵

307. Rick Bragg, *2 Floridians Talk of How They Taped the Speaker*, N.Y. TIMES, Jan. 14, 1997, at A13.

308. *Id.*

309. *Boehner v. McDermott*, Civ. No. 98-594, 1998 U.S. Dist. LEXIS 11509, at *3 (D.D.C. July 27, 1998), *rev'd and remanded*, 191 F.3d 463 (D.C. Cir. 1999).

310. Jessica Lee, *Democrat Accused in Taped-Call Case*, USA TODAY, Jan. 14, 1997, at 6A.

311. *Boehner v. McDermott (Boehner II)*, 441 F.3d 1010, 1012, *vacated and reh'g en banc granted*, No. 04-7203, 2006 U.S. App. LEXIS 32570 (June 23, 2006), *aff'd en banc*, 484 F.3d 573 (D.C. Cir. 2007).

312. Ceci Connolly, *Tape Scandal Entangles Thurman*, ST. PETERSBURG TIMES, Jan. 16, 1997, at 10A; Guy Gugliotta & Nick Madigan, *Couple Thought Tape was Part of History; Floridians Tell of Recording Call, Giving Copy to House Democrat*, WASH. POST, Jan. 14, 1997, at A1.

313. Gugliotta & Madigan, *supra* note 312, at A1.

314. H.R. REP. NO. 109-732, at 27 (2006).

315. *Id.* According to Thurman's spokesperson, Steven Cohen, Thurman mentioned immunity to the Martins after speaking to Bonior's staff, but "[t]here was never any promise made." Connolly, *supra* note 312. The *Atlanta Journal-Constitution* reported that the "Martins said they were told by Thurman's office they would be granted immunity." Mike Williams & Mark Sherman, *GOP Asks for Probe into Recorded Call*, ATLANTA J.-CONST., Jan. 14, 1997, at A1. In the first opinion by the U.S. Court of Appeals for the District of Columbia, Judge Randolph initially stated that the Martins

McDermott listened to the tape later that evening and concluded that Gingrich was violating the agreement not to orchestrate any response or undermine the work of the committee.³¹⁶ Based on his perception of the public's right to know about Gingrich's behavior, McDermott decided to leak the tape to Adam Clymer of the *New York Times* and Jeanne Cummings of the *Atlanta Journal-Constitution*.³¹⁷

On January 10, 1997, the *New York Times* published a front-page article containing lengthy excerpts of the telephone conversation.³¹⁸ The *New York Times* reported how it obtained the tape recording:

The call was taped by people in Florida who were unsympathetic to Mr. Gingrich and who said they heard it on a police scanner that happened to pick up the cellular telephone transmissions of one of

met with Thurman to discuss the tape and the possibility of immunity. *Boehner v. McDermott* (*Boehner I*), 191 F.3d 463, 465 (D.C. Cir. 1999), *vacated*, 532 U.S. 1050 (2001). Later in the opinion, though, Judge Randolph suggested that McDermott offered them immunity. "When they transmitted the tape to McDermott, the Martins expressed their understanding that they would be receiving immunity for their illegal conduct. The inference is that someone promised this in return for the tape. Who? The obvious candidate is McDermott, or someone acting in concert with him." *Id.* at 476. However, McDermott first learned of the Martins and the tape when he met them in Washington. There is no proof that he promised the Martins immunity. In a declaration filed in the lawsuit, McDermott claimed that he never talked with the Martins about immunity, nor did anyone on his staff. H.R. REP. NO. 109-732, at 8.

316. H.R. REP. NO. 109-732, at 8, 10. *But see* *Boehner v. McDermott*, No. 98-0594, at 15 (D.D.C. Oct. 22, 2004) (stating that McDermott could not have intended to expose misconduct, since there is no evidence he was aware of any at the time he made the disclosure).

317. On the website of McDermott's legal trust, his decision to leak the tape is described in the following terms:

McDermott immediately recognized the gravity of the circumstances confirmed by the tape. He understood that the information on the tape was of great public import because it directly concerned the Speaker of the House of Representatives, one of the highest ranking officers of the United States Government. The conference call revealed the clear intention of this prominent public official to manipulate to his own advantage the press coverage of the investigation results.

That the Speaker had promptly and purposely violated his agreement with the Ethics Committee's investigators could not be concealed or ignored. Accordingly, McDermott contacted reporters from national daily newspapers, and advised them of the tape and its contents.

A History of *Boehner v. McDermott*, <http://www.mcdermottlegaltrust.org/docs/CaseHistory.pdf>. Judge Hogan described McDermott's motives differently in his opinion assessing \$50,000 in punitive damages. Judge Hogan said McDermott's behavior was "outrageous"—and his intention was "to embarrass and politically harm the individuals overheard on the tape." *Boehner v. McDermott*, No. 98-0594, at 13-14. McDermott's failure to seek legal counsel before he leaked the tape was also "reckless." *Id.* at 16; *see also* *Boehner I*, 191 F.3d at 481 (Sentelle, J., dissenting) (stating McDermott was pursuing the "politics of personal destruction").

318. Adam Clymer, *Gingrich is Heard Urging Tactics in Ethics Case*, N.Y. TIMES, Jan. 10, 1997, at A1.

the participants. It was given to a Democratic Congressman, who made the tape available to [t]he *New York Times*.³¹⁹

The *Times* added that the unnamed Democratic Congressman was “hostile” to Gingrich and insisted on anonymity.³²⁰ Cummings’ article, published on January 11, merely stated that the “conversation was picked up on a Florida couple’s scanner and a copy of the tape was obtained by [t]he *Atlanta Journal-Constitution* and the *New York Times*.”³²¹

Republicans immediately suspected McDermott was the unnamed Democratic Congressman.³²² On the day that the *New York Times* broke the story, McDermott told reporters that he knew nothing about the tape’s existence.³²³ However, on January 13, the Martins held a press conference to announce that they had made the recording and had given it to McDermott.³²⁴ Republicans immediately responded with outrage, calling for McDermott’s resignation from the Ethics panel.³²⁵ McDermott resigned from the Ethics Committee on January 13 and for the first time sought to make the tape available to the Committee, which Nancy Johnson, Committee Chair, refused to accept and instead forwarded it to the Department of Justice.³²⁶ The Martins subsequently pled guilty and were fined \$500 for violating a federal statute forbidding unauthorized interception of electronic communication.³²⁷

Representative John Boehner, one of the participants in the telephone conversation, fired a “salvo in the partisan battle between rival groups in the House”³²⁸ by suing McDermott on March 9, 1998, for passing the tape to reporters in violation of a federal statute that makes intentional disclosure of any illegally recorded conversation a crime if the person disclosing the conversation knew or had reason to

319. *Id.*

320. *Id.*

321. Jeanne Cummings, *Gingrich Ethics Case; Panel Trusted His Motives, Gingrich Told GOP Allies; Tape Reveals Confidence to Seek Speaker’s Post*, ATLANTA J.-CONST., Jan. 11, 1997, at A6.

322. Paul Leavitt, *GOP Seeks Punishment for Leak of Phone Call*, USA TODAY, Jan. 13, 1997, at 6A.

323. James Grimaldi, *Seattle’s Man in Congress in Trouble*, SEATTLE TIMES, Jan. 14, 1997, at A1.

324. Bragg, *supra* note 307.

325. Williams & Sherman, *supra* note 315.

326. H.R. REP. NO. 109-732, at 9, 26 (2006).

327. *See id.* at 18–19 (exhibiting the Department of Justice press release announcing the plea agreement). The statute the Martins violated is 18 U.S.C. § 2511(1)(a). *Id.*

328. *Boehner v. McDermott*, Civ. No. 98-594, 1998 U.S. Dist. LEXIS 11509, at *22 (D.D.C. July 27, 1998), *rev’d and remanded*, 191 F.3d 463 (D.C. Cir. 1999).

know that it was illegally intercepted.³²⁹ Adding an ingenious inside-the-Beltway touch, Boehner received permission from the Federal Election Commission to finance this suit with campaign funds.³³⁰ Boehner did not name the *New York Times* or the *Atlanta Journal-Constitution* as defendants although each disclosed the contents of the conversation with knowledge that the tape had been illegally made.

2. *The duty of nondisclosure*

After issuing two opinions that McDermott acquired the tape illegally, the court of appeals ordered that the case be reheard *en banc*.³³¹ While the case was pending at the appellate court, the House Ethics Committee issued a report concluding that McDermott's leak to the press "represented a failure on his part to meet his obligations as Ranking Minority Member" of the Ethics Committee.³³² To prevent "even the appearance of unfairness" or bias,³³³ McDermott should have provided the tape to the Committee members, rather than leaking it to the press.³³⁴ This report provided a new rationale to support the appellate court's conclusion that McDermott's actions violated the First Amendment.

329. 18 U.S.C. § 2511(1)(c) (Supp. II 2002).

330. Because the conversation pertained to Boehner's duties as a federal officeholder, he was allowed to use campaign funds to finance the civil lawsuit, but was not allowed to personally share in any award. Op. Fed. Election Comm'n 1997-27 (1998).

331. *Boehner v. McDermott*, 2006 U.S. App. LEXIS 32570 (D.C. Cir. June 23, 2006), *aff'd*, 484 F.3d 573 (D.C. Cir. 2007); *see* *Boehner v. McDermott*, 332 F. Supp. 2d 149, 152 (D.D.C. 2004), *aff'd en banc*, 484 F.3d 573 (D.C. Cir. 2007) (laying out the procedural history of the case prior to the court of appeals' grant of rehearing *en banc*).

332. H.R. REP. NO. 109-732 at 16. House Rule 23, clause 2 provides that members "shall adhere to the spirit and letter" of House rules and committee rules. *Id.* at 17 n.78. This rule has been interpreted to mean that "a narrow technical reading of a House rule should not overcome its 'spirit' and the intent of the House in adopting that and other rules of conduct." *Id.* (citing H.R. REP. NO. 95-1837, at 61 (1979)). The Ethics Committee concluded that McDermott's actions "were not consistent with the spirit" of its rules regarding the handling of evidence and information. *Id.* at 17.

333. *Id.*

334. The Committee was unimpressed with McDermott's "right to know" justification. It stated the following:

[T]he Investigative Subcommittee did not give weight to Representative McDermott's stated excuse for his conduct: the public's entitlement to be informed. This is not a justification for potentially undermining the House ethics process. In the normal course, Members entrusted to serve on the Committee have their first obligation to the integrity of the House ethics process, which itself supports public confidence in the institution of the House. A better course of action would have been for Representative McDermott to entrust the Committee at the outset with the information to which he alone on the Committee had access, and for that body, collectively, to make determinations, consistent with its rules, as it deemed appropriate.

Id.

On May 1, 2007, the court of appeals issued *Boehner III*,³³⁵ voting 5-4 that McDermott accepted a duty of confidentiality when he became a member of the Ethics Committee.³³⁶ Judge Randolph's opinion assumed arguendo that McDermott lawfully obtained the tape,³³⁷ but found his "position on the Ethics Committee imposed a 'special' duty on him not to disclose this tape in these circumstances."³³⁸ In a sense, Judge Randolph was mirroring the brusque treatment of the First Amendment claims in the *Morison* and *Franklin* cases. The majority noted a variety of restrictions on government employees who face sanctions for disclosing lawfully acquired information, such as the Espionage Act,³³⁹ the case it found most analogous, though, was *Aguilar*, which, as discussed earlier, upheld sanctions against a federal judge who illegally disclosed a wiretap.³⁴⁰ Just as Judge Aguilar was not "simply a member of the general public,"³⁴¹ McDermott's position on the Ethics Committee placed him in a position of trust. Judge Randolph wrote that "those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information."³⁴²

The *Aguilar* Court, as shown earlier, treated Judge Aguilar's breach of confidentiality as completely outside of the First Amendment's coverage.³⁴³ Similarly, once Judge Randolph concluded that McDermott was subject to the Ethics Committee's rules, he did not

335. *Boehner v. McDermott (Boehner III)*, 484 F.3d 573 (D.C. Cir.) (en banc), *cert. denied*, 128 S. Ct. 712 (2007).

336. *Id.* at 574-75.

337. *Id.* at 577. However, Chief Judge Ginsburg and Judges Henderson, Randolph, and Brown maintained that under *Boehner II*, McDermott did not lawfully obtain the tape. *Id.* at 577 n.1; see *Boehner v. McDermott (Boehner II)*, 441 F.3d 1010, 1016, *vacated and reh'g en banc granted*, No. 04-7203, 2006 U.S. App. LEXIS 32570 (June 23, 2006), *aff'd en banc*, 484 F.3d 573 (D.C. Cir. 2007) (ruling *Boehner* was entitled to judgment as a matter of law in that McDermott knew the tape he received from the Martins was an illegally intercepted recording and, therefore, McDermott did not lawfully receive that tape).

338. *Boehner III*, 484 F.3d at 579, 580-81.

339. *Id.* at 578. In addition to the Espionage Act and the Intelligence Identities Protection Act, discussed earlier in this Article, Judge Randolph also cited restrictions on IRS employees, 26 U.S.C. § 6103(a), state motor vehicle department employees, 18 U.S.C. § 2721, and employees of the Social Security Administration, 42 U.S.C. § 405(c)(2)(C)(viii)(I), (III). *Id.* He also cited restrictions on non-employees, such as private attorneys. *Id.* at 578 n.2.

340. 515 U.S. 593 (1995).

341. *Id.* at 605-06.

342. *Boehner III*, 484 F.3d at 579; see *Aguilar*, 515 U.S. at 606 (stating "[g]overnment officials in sensitive confidential positions may have special duties of nondisclosure").

343. See *supra* notes 122-24 and accompanying text.

engage in any meaningful analysis of the rules.³⁴⁴ Judge Hogan's district court rulings in *Boehner I* and *II* found *Aguilar* inapplicable to McDermott, but the *Boehner III* majority ignored his prior analysis.³⁴⁵ Instead, the majority of the appellate court merely stated it agreed with and accepted the Ethics Committee's interpretation of the rules as applied to this case.³⁴⁶ In his dissenting opinion, Judge Sentelle questioned, for example, whether the tape was "evidence related to an investigation" within the meaning of the Ethics Committee rules.³⁴⁷

Although Judge Randolph cited press cases such as *Seattle Times Co. v. Rhinehart*³⁴⁸ as examples of restrictions on disclosure of lawfully obtained information,³⁴⁹ the duty of nondisclosure underlying *Boehner III* applies to a narrow range of actors. First, he limited this duty to government employees by distinguishing this case from *Bartnicki v.*

344. A fundamental question is whether the unsolicited tape fell within McDermott's duty of confidentiality. See *Boehner v. McDermott*, 332 F. Supp. 2d 149, 162 (D.D.C. 2004), *aff'd en banc*, 484 F.3d 573 (D.C. Cir. 2007) (noting questions such as "whether the [Ethics] Committee's non-disclosure rule . . . applies to unsolicited, illegal information presented outside the Committee by private citizens").

345. In reviewing *Boehner* for the first time at the district court, Judge Hogan stated that *Aguilar* could not have obtained the information without a pre-existing duty against disclosure. *Boehner v. McDermott*, Civ. No. 98-594, 1998 U.S. Dist. LEXIS 11509, at *18 (D.D.C. July 27, 1998), *rev'd and remanded*, 191 F.3d 463 (D.C. Cir. 1999). In contrast, McDermott had no "independent duty not to disclose." *Id.* Six years later, Judge Hogan held that although McDermott "received the information from the Martins in his official political capacity," he was not "under an independent preexisting duty greater than that required of any citizen." 332 F. Supp. at 163.

346. *Boehner III* merely states, "Here we can be confident that the rules covered Representative McDermott's handling of the tape." 484 F.3d at 580. The Ethics Committee report devoted no attention to these matters. The announcement of the formation of a subcommittee to examine the charges against McDermott treated as a foregone conclusion the fact that the tape was related to Committee proceedings. See H.R. REP. NO. 109-732, at 32 (2006) (exhibiting the statement announcing the formation of the investigative subcommittee to examine the McDermott affair).

347. *Boehner III*, 484 F.3d at 589 (Sentelle, J., dissenting) (stating that the tape never came into possession of the Committee, even though the Martins may have intended that it do so; it is unclear that the rule forbids disclosure of information obtained from private citizens). He also raised vagueness concerns. *Id.* at 590.

348. 467 U.S. 20 (1984). A close look at *Seattle Times* shows that a duty of nondisclosure may be imposed on the press (and the public) only in extremely limited circumstances. The *Seattle Times* acquired discovery materials as a litigant and a protective order prevented the newspaper from publishing this information. *Id.* at 27. In upholding the protective order, the Supreme Court noted the newspaper, like other litigants, gained the information "only by virtue" of the discovery process. *Id.* at 32. Further, the newspaper was free to publish the same information as long as it was acquired through means independent of the discovery process. *Id.* at 34.

349. In addition to *Seattle Times*, he cited *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) and *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). *Boehner III*, 484 F.3d at 578. In *Cohen*, however, the Court noted that it was not clear that the information in question was obtained lawfully. 501 U.S. at 671. Judge Sentelle found the reference to these cases to be misplaced. *Boehner III*, 484 F.3d at 587-88 (Sentelle, J., dissenting).

Vopper,³⁵⁰ where “[t]he individuals who disclosed the tape in that case were *private citizens* who did not occupy positions of trust.”³⁵¹ Second, he abandoned his suggestion in *Boehner I* that the wiretapping statute imposed a duty of nondisclosure upon McDermott.³⁵² Since the wiretapping statute applied to all citizens, this general duty of nondisclosure was not unique to McDermott. By relying on the House Ethics Committee Rules in *Boehner III*, Randolph limited the reach of the ruling to only Committee members and staff.

While *Boehner III*, like *Morison* and *Franklin*, treats leaking by insiders as completely outside of the scope of First Amendment coverage, the later cases at least imposed modest limitations on the reach of the Espionage Act to promote the public’s interest in learning about the actions of government. Strikingly, *Boehner III* imposes no limitations on the Ethics Committee Rules, despite ambiguities in those rules that arguably leave Members guessing about the contours of the rules.³⁵³ Nor do the Ethics Committee Rules have requirements, such as proof that the Member knew that a disclosure was inappropriate, similar to the mental states necessary to support an Espionage Act or IIPA prosecution.³⁵⁴ It may be that because four of the members of the appellate court continued to believe that McDermott knew his receipt of the tape was illegal, they felt no need to question this aspect of the House Rules.

III. OUTSIDERS

When may the government prosecute outsiders who receive and disseminate leaked information? For example, if outsiders, such as reporters, cultivate a relationship with an insider and receive classified information, does this constitute a conspiracy? Is mere knowledge of an insider’s breach of security measures sufficient to make the outsider’s receipt an illegal action? These extraordinary questions are presented in the prosecution of the AIPAC lobbyists Rosen and Weissman. Although the *Boehner v. McDermott* action did not target an outsider, the analysis in the *Boehner* proceedings has

350. 532 U.S. 514 (2001).

351. *Boehner III*, 484 F.3d at 579 (emphasis added).

352. *Id.* at 575–81; see *Boehner v. McDermott (Boehner I)*, 191 F.3d 463, 477 (D.C. Cir. 1999), *vacated*, 532 U.S. 1050 (2001) (discussing the court’s view of a duty imposed by the statute).

353. 484 F.3d at 590 (Sentelle, J., dissenting).

354. See 18 U.S.C. §§ 793–794 (2000) (describing the various mental states necessary for prosecution under the Espionage Act relating to disclosure of certain information); 50 U.S.C. § 421 (2000) (describing the various mental state requirements necessary for prosecution under the IIPA relating to disclosure of certain information).

significant implications for the press and others who receive information from insiders.

A. *Rosen and Weissman*

Recall that Steven Rosen and Keith Weissman are charged with conspiring with Lawrence Franklin to violate the Espionage Act. The prosecution of Rosen and Weissman, as Judge Ellis acknowledged, is unprecedented.³⁵⁵ No civilian has ever been charged with conspiracy or aiding and abetting the unauthorized oral disclosure of classified information to the press.³⁵⁶ Rosen and Weissman mounted a First Amendment attack on the indictment, stating that by receiving information from Franklin and passing it on to others, the former AIPAC lobbyists merely did “what members of the media, members of the Washington policy community, lobbyists and members of congressional staffs do perhaps hundreds of times each day.”³⁵⁷ They claimed the law was being arbitrarily enforced because State Department official David Satterfield was not being prosecuted for disclosing classified information, nor was the press being prosecuted for unlawfully receiving and disclosing classified information.³⁵⁸

In announcing the indictments, Paul McNulty, United States Attorney for the Eastern District of Virginia, used language that would apply to leakers such as Satterfield and recipients of leaks, such as Glenn Kessler of the *Washington Post*. “Those entrusted with safeguarding our nation’s secrets must remain faithful to that trust[,]” McNulty said. “Those not authorized to receive classified information must resist the temptation to acquire it, no matter what their motivation may be.”³⁵⁹ Of course, McNulty did not explain why Satterfield or Kessler were not indicted. The reason journalists were not indicted was later revealed at a pretrial motions hearing.

355. Transcript of Motions Hearing at 25, *United States v. Rosen*, Cr. No. 05-225 (E.D. Va. Apr. 21, 2006) [hereinafter Transcript of Motions Hearing, April].

356. Espionage Act prosecutions generally involve the transmission of documents to agents of foreign governments by government officials. *United States v. Rosen*, 445 F. Supp. 2d 602, 614 (E.D. Va. 2006). Cases where civilians have unauthorized possession of classified information and disclose it to agents of foreign governments have not presented First Amendment claims. *See, e.g., United States v. Truong*, 629 F.2d 908, 912–13 (4th Cir. 1980) (discussing numerous defenses and claims raised by the defendant in an espionage case, which did not include a First Amendment challenge to the espionage laws).

357. Memorandum of Law in Support of Defendant’s Motion to Dismiss the Superseding Indictment at 3, *United States v. Rosen*, Cr. No. 05-225 (E.D. Va. Jan. 19, 2006).

358. *Id.* at 26–27. The defendants cited an array of newspaper articles published in the *Washington Post* and *New York Times* between 2000 and 2005 featuring classified information. *Id.* at 9–10 n.10.

359. Press Release, Department of Justice, Aug. 4, 2005.

During a pretrial hearing, Judge Ellis asked the government's attorney: "Does it make any difference to you if, instead of these defendants, it had been reporters for the *Washington Post* and the *Washington Times*?"³⁶⁰ In a prior filing, the government had claimed that neither Rosen nor Weissman enjoyed the "constitutional rights reserved to the press[.]"³⁶¹ a position contrary to the equal status of freedom of speech and freedom of the press. When pressed on this issue at the motions hearing, Kevin DiGregory, attorney for the United States, backed away from the claim that the press has special constitutional status and stated that due to "the function that the media serves in this country[.]" the government would carefully exercise its prosecutorial discretion.³⁶² In other words, despite his initial claim that the press has special constitutional status, the government attorney was really saying that prosecuting the press for receiving and publishing classified information would be politically messy. Prosecutorial discretion, though, may well prove to be a thin protection for the press.

1. *The memorandum opinion*

In response to the defendants' motion to dismiss, Judge Ellis set the stage for the trial in a memorandum opinion that outlined his approach to the First Amendment issues.³⁶³ Nothing in Ellis' pretrial

360. Transcript of Motions Hearing at 49, *United States v. Rosen*, Cr. No. 05-225 (E.D. Va. Mar. 24, 2006) [hereinafter Transcript of Motions Hearing, March].

361. Government's Consolidated Responses to Defendants' Pretrial Motion at 17, *United States v. Rosen*, Cr. No. 05-225 (E.D. Va. Feb. 22, 2006). The government added that neither the defendants nor AIPAC "are members of the press. During the conspiracy, they were lobbyists representing for all practical purposes the interests of a foreign country." *Id.*

362. Transcript of Motions Hearing, April, *supra* note 355, at 52-53.

363. *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006). Judge Ellis rejected the defendants' claim that section 793 applied only to tangible information. *Id.* at 614-17. On the Due Process issues, Ellis held that the phrase "information relating to the national defense" had been judicially limited to information "that . . . is closely held by the government, and . . . the information is the type which, if disclosed, could threaten the national security of the United States." *Id.* at 622. Furthermore, Executive Order No. 13,292 defined those who were entitled to receive such information. *Id.* at 622-23. The statute also had a "willfulness" requirement that eliminated the risk of holding someone criminally responsible for conduct that was not reasonably understood to be proscribed. *Id.* at 625-26. Finally, the statute imposed a scienter requirement. *Id.* As to the novelty of the prosecution, Ellis held that "the rarity of prosecution under the statutes does not indicate that the statutes were not to be enforced as written." *Id.* at 629 (quoting *United States v. Morison*, 844 F.2d 1057, 1067 (4th Cir. 1988)). Because of the First Amendment issues involved in *Rosen*, a student commentator claimed that heightened scrutiny should have been applied to the vagueness issues. See Recent Case, *District Court Holds That Recipients of Government Leaks Who Disclose Information "Related to the National Defense" May Be Prosecuted Under the Espionage Act—United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006), 120 HARV. L. REV. 821, 821 (2007) (arguing the *Rosen* case was

ruling inhibits the government from charging journalists with violating the espionage statutes.³⁶⁴ Judge Ellis ruled that the government may prosecute government leakers *and* the recipients of those leaks. Although Rosen and Weissman were not in positions of trust, “both common sense and the relevant precedent point 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.”³⁶⁵ Drawing upon *New York Times Co. v. United States*,³⁶⁶ where some of the Justices indicated that a post-publication prosecution of the newspapers publishing the Pentagon Papers would be constitutionally permissible,³⁶⁷ Ellis held that it was a reasonable exercise of congressional power to protect national security by punishing the general populace for disclosure of NDI.³⁶⁸

Assuming both insiders and outsiders are liable for violations of the Espionage Act, nonetheless the diminished First Amendment standards applied to insiders should not also be applied to outsiders. Judge Ellis acknowledged a distinction between Franklin and the lobbyists in theory, but drew upon *Morison* for a “potentially harmful” standard for *all* § 793 cases.³⁶⁹ A higher standard, such as the clear

wrongly decided due to the vagueness issues of the Espionage Act as applied in First Amendment cases).

364. Ellis’ rulings have provoked strong comments. Renowned First Amendment attorney Floyd Abrams said the case “is the single most dangerous case for free speech and free press.” Walter Pincus, *First Amendment Issues Raised About Espionage Act*, WASH. POST, Mar. 31, 2006, at A6. Steven Aftergood, Director of the Project on Government Secrecy at the Federation of American Scientists, said Judge Ellis’ treatment of the First Amendment issues “is breathtaking. It is a bold new interpretation of the Espionage Act that expands its reach dramatically.” Jerry Markon, *Judge Rejects Dismissal of Pro-Israel Lobbyists Case*, WASH. POST, Aug. 11, 2006, at A5.

365. *Rosen*, 445 F. Supp. 2d at 637 (emphasis added).

366. 403 U.S. 713 (1971).

367. See, e.g., *id.* at 737–39 (White, J., concurring) (foreseeing circumstances under which he would support a conviction based on such a prosecution).

368. *Rosen*, 445 F. Supp. 2d at 639. The legislative history and seemingly impenetrable language of sections 793 (d) and (e) are extensively discussed in Edgar & Schmidt, *supra* note 11.

369. *Rosen*, 445 F. Supp. 2d at 641. Judge Ellis described *Morison* as “[p]articularly pertinent . . .” *Id.* at 613. He read *Morison* as requiring the government prove the information disclosed “is potentially harmful to the United States, and the defendant must know that disclosure of the information is potentially harmful to the United States.” *Id.* at 641. Judge Ellis ignored the fact that the Fourth Circuit carefully noted that *Morison* “was an experienced intelligence officer,” and because of his expertise, the statute was not unconstitutionally vague *as applied* to *Morison*. *United States v. Morison*, 844 F.2d 1057, 1073 (4th Cir. 1988). Two of the critical issues at trial will be Rosen and Weissman’s awareness of statutory limits on distribution of the information they orally received from Franklin and the harmfulness of these disclosures. At trial the government will seek to prove that Rosen and Weissman, experienced lobbyists, “are not babes in the woods.” Government’s Consolidated

and present danger standard, should be applied to outsiders. Strikingly, Judge Ellis did not refer to cases such as *Landmark*³⁷⁰ and *Florida Star v. B.J.F.*,³⁷¹ in which the government sought to punish the publication of information that was improperly disclosed to the press. In each case, the Supreme Court applied a standard markedly higher than “potentially harmful.” For example, in *Landmark*, the Court ruled that publication of confidential information about judicial qualifications proceedings did not create a clear and present danger to the orderly administration of justice.³⁷² Relying upon a series of cases in which the Court found out-of-court commentary about the judiciary did not create a clear and present danger to the administration of justice, the *Landmark* Court stated the following:

What emerges from these cases is the “working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished,” . . . and that a “solidity of evidence,” . . . is necessary to make the requisite showing of imminence. “The danger must not be remote or even probable; it must immediately imperil.”³⁷³

Compared to the standards set by *Landmark* and similar cases, the “potentially harmful” standard inadequately protects outsiders.

2. *The conspiracy charge*

The threshold inquiry under the *Landmark/Florida Star* line of cases is whether Rosen and Weissman lawfully obtained the information. The United States claimed that Rosen and Weissman did not lawfully acquire information from Franklin because they participated in a conspiracy with him, knowing that Franklin’s disclosures were unlawful.³⁷⁴ In contrast, the defense argued that even if Rosen and

Responses at 14, *supra* note 361; *see also id.* at 12 (stating “[i]t is unbridled hubris for the defendants to assert that the Director of Foreign Policy for AIPAC and its Senior Middle East analyst on foreign policy issues, both of whom lobbied the Executive Branch, are unable to understand the meaning of the term ‘information related to the national defense’”). The defense will seek to prove that Rosen and Weissman were like “any ordinary persons” and were in no position to properly evaluate the oral information they received from Franklin. Memorandum of Law in Support of Defendants Steven J. Rosen and Keith Weissman’s Motion to Dismiss the Superseding Indictment at 22, *United States v. Franklin*, Cr. No. 05-225 (E.D. Va. Jan. 19, 2006).

370. 435 U.S. 829 (1978).

371. 491 U.S. 524 (1989).

372. *Landmark*, 435 U.S. at 845.

373. *Id.*

374. Government’s Consolidated Responses, *supra* note 361, at 19, 50. At a motions hearing, the United States Attorney added “the defendants are charged with not merely having knowledge of the illegality of the information, but they’re charged with participating in the illegality itself.” Transcript of Motions Hearing, April, *supra* note 355, at 37.

Weissman were aware of Franklin's illegal action in disclosing classified information to them, under cases such as *Florida Star* and *Landmark*, their disclosures to others were protected.³⁷⁵

In his 2006 memorandum opinion, Judge Ellis offered no analysis of the meaning of "lawfully acquired" information. He merely noted that if Rosen and Weissman are shown to have conspired with Franklin, they may be prosecuted under § 793.³⁷⁶ In a later ruling, though, he outlined the government's burden of proof;³⁷⁷ a key aspect of the conspiracy and aiding and abetting charges is showing that Rosen and Weissman were aware of the illegal nature of Franklin's disclosures.³⁷⁸ However, as discussed below, the Court of Appeals for the District of Columbia Circuit ruled in 2007 that the right to disclose information is not reduced by knowledge of the illegal actions of another party.³⁷⁹

An examination of the superseding indictment shows that the government's definition of conspiracy threatens others, especially reporters.³⁸⁰ The model the government appears to embrace comes from *Bartnicki v. Vopper*,³⁸¹ where an individual found a tape recording of an illegally recorded conversation in his mailbox and had no knowledge of its origin.³⁸² As stated by the Assistant United States Attorney Kevin DiGregory, there is a significant "distinction between a conspirator and mere recipient."³⁸³ To the government in *Rosen*, passive receipt of information is permissible, but it alleged Rosen and Weissman did more than just "sit and listen" to Franklin.³⁸⁴ How did Rosen and Weissman cross the line into a conspiracy?

Notably, the superseding indictment does not claim that Rosen and Weissman bribed or coerced Franklin, nor did they solicit classified information from him.³⁸⁵ Franklin did not need them to facilitate his leaks to the press and Israeli diplomat Gilon; Franklin was quite

375. *Id.* at 42–43.

376. *United States v. Rosen*, 445 F. Supp. 2d 602, 636 (E.D. Va. 2006).

377. *United States v. Rosen*, 240 F.R.D. 204, 209–10 (E.D. Va. 2007).

378. *Id.*

379. *See infra* notes 459–463 and accompanying text.

380. *See* Superseding Indictment, *supra* note 165, at Count One (alleging that giving information to reporters was part of a conspiracy and threatened the United States).

381. 532 U.S. 514 (2001).

382. *Id.* at 519.

383. Transcript of Motions Hearing, April, *supra* note 355, at 24.

384. Government's Supplemental Responses, *supra* note 186, at 44.

385. *See, e.g.*, Memorandum of Law in Support of Defendants Steven J. Rosen's and Keith Weissman's Motion to Dismiss the Superseding Indictment, *supra* note 369, at 45 (stating that "there is no allegation that Rosen and Weissman "stole classified documents, hacked into government computers, paid bribes for classified materials, or even in any way solicited classified information").

willing to leak without their assistance, believing this would “enhance his own standing, advance his own personal foreign policy agenda, and influence persons within and outside the United States government.”³⁸⁶ Certainly Franklin trusted Rosen and Weissman,³⁸⁷ but it is difficult to see how this relationship differs from the relations between journalists and confidential sources.

The superseding indictment charged that Rosen and Weissman “cultivated a relationship” with Franklin; this consisted of mealtime meetings and in one instance taking Franklin to a Baltimore Orioles game.³⁸⁸ (Incidentally, if Rosen and Weissman had been reporters for the *New York Times*, their activities would have been in compliance with the newspaper’s ethics policy that states that “[c]ultivating sources is an essential skill, often practiced most effectively in informal settings outside of business hours.”³⁸⁹) The only time Rosen promised to do something for Franklin was when Franklin asked for help in getting a job at the NSC and Rosen responded, “I’ll do what I can.”³⁹⁰ The superseding indictment does not allege that Rosen followed through on this promise. Apparently, though, Rosen and Weissman created an environment in which Franklin “felt free to disclose classified information.”³⁹¹ At its heart, the conspiracy charge means that Rosen and Weissman knew that Franklin was disclosing

386. Superseding Indictment, *supra* note 165, at Count Five, ¶ D.

387. The government claimed that by conspiring with Franklin, the defendants were responsible for Franklin’s acts, Government’s Supplemental Responses, *supra* note 186, at 30, and that the three were in the same shoes as Samuel Morison. Transcript of Motions Hearing, April, *supra* note 355, at 24. Referring to Rosen and Franklin, Assistant United States Attorney DiGregory added that if Franklin “misappropriated, stole classified information, and shared it with them as a result of their agreement and in furtherance of their agreement to gather and disseminate classified information, they stand in the shoes of a thief.” *Id.* at 26. However, in addition to violating the Espionage Act, Morison was convicted of stealing government property and selling it. *United States v. Rosen*, 445 F. Supp. 2d 602, 631 (E.D. Va. 2006). Judge Ellis indicated that he viewed Franklin, Rosen, and Weissman differently than Morison. See Transcript of Motions Hearing, April, *supra* note 355, at 26 (cautioning the United States Attorney that Franklin was not charged with stealing information, nor did the indictment charge Rosen and Weissman with conspiring with Franklin to steal information). Ellis added, “They didn’t, for example, gather in a room and suggest to him that he go to a particular part in the Pentagon and open a safe and secrete some documents and give them the information.” *Id.* He noted that the conduct here was “more squarely within the ambit of the First Amendment than Morison’s conduct.” *Rosen*, 445 F. Supp. 2d at 630–31.

388. Superseding Indictment, *supra* note 165, at Count One, ¶¶ 17–37.

389. N.Y. TIMES, *supra* note 50, at 8.

390. Superseding Indictment, *supra* note 165, at Count One, ¶ 19.

391. *Id.* at Count Five, ¶ B. Although this quotation is about Franklin’s relationship with Naor Gilon, their activities, such as meeting in restaurants and discussing foreign policy issues, followed a pattern similar to Franklin’s relationship with Rosen and Weissman.

NDI to them with the expectation that they would pass this information on to other unauthorized recipients.

If this is a conspiracy, then reporters are in widespread violation of the Espionage Act.³⁹² Reporters carefully cultivate relationships with government officials, frequently meet for meals with those officials, ask about classified topics—knowing the restraints upon those officials—and promise anonymity in exchange for information.³⁹³ The tape recording of Bob Woodward’s interview with State Department official Richard Armitage, played at Scooter Libby’s trial, revealed a chummy exchange involving classified information.³⁹⁴ As reported in the *New York Times*, “[t]hough only one minute of tape was played, the tone of their exchange—gossipy, confiding, sprinkled with expletives on Mr. Armitage’s part—demonstrated vividly their close relationship.”³⁹⁵ Woodward, like other experienced Washington journalists,³⁹⁶ is a master at cultivating high-level government officials as sources, and he promises them anonymity in exchange for classified information. Woodward freely acknowledges that his recent books, such as *Plan of Attack*,³⁹⁷ *Bush at War*,³⁹⁸ and *State of Denial*³⁹⁹ are

392. See generally Espionage Act of 1917, 18 U.S.C. §§ 793–799 (2000) (listing different ways in which one may violate the Act including losing, gathering, and transmitting defense information).

393. Writing in the *Wall Street Journal*, Dorothy Rabinowitz warned,

If such activities can be charged, successfully, as a “conspiracy,” every professional, every business, every quarter of society—not to mention members of the press—will have reason to understand that this is a bell that tolls not just for two AIPAC lobbyists, but also for countless others to face trials in the future, for newly invented crimes unearthed by willing prosecutors.

Rabinowitz, *supra* note 163.

394. Neil Lewis & Scott Shane, *Libby Lawyers Open Case With Denials by Reporters*, N.Y. TIMES, Feb. 13, 2007, at A15.

395. *Id.*

396. Robert Novak’s memoir is filled with examples of his close relationships with prominent government officials. For example, he states that at the start of the Reagan Administration, he was “on close terms” with David Stockman, perhaps “the best high-level source” he ever had. NOVAK, *supra* note 229, at 361. In a passage resembling the meal-time interactions between Franklin and Rosen and Weissman, Novak writes, “[s]oon after Stockman took office, we started having breakfast every other Saturday, where Stockman could leak at length in the nearly deserted Hay Adams dining room.” *Id.*

397. BOB WOODWARD, *PLAN OF ATTACK* x (2004) (stating that more than 75 key people “including war cabinet members, the White House staff and officials serving at various levels of the State and Defense Departments and the Central Intelligence Agency” provided information “on background” for his book).

398. BOB WOODWARD, *BUSH AT WAR* xi–xii (2002) (stating that he interviewed more than one hundred people involved in war planning and gained access to notes taken during more than fifty NSC meetings).

399. BOB WOODWARD, *STATE OF DENIAL* 493 (2006) (explaining that nearly all of the information for this book came from interviews with President Bush’s national security team).

based on classified information. For example, in *Bush at War*, Woodward admitted “[w]ar planning and war making involve secret information. I have used a good deal of it”⁴⁰⁰ Another reporter who aggressively cultivates national security officials as confidential sources is the *New Yorker’s* Seymour Hersh.⁴⁰¹ Trust is the critical ingredient in relationships between these reporters and their high-level sources.⁴⁰² Yet neither these reporters nor their sources have been charged with conspiracy to violate the espionage laws.

As stated at the outset of this Article, journalists commonly work under the premise that they are free to ask for information and those with access to it are free to say no. Under the government’s conspiracy theory in *Rosen*, though, journalists must passively hope for packages of leaked information in the mail, à la *Bartnicki*.⁴⁰³ Of course, journalists do receive unsolicited information,⁴⁰⁴ but more often they seek information from insiders.⁴⁰⁵ As the editor of the *Los Angeles Times* and the Executive Editor of the *New York Times* wrote, sensitive stories “may begin with a tip from a source who has a grievance or a guilty conscience, but those tips are just the beginning of long, painstaking work.”⁴⁰⁶ Punishing journalists for seeking classified information fundamentally alters the newsgathering process.

Moreover, the conspiracy charge especially threatens reporter-source transactions where the reporter promises not to disclose the identity of the source. This fundamental journalism practice does more than anything *Rosen* and *Weissman* did to create an

400. WOODWARD, *BUSH AT WAR*, *supra* note 398, at xii.

401. Hersh’s editor at the *New Yorker*, David Remnick, wrote that Hersh “had developed, over the years, an extraordinary stable of knowledgeable, well-placed sources, who trust him.” David Remnick, *Introduction to SEYMOUR M. HERSH, CHAIN OF COMMAND* xv (2004). See generally Scott Sherman, *The Avenger: Sy Hersh, Then and Now*, COLUM. JOURNALISM REV., July–Aug. 2003, at 34 (recounting Hersh’s experience as a journalist over the years).

402. Speaking in defense of a bill creating a federal journalist’s privilege, Senator Specter quoted journalist William Safire who said “the essence of news gathering is this: if you don’t have sources you trust and who trust you, then you don’t have a solid story—and the public suffers for it.” 153 CONG. REC. S11330 (daily ed. Sept. 10, 2007) (remarks of Sen. Specter).

403. See discussion *infra* Part III.B.2 (describing passive receipt of information from an anonymous source).

404. See, e.g., NOVAK, *supra* note 229, at 303, 311–13 (describing receipt of documents from John Carbaugh).

405. They may also be persistent in their requests for classified information. See *Jurgensen v. Fairfax County*, 745 F.2d 868, 875 (4th Cir. 1984) (describing Bob Woodward’s repeated phone calls seeking a confidential police report); see also FRANKEL, *supra* note 44, at 346 (describing the “essence of great reporting” as “dogged detective work that confronts and badgers sources until they cough up the clues that transform suspicion into evidence”).

406. Baquet & Keller, *supra* note 2.

environment in which insiders feel free to disclose classified information. Bribery, coercion, and theft may be punished, but as I wrote in an earlier article, “sources alone bear the burden of legal consequences for their breach of confidentiality, while the press is free to ask for information.”⁴⁰⁷

3. *Post script*

Rosen and Weissman’s defense has consistently claimed that leaking is a common practice in Washington and that Rosen and Weissman’s meetings with Franklin were similar to their meetings with other top-level officials.⁴⁰⁸ On November 2, 2007, Judge Ellis authorized subpoenas for Secretary of State Condoleezza Rice and fourteen current and former government officials from the NSC and the Department of Defense, ruling that their testimony may show that the overt acts in the superseding indictment “reflect nothing more than the well-established official Washington practice of engaging in ‘back channel’ communication with various non-governmental entities and persons for the purpose of advancing U.S. foreign policy goals.”⁴⁰⁹ Testimony that Rosen and Weissman regularly received classified information from government officials with the expectation that this information would be further disclosed to foreign officials and the press would negate the criminal states of mind necessary to convict the defendants.⁴¹⁰ This ruling presents the government with difficult choices; a refusal to allow the officials to testify on the grounds that their testimony would disclose sensitive NDI could lead to dismissals of the indictment.⁴¹¹ A trial featuring high-level officials discussing their habitual leaking would make the few attempts to apply the Espionage Act to leaking appear even more anomalous.

B. *Boehner v. McDermott*

The *Boehner* litigation presented novel First Amendment questions relating to leaking. Did McDermott’s knowledge of the illegality of the Martins’ taping mean that he did not lawfully acquire the tape?

407. Lee, *supra* note 51, at 96.

408. See generally *United States v. Rosen*, 520 F. Supp. 2d 802, 806–07 (E.D. Va. 2007) (asking for subpoenas for other government officials who might help prove their defense).

409. *Id.* at 808.

410. *Id.*; see also *United States v. Rosen*, 445 F. Supp. 2d 602, 618–26 (E.D. Va. 2006) (reviewing general versus specific intent with regard to the Espionage Act).

411. *Id.* at 810; see also Jerry Markon, *Rice, Others Told to Testify in AIPAC Case*, WASH. POST, Nov. 3, 2007, at A6.

Was McDermott's disclosure of the tape to reporters distinct from the newspapers' publication of the illegally recorded information?

I. Boehner I

The United States District Court for the District of Columbia granted McDermott's motion to dismiss,⁴¹² holding that his receipt and disclosure of the tape were protected under *Florida Star v. B.J.F.*⁴¹³ and similar press cases protecting the public disclosure of information of public significance *if* lawfully obtained.⁴¹⁴ By analyzing the case within the framework provided by *Florida Star*, Judge Hogan implicitly treated McDermott's disclosure to the newspaper reporters as equivalent to the newspapers' publication of the information.

The threshold question under *Florida Star* was whether McDermott had lawfully obtained the recording.⁴¹⁵ Judge Hogan wrote,

Although the wiretap statutes prohibit the Martin's interception, and the Martin's disclosure of the tape to Reps. Thurman and McDermott, they do not prohibit Rep. McDermott's *receipt* of the tape. Because defendant did not break any laws in taking possession of the tape, he lawfully obtained that information, in a literal sense.⁴¹⁶

McDermott had exploited the "loopholes" in the wiretapping laws, and Judge Hogan expressed concern that this development would encourage the laundering of illegally intercepted information, diluting the wiretapping statute into "nothingness."⁴¹⁷ Nonetheless, Judge Hogan reluctantly concluded cases like *Florida Star* stand for the proposition that "information, even if initially garnered through illegal means, is lawfully obtained by anyone who did not himself break the law to obtain it."⁴¹⁸

By a 2-1 vote, the Court of Appeals for the District of Columbia Circuit reversed.⁴¹⁹ Judges Randolph and Ginsburg concluded that McDermott had illegally obtained the tape, thus the *Florida Star* line

412. *Boehner v. McDermott*, Civ. No. 98-594, 1998 U.S. Dist. LEXIS 11509, at *23 (D.D.C. July 27, 1998), *rev'd and remanded*, 191 F.3d 463 (D.C. Cir. 1999).

413. 491 U.S. 524 (1989).

414. See *Boehner*, 1998 U.S. Dist. LEXIS 11509, at *23 (finding that "[t]he *First Amendment* prevents the government from punishing the disclosure of truthful, lawfully obtained information of public significance").

415. *Fla. Star v. B.J.F.*, 491 U.S. 524, 526 (1989).

416. *Boehner*, 1998 U.S. Dist. LEXIS 11509, at *12.

417. *Id.* at **10-11. Judge Hogan added, "[l]ogic suggests that a criminal cannot launder the stains off illegally obtained property simply by giving it to someone else, when that person is aware of its origins." *Id.* at *14. However, he noted that First Amendment case law "does not seem to adopt this logic." *Id.*

418. *Id.*

419. *Boehner v. McDermott (Boehner D.C. Cir. I)*, 191 F.3d 463, 481 (D.C. Cir. 1999), *vacated*, 532 U.S. 1050 (2001).

of cases was inapplicable.⁴²⁰ Judge Ginsburg, though, did not join those portions of Randolph's opinion that treated McDermott's actions as "conduct," not "speech,"⁴²¹ and distinguished McDermott's behavior from newspaper publication.

If McDermott illegally accepted the tape, didn't the journalists also enter into an illegal transaction by accepting the tape from McDermott? Judge Randolph sought to distinguish McDermott from the press, writing, "one must remember that in the newspaper business, sources provide information, but newspapers, not sources, are the publishers."⁴²² Judge Randolph narrowly read the Supreme Court's precedents, such as *Florida Star*, as protecting newspaper publication of information; McDermott's disclosure was not the equivalent of newspaper publication.⁴²³

420. See *id.* at 476 ("By accepting the tape from the Martins, McDermott participated in their illegal conduct"); see also *id.* at 479 (Ginsburg, J., concurring) ("McDermott knew the transaction was illegal at the time he entered into it").

421. Randolph's discussion of whether McDermott's behavior was "conduct" rather than "speech" was cryptic. At one point, Randolph appeared to mean that McDermott's behavior was not sufficiently expressive to warrant analysis as "speech." *Id.* at 466–67, 477. At another point, though, Randolph emphasized that even if McDermott's behavior "in turning over the tapes" conveyed a message, it was nonetheless unprotected by the First Amendment. *Id.* at 467. He appeared to blend both lines of inquiry in a passage stating that those who expose private activity to public gaze are "not necessarily engaging in speech, let alone 'the freedom of speech.'" *Id.* at 466. Despite raising questions about the qualities or nature of McDermott's act, Randolph's use of "conduct" label appears to announce his conclusion that the act is unprotected by the First Amendment. See *id.* at 477 (finding that because Boehner seeks recovery for McDermott's handing over the tape to newspapers, it was conduct rather than speech). As I have stated elsewhere, the conduct distinction is properly understood as a "conclusion concerning whether and to what extent the First Amendment protects the activity." William E. Lee, *Speaking Without Words: The First Amendment Doctrine of Symbolic Speech and the Supreme Court*, 15 COLUM. J.L. & ARTS 495, 514 (1991); see also *id.* at 516–17 (stating that the speech/conduct distinction is a façade for factors that are not explicitly stated and that disputes about whether an act is conduct are "not truly about the nature or qualities of an act, but are disputes about whether the activity is entitled to First Amendment protection"). In an important passage in *Bartnicki v. Vopper* focusing on behavior similar to McDermott's, Justice Stevens stated the following:

It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of "speech" that the First Amendment protects.

Bartnicki v. Vopper, 532 U.S. 514, 527 (2001).

422. *Boehner*, 191 F.3d at 472.

423. *Id.* at 472–73; see also *id.* at 476 (stating that McDermott is not the "media"). In *Bartnicki v. Vopper*, Judge Pollock's dissenting opinion treated a media source differently than the media. See *Bartnicki v. Vopper* (*Bartnicki II*), 200 F.3d 109, 131 n.3 (3d Cir. 1999) (Pollack, J. dissenting) (applying *O'Brien* analysis to a media source, but rejecting that analysis for the media defendants); see also *id.* at 136 n.7 (holding that whatever First Amendment protections apply to the media do not necessarily apply to sources).

In a dissenting opinion, Judge Sentelle claimed that Randolph's "sources do not publish; the newspapers do" distinction was "without substance or force" and created "a hierarchy of First Amendment protection for a publishing aristocracy nowhere suggested in the Amendment, its history, or the cases applying it."⁴²⁴ Further, Sentelle argued that punishing McDermott because of his awareness of the Martins' illegal act raised the prospect of also punishing the press. "I do not see how we can draw a line today that would punish McDermott and not hold liable for sanctions every newspaper, every radio station, every broadcasting network that obtained the same information from McDermott's releases and published it again," he wrote.⁴²⁵ As was shown above in the discussion of the duty of nondisclosure in *Boehner III*, a line can be drawn between those subject to a duty of nondisclosure (McDermott) and those not subject to such a duty (the press and the public). The duty of nondisclosure ensnares a smaller group of actors and is less problematic than the punishment of those who are aware of the illegal activity of another party.

After the Supreme Court decided *Bartnicki v. Vopper*,⁴²⁶ another case involving disclosure of an illegally intercepted telephone conversation, the Court vacated *Boehner I* and returned the case to the court of appeals for further consideration in light of *Bartnicki*.⁴²⁷ To understand the rulings in *Boehner II*, it is necessary to briefly describe *Bartnicki*.

2. *Bartnicki v. Vopper*

During a contentious contract negotiation between a teachers' union and a Pennsylvania school district, Jack Yocum, president of a taxpayers' association formed solely to oppose the union, found a tape recording in his mailbox.⁴²⁸ There were no markings on the tape identifying who made it or gave it to Yocum.⁴²⁹ Yocum listened to the tape and recognized the voices of Gloria Bartnicki, the union's chief

424. *Boehner I*, 191 F.3d at 484 (Sentelle, J., dissenting) (writing that the "First Amendment protections of speech and press extend to those who speak and those who write, whether they be press barons, members of Congress, or other sources").

425. *Id.* at 485. Conversely, Judge Randolph argued that if the Martins' activities were unprotected, so were those of McDermott. *See id.* at 466 (stating "[i]f the Martins were not exercising their right of free speech . . . it is difficult to see why McDermott was exercising his freedom of speech when he gave copies of their tape to the newspapers").

426. 532 U.S. 514 (2001).

427. *McDermott v. Boehner*, 532 U.S. 1050 (2001).

428. *Bartnicki v. Vopper (Bartnicki I)*, Civ. No. 94-1201, 1996 U.S. Dist. LEXIS 22517, at *3-4 (M.D. Pa. June 17, 1996).

429. *Id.*

negotiator, and Anthony Kane, the union president.⁴³⁰ The illegally recorded telephone conversation revealed Kane saying that if the school board would not agree to a three-percent raise, “we’re gonna have to go to their, their homes . . . to blow off their front porches, we’ll have to do some work on some of those guys”⁴³¹ Yocum played the tape for some members of the school board and gave a copy to a local radio commentator, Frederick Vopper.⁴³² When the teachers’ union got a favorable settlement, Vopper played the recording during his news/talk program.⁴³³ Bartnicki and Kane sued Yocum, Vopper, and the two radio stations carrying Vopper’s program for civil damages under the Federal and Pennsylvania wiretapping acts.⁴³⁴

In finding the wiretapping statutes could not be constitutionally applied to the defendants, the Court of Appeals for the Third Circuit emphasized the chilling effect that would be created if the press were liable for merely disclosing information improperly intercepted by another party.⁴³⁵ The Third Circuit acknowledged that reporters “often will not know the precise origins” of information they receive from sources, “nor whether the information stems from a lawful source.”⁴³⁶ The Third Circuit distinguished this case from *Boehner* because the latter did not attempt to impose liability on the newspapers that had disclosed the illegally intercepted conversation.⁴³⁷ Additionally, although Yocum and McDermott were both sources for the media, the Third Circuit stated that Yocum had not “entered into” any transaction with the interceptor.⁴³⁸ McDermott, in contrast, knew the transaction with the Martins was illegal at the time he accepted the tape.⁴³⁹

By a 6-3 vote, the Supreme Court held that the First Amendment protects the disclosure or publication of information illegally intercepted by someone else.⁴⁴⁰ In framing the case, the Court

430. *Id.*

431. *Bartnicki v. Vopper (Bartnicki II)*, 200 F.3d 109, 113 (3d Cir. 1999).

432. *Id.*

433. *Id.*

434. *Id.*

435. *See id.* at 127 (expressing concern that more speech will be deterred than necessary).

436. *Id.*

437. *Id.* at 128.

438. *Id.* at 129.

439. *Id.* at 128–29. The Third Circuit also referred to that portion of *Boehner I* in which Judge Randolph suggested that McDermott promised the Martins immunity. *Id.* at 128. As shown above, there is no proof McDermott offered the Martins immunity. *See* discussion *supra* note 315 (giving several sources that question whether a grant of immunity was promised).

440. *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001).

emphasized that Yocum and Vopper played no part in the illegal interception; in fact, they did not know who made the interception.⁴⁴¹ Hence their access to the information was lawful.⁴⁴² Even though the Court accepted the petitioners' submission that Yocum and Vopper knew, or had reason to know, that the interception was unlawful,⁴⁴³ this state of mind did not reduce the First Amendment protection for their disclosures. Although it was mentioned only briefly, the Court treated Yocum and the media defendants alike for analytical purposes.⁴⁴⁴ This undercuts Randolph's attempt in *Boehner I* to separate sources from the press, at least in this type of case.

The *Bartnicki* Court carefully limited its ruling to situations where information is lawfully acquired by those who disclose or publish.⁴⁴⁵ However, the Court did not explore what "lawfully acquired" meant and the passive receipt by Yocum of the tape recording is arguably unlike journalist-source transactions where a journalist asks for or receives confidential information from a source and in exchange promises to protect the source's identity.⁴⁴⁶ *Boehner II* would feature sharp disputes about the meaning of lawful acquisition.

3. *Boehner II*

After the Supreme Court vacated *Boehner I* and returned the case to the court of appeals, the appellate court in turn remanded the case to the district court.⁴⁴⁷ Ruling on cross motions for summary judgment, the district court held that McDermott did not lawfully acquire the tape.⁴⁴⁸ The district court read *Bartnicki* as standing for the proposition that one "who anonymously receives illegally intercepted information *without present knowledge* of its illegality has obtained it lawfully."⁴⁴⁹ Carefully examining the record developed

441. *Id.* at 525.

442. *Id.*

443. *Id.*

444. *Id.* at 525 n.8 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964) and *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

445. *Id.* at 532 n.19.

446. In cases prior to *Bartnicki*, the Court emphasized that the press was free to publish information acquired through "routine" newsgathering methods. *See, e.g.*, *Fla. Star v. B.J.F.*, 491 U.S. 524, 538 (1989) (referring to reliance on a police report as a routine technique). I have previously observed that the contours of the phrase "routine" newsgathering methods are poorly defined. *Lee, supra* note 51, at 56. However, unless a journalist employs measures such as blackmailing a source, "sources alone bear the burden of legal consequences for their breach of confidentiality, while the press is free to ask for information." *Id.* at 96.

447. *Boehner v. McDermott*, 22 Fed. App'x 16 (D.C. Cir. 2001).

448. *Boehner v. McDermott*, 332 F. Supp. 2d 149, 169 (D.D.C. 2004), *aff'd en banc*, 484 F.3d 573 (D.C. Cir. 2007).

449. *Id.* at 165.

during discovery, Judge Hogan concluded that McDermott knew of the Martins' illegal activity when he took possession of the tape.⁴⁵⁰

This ruling sent a shock wave through media lawyers; they claimed the press regularly receives information that has some flaw in the way it was initially obtained.⁴⁵¹ George Freeman, an attorney for the *New York Times* stated, "Under this new rule, much of the information reporters acquire every day, from the Pentagon Papers on down, would become legally suspect."⁴⁵²

The court of appeals affirmed the district court, stating that the "difference between this case and *Bartnicki* is plain to see."⁴⁵³ The appellate court explained,

It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is

450. *Id.* at 169. Judge Hogan made two quite distinct statements about McDermott's state of mind. First, he found that by the time McDermott *disclosed* the tape to the media, "he knew or had reason to know that the tape had been obtained through the unlawful interception of communications." *Id.* at 157. Secondly, Hogan stated that at the time McDermott took *possession* of the tape, McDermott knew the interception was illegal. *Id.* at 169. There is a difference of several hours between the time McDermott took possession of the tape and when he first disclosed it to Adam Clymer of the *New York Times*. *See id.* at 167 (stating that the call to Clymer was later that night). However, in discussing *Bartnicki*, Judge Hogan emphasized McDermott's state of mind at the time of taking possession of the tape. *Id.* at 167-68. He said that under *Bartnicki*, liability under the wiretap statute "depends upon the lawfulness of the manner in which he *initially obtained* the information." *Id.* at 163.

Shortly after issuing this ruling, Judge Hogan also found McDermott liable for \$10,000 in statutory damages, \$50,000 in punitive damages, and Boehner's legal fees. *Boehner v. McDermott*, Civ. No. 98-0594 (TFH) (D.D.C. Oct. 22, 2004). The fees at that time totaled about \$545,000. Alex Fryer, *McDermott Gets \$600,000 Tab in Leak of Illegal Cellphone Tape*, SEATTLE TIMES, Oct. 29, 2004, at A1. Most recently, Judge Hogan awarded Boehner slightly more than \$1 million for legal fees, costs and interest. *Boehner v. McDermott*, Civ. No. 98-0594, 2008 U.S. Dist. LEXIS 25267, at *2 (D.D.C. Mar. 31, 2008).

451. Adam Liptak, *Congressman Illegally Shared Wiretap Tape, Judge Rules*, N.Y. TIMES, Aug. 24, 2004, at A12. Another media lawyer, Lee Levine said the decision, "if it holds" would be a disaster for journalists. *Id.*; *see also* Peter Karanjia, *Boehner v. McDermott: Trafficking in Illegally Intercepted Information*, COMM. LAW, Winter 2005, at 10 (writing that the gloss the rulings in *Boehner* add "to the concept of unlawful conduct should be troubling to publishers and reporters").

452. Liptak, *supra* note 451, at A12.

453. *Boehner v. McDermott (Boehner II)*, 441 F.3d 1010, 1017, *vacated and reh'g en banc granted*, No. 04-7203, 2006 U.S. App. LEXIS 32570 (June 23, 2006), *aff'd en banc*, 484 F.3d 573 (D.C. Cir. 2007). Although the Martins' letter was attached to the outside of the envelope, the appellate court held that McDermott was entitled to a justifiable inference that he did not read the letter. *Id.* at 1016. But the appellate court concluded that no such inference was permissible relating to McDermott's conversation with the Martins. *See id.* (stating that McDermott does not deny that the Martins told him they used a scanner to intercept the conversation).

guilty of receiving stolen property, even if the ring was intended only as a gift.⁴⁵⁴

Judges Randolph and Ginsburg read *Bartnicki* as resting on the anonymity of the interceptor.⁴⁵⁵ Since McDermott met the Martins and knew of their illegal act at the time he accepted the tape, he did not lawfully obtain the tape.⁴⁵⁶

In a dissenting opinion, Judge Sentelle claimed the Supreme Court's *Bartnicki* opinion "underlined" the lack of significance of a communicator's knowledge of another party's illegal action.⁴⁵⁷ Sentelle again feared the danger the majority's opinion posed to the press and others:

Just as Representative McDermott knew that the information had been unlawfully intercepted, so did the newspapers to whom he passed the information. I see no distinction, nor has Representative Boehner suggested one, between the constitutionality of regulating communication of the contents of the tape by McDermott or by [t]he *Washington Post* or [t]he *New York Times* or any other media resource. For that matter, every reader of the information in the newspapers also learned that it had been obtained by unlawful intercept. Under the rule proposed by Representative Boehner, no one in the United States could communicate on this topic of public interest because of the defect in the chain of title.⁴⁵⁸

As discussed next, Sentelle's views garnered support from the majority of the members of the District of Columbia Court of Appeals in *Boehner III*.

4. Boehner III

Judge Sentelle wrote for a majority of the court of appeals in *Boehner III* on the issue of knowledge of illegal activity. He emphasized, as he had in *Boehner II*, that there was no "distinction of legal, let alone constitutional, significance between our facts and those before the Court in *Bartnicki*."⁴⁵⁹ The parties in *Bartnicki* knew, or had reason to know, the tape they disseminated was the result of illegal wiretapping.⁴⁶⁰ Thus, "the otherwise-lawful receipt of unlawfully obtained information remains in itself lawful, even where

454. *Id.* at 1017.

455. *Id.* at 1015.

456. *Id.* at 1016.

457. *Id.* at 1020 (Sentelle, J., dissenting).

458. *Id.* at 1022.

459. *Boehner v. McDermott (Boehner III)*, 484 F.3d 573, 584 (D.C. Cir.) (en banc), *cert. denied*, 128 S. Ct. 712 (2007) (Sentelle, J., dissenting).

460. *Id.* at 585.

the receiver knows or has reason to know that the source has obtained the information unlawfully.”⁴⁶¹ Central to Sentelle’s analysis is his belief that sanctioning McDermott because of an awareness of the Martins’ illegal action might also lead to sanctions against newspapers and even their readers. “[N]o one in the United States could communicate on this topic of public interest because of the defect in the chain of title,”⁴⁶² he wrote. As in his dissenting opinions in *Boehner I* and *Boehner II*, he asserted that there was no distinction between the First Amendment rights of the press and the First Amendment speech rights of nonprofessional communicators.⁴⁶³

When all of the opinions in *Boehner III* are read together, the following becomes apparent: the press may publish information from sources such as McDermott, even though McDermott had no right to disclose the information. This is an appropriate accommodation of the varied rights and interests at play. First, it focuses punishment on government actors who acquire information as part of their official responsibilities, yet violate confidentiality rules. Second, it avoids the problems inherent in the now-discredited “knowledge of illegal activity” rationale. Treating journalist-source transactions as illegal because the journalist is aware of the source’s illegal action markedly expands the government’s power to punish the press and contravenes the principles of cases such as *Landmark*, *Florida Star*, and *Bartnicki*.

CONCLUSION

“But after years of investigating, Fitzgerald decided that Rove had done nothing for which he could be indicted. The leak was ‘smarmy politics,’ one senior law enforcement official familiar with the case said. It was sloppy and reckless. But it wasn’t criminal.”

Michael Isikoff and David Corn

In their book about the selling of the Iraq war, journalists Isikoff and Corn reported that the Bush Administration crackdown on leaks has “sent a chill through the ranks” of the federal government, especially among lower-ranking officials.⁴⁶⁴ The government’s use of internal measures, such as increasing employee awareness of security procedures, revocation of security clearances for those employees

461. *Id.* Similarly, the receipt of information from an anonymous source, emphasized in *Boehner II*, was irrelevant. *Id.*

462. *Id.* at 586.

463. *Id.*

464. *Id.* at 423.

who have unauthorized contact with the press, and termination of leakers, are permissible ways to deter leaking. However, criminal prosecutions against government employees who leak are imbued with an overwhelming sense of randomness due to the rarity of those prosecutions. The Libby jury believed that Libby was the “fall guy” and that Rove and Armitage should also have been on trial, striking evidence of the layperson’s sense of the randomness inherent in criminal leak cases.⁴⁶⁵

The paucity of leak prosecutions reveals a political culture that largely tolerates leaks, acknowledges the importance of leaks in the democratic dialogue, and recognizes the difficulty of applying existing statutes to conduct related to publication. Leaking may be smarmy politics, but equally smarmy are prosecutorial decisions that seem arbitrary. That the press was not prosecuted for receiving the same information the AIPAC lobbyists received makes the exercise of prosecutorial discretion in that case appear capricious. If Rosen and Weissman conspired with Franklin, it is difficult to understand a principle preventing the government’s theory of conspiracy from also being applied to the press. Granted, federal prosecutors are naturally reluctant to pick politically messy fights with those who buy ink by the barrel, but there is no constitutional principle that can explain the government’s decision not to charge the press for behavior similar to that of the AIPAC lobbyists. As a bedrock principle, the recipients of leaks should not be liable for the actions of government employees. Stated differently, courts have an appropriate role in protecting outsiders who receive leaks, but policy toward insiders who engage in unauthorized disclosures is a matter for the political branches.

465. Amy Goldstein & Elizabeth Williamson, *Libby ‘Pilloried’ for Leak, Panel Members Believed*, WASH. POST, Mar. 7, 2007, at A8.