

2014

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### Recommended Citation

Becker, Michael D. "The Espionage Act & An Evolving News Media: Why Newspapers That Publish Classified Information May Face Criminal Charges as They Enter the Digital Age." *National Security Law Brief* 4, no. 2 (2014): 1-19.

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# THE ESPIONAGE ACT & AN EVOLVING NEWS MEDIA: WHY NEWSPAPERS THAT PUBLISH CLASSIFIED INFORMATION MAY FACE CRIMINAL CHARGES AS THEY ENTER THE DIGITAL AGE

MICHAEL D. BECKER<sup>1</sup>

## I. INTRODUCTION

The summer of 2013 was not kind to the press. First, it was revealed that the Department of Justice (DOJ) secretly obtained the phone records of *Associated Press* reporters and editors to further a high-profile leak investigation.<sup>2</sup> Then, journalists learned that one of their own, *Fox News* correspondent James Rosen, had been characterized by the DOJ as a “co-conspirator” in court records filed in another leak probe.<sup>3</sup> By the time politicians and pundits began questioning the complicit relationship between reporter Glenn Greenwald of *The Guardian* and former National Security Agency (NSA) contractor Edward Snowden,<sup>4</sup> some were convinced that President Obama was “at war with journalists.”<sup>5</sup>

The media had always enjoyed some measure of political protection, even as it revealed damaging yet informative revelations related to our national security.<sup>6</sup> Indeed the press, to this day, has never faced criminal charges for obtaining or revealing classified information under the Espionage Act of 1917.<sup>7</sup> But the summer of 2013 shook the status quo. So fearful were journalists of impending

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2 Michael Calderone, et al., *AP Phone Records Seized By Justice Department As War On Leaks Continues*, HUFFINGTON POST (May 13, 2013) [http://www.huffingtonpost.com/2013/05/13/ap-phone-records-doj-leaks\\_n\\_3268932.html](http://www.huffingtonpost.com/2013/05/13/ap-phone-records-doj-leaks_n_3268932.html).

3 Ann E. Marimow, *A Rare Peek Into a Justice Department Leak Probe*, WASH. POST (May 19, 2013), [http://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4-a479289a31f9\\_print.html](http://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4-a479289a31f9_print.html) (“[T]here was evidence Rosen had broken the law, ‘at the very least, either as an aider, abettor and/or co-conspirator.’”).

4 Jack Mirkinson, *David Gregory To Glenn Greenwald: ‘Why Shouldn’t You Be Charged With A Crime?’*, HUFFINGTON POST (June 23, 2013), [http://www.huffingtonpost.com/2013/06/23/david-gregory-glenn-greenwald-crime\\_n\\_3486654.html](http://www.huffingtonpost.com/2013/06/23/david-gregory-glenn-greenwald-crime_n_3486654.html). (questioning Greenwald on “Meet the Press” as to why he should not be prosecuted by the government).

5 Martha T. Moore & Aamer Madhani, *Is Obama at War With Journalists?*, USA TODAY (May 27, 2013), <http://www.usatoday.com/story/news/politics/2013/05/27/obama-war-media-leaks/2358059/> (“President Obama finds himself battling charges that his administration has effectively launched a war on journalists.”).

6 See Ryan J. Reilly, *Eric Holder Vows Not To Prosecute Reporters*, HUFFINGTON POST (June 6, 2013), [http://www.huffingtonpost.com/2013/06/06/eric-holder-prosecute-reporters\\_n\\_3397335.html](http://www.huffingtonpost.com/2013/06/06/eric-holder-prosecute-reporters_n_3397335.html) (arguing that the Department of Justice will not prosecute reporters, because reporters perform a vital function in American democracy).

7 Emily Peterson, *WikiLeaks and the Espionage Act of 1917: Can Congress make it a crime for journalists to publish classified information?*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/news-media-law/wikileaks-and-espionage-act-1917> (“The U.S. government has never successfully prosecuted anyone

prosecution, and so constant the outrage from opportunistic politicians, that the Attorney General himself felt compelled to clarify the Obama Administration's stance on prosecuting the press.

"The Department [of Justice] has not prosecuted, and as long as I'm attorney general, will not prosecute any reporter for doing his or her job," Attorney General Eric Holder told the Senate Appropriations Committee on June 6, 2013,<sup>8</sup> a stance that did not entirely inspire confidence in journalists around the country.<sup>9</sup> For instance, what happens when Holder is no longer attorney general? Or when a reporter acts less like an objective observer and more like Greenwald, who chronicled many of the NSA programs revealed by Snowden, and is at best a fervent ally of the young leaker and at worst his co-conspirator. And finally, what happens when newspapers no longer resemble the newspapers of old, the kind that offer objective journalism, can be held with two hands and perpetually stain one's fingers with ink?

This Paper posits that the federal government is closer than ever to prosecuting newspapers under the Espionage Act of 1917, and has stopped short of doing so only as a matter of policy. This Paper further argues that the declining influence and uncertain future of newspapers will enable—and embolden—the government to someday prosecute the press under the Espionage Act for revealing classified information.

## II. BACKGROUND

### *A. Espionage Act of 1917 as it Applies to the Press*

The Espionage Act of 1917<sup>10</sup> is a confusing<sup>11</sup> and unwieldy set of statutes that make it a general crime to transfer national defense information of the United States to foreigners.<sup>12</sup> The relevant statutes are codified in sections 793-798 in Title 18 of the United States Code.<sup>13</sup> The act is so mystifying because few people really understand the contents therein.<sup>14</sup> Indeed, in the early 1970s, two law professors at Columbia University authored an extensive study of the Espionage Act<sup>15</sup> to determine,

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other than a government employee for disseminating unlawfully leaked classified information.”).

8 Reilly, *Eric Holder vows not to Prosecute Reporters*, *supra* note 6.

9 See, Josh Gerstein, *Holder Walks Fine Line On Prosecuting Journalists*, POLITICO (May 20, 2013), <http://www.politico.com/blogs/under-the-radar/2013/05/holder-walks-fine-line-on-prosecuting-journalists-164367.html>.

10 Espionage Act of 1917, 18 U.S.C. §§ 793 et seq.

11 Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 998 (1973) [hereinafter *Columbia Study*] (calling sections 793(d) and 793(e) of the Espionage Act of 1917 “undoubtedly the most confusing and complex of all the federal espionage statutes”).

12 *Id.* at 937 (“The basic provisions . . . contain[] comprehensive provisions bearing on transfer of defense information to foreigners . . . [and] punishes actual or attempted communication to a foreign agent of any document or information ‘relating to the national defense,’ if the communication is ‘with the intent or reason to believe that it [the information] is to be used to the injury of the United States or to the advantage of a foreign nation.’” (third alteration in original)); see also Gabriel Schoenfeld, *Has The New York Times Violated the Espionage Act?*, COMMENT. (March 2006), <http://www.commentarymagazine.com/article/has-the-%E2%80%9Cnew-york-times%E2%80%9D-violated-the-espionage-act/> (analyzing the use of the Espionage Act since its enactment).

13 *Columbia Study*, *supra* note 11, at 937.

14 *Id.* at 930 (“Either advancing myopia had taken its toll, or the statutes implacably resist the effort to understand.”).

15 *Id.* at 929 nn.a1, aal.

in essence, the degree to which the Act applied to the press: “Their goal proved elusive.”<sup>16</sup>

The authors, Professors Harold Edgar and Benno C. Schmidt, Jr., discovered a statute whose legislative history seemed to exclude the possibility of prosecuting the news media, but whose plain meaning remained ambiguously open to the possibility.<sup>17</sup> The Supreme Court of the United States only added to the confusion when deciding *New York Times, Co. v. United States*,<sup>18</sup> in which the United States sought to enjoin *The New York Times* and *The Washington Post* from publishing a top-secret study of the Vietnam War referred to as the “Pentagon Papers.”<sup>19</sup> Although the Government’s brief did not even mention the Espionage Act, no less address the proposition of whether the *Times* and the *Post* could be subject to its reach,<sup>20</sup> several Justices weighed in on its application to the press.

Justice White delivered the starkest warning in his concurrence, detailing several statutes of the Espionage Act and adding that

newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.<sup>21</sup>

Chief Justice Burger and Justice Blackmun similarly agreed in dissent.<sup>22</sup> Finally, Justice Marshall wrote that criminalizing *The New York Times* under the Espionage Act was only one “plausible construction” of the Act.<sup>23</sup> Although these interpretations amounted merely to dicta, they still represented what the Columbia law professors referred to as a “loaded gun pointed at newspapers and reporters.”<sup>24</sup> The professors found it “most regrettable” that the Justices used their opinions to opine on the Espionage Act, especially since four Justices demonstrated a misunderstanding of its reach.<sup>25</sup>

The basic provisions of the Espionage Act are sections 793 and 794.<sup>26</sup> Subsections 793(a)-(b)

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16 Schoenfeld, *supra* note 12.

17 *See id.* (calling the dichotomy between the legislative history of the Espionage Act and its plain meaning a “kind of schizophrenia”).

18 403 U.S. 713 (1971).

19 *Id.* at 714; DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE* 99 (1996).

20 *Columbia Study, supra* note 11, at 931-32.

21 *New York Times, Co.*, 403 U.S. at 736-37 (White, J., concurring) (warning specifically of section 797, which makes it a crime to publish photographs of military installations, and section 798, which criminalizes the willful publication of classified information related to, among other things, communication intelligence activities of the United States).

22 *Columbia Study, supra* note 11, at 935; *see New York Times, Co.*, 403 U.S. at 752, 759 (Burger, C.J., dissenting) (“I should add that I am in general agreement with much of what Mr. Justice White has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.”). Justice Blackmun, in his dissenting opinion, wrote that “I also am in substantial accord with much that Mr. Justice White says, by way of admonition, in the later part of his opinion.” *Id.* at 759 (Blackmun, J., dissenting).

23 *New York Times, Co.*, 403 U.S. at 745 (Marshall, J., concurring).

24 *Columbia Study, supra* note 11, at 936.

25 *Id.* at 935.

26 *Id.* at 937.

criminalize entering an installation or copying anything related to the national defense “for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation.”<sup>27</sup> The Columbia professors considered subsections (c), (d), and (e) “more sweeping” because they criminalize the “receipt of material knowing that it has been obtained in violation of other espionage provisions, communication of defense-related material or information to any person not entitled to receive it, and retention of such information.”<sup>28</sup> A major difference between subsection 793(c) and subsections 793(d) and (e) is that (d) and (e) prohibit “willful conduct,” whereas (c) seemingly prohibits receipt of defense information that had been obtained in violation of the Espionage Act.<sup>29</sup>

Section 794 generally prohibits the transfer of defense information to foreign governments or agents of a foreign power.<sup>30</sup> Subsection (a) punishes actual or attempted communication to an agent of a foreign power, while subsection (b) prohibits publishing such information to benefit a foreign power—but only “in [a] time of war.”<sup>31</sup>

While the Justice Department often uses Sections 793 and 794 to prosecute those who “leak” classified information,<sup>32</sup> it would have difficulty holding newspapers accountable under those particular statutes. Indeed, the Columbia scholars agreed that subsections 793(a) and (b) would not apply to “the act of publication.”<sup>33</sup> Similarly, it’s unlikely that subsection 794(a) would apply to the press because of the requisite “intent” that the information be “be used to the injury of the United States or to the advantage of a foreign nation.”<sup>34</sup> Subsection 794(b) applies only in times of war and is so limited that it might as well be “insignificant.”<sup>35</sup>

Subsections 793(d) and (e) are far more confounding because of their ambiguity and overbreadth. Subsection (d) seems to criminalize the communication of national defense information that had been obtained lawfully, while subsection (e) criminalizes the communication or retention of national defense information that had been obtained unlawfully.<sup>36</sup> “If these statutes mean what they

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27 Espionage Act of 1917, 18 U.S.C. § 793(a)-(b) (2006); *see also Columbia Study, supra* note 11, at 938.

28 *Columbia Study, supra* note 11, at 938.

29 *Id.*

30 § 794. Section 794 is titled “Gathering or delivering defense information to aid foreign government.” *Id.*

31 § 794(a)-(b).

32 *See, e.g.,* Verdicts in U.S. vs. Pfc. Bradley E. Manning, McCLATCHY DC (July 30, 2013), [http://www.mcclatchydc.com/2013/07/30/198087/verdicts-in-us-vs-pfc-bradley.html#.UkcUCz\\_cDV8](http://www.mcclatchydc.com/2013/07/30/198087/verdicts-in-us-vs-pfc-bradley.html#.UkcUCz_cDV8) (finding Pfc. Bradley Manning guilty of several counts of section 793(e)); Criminal Complaint at 1, *United States v. Kiriakou*, (No. 1-12-MJ-33) (E.D. Va. Jan. 23, 2012), 2013 WL 316490; *United States v. Kim*, 808 F. Supp. 2d 44, 60 (D.D.C. 2011) (concluding that the prosecution of Stephen Jin-Woo Kim under § 793(d) for disclosing classified information to a reporter did not violate the Treason Clause, the Due Process Clause, or the First Amendment); *United States v. Rosen*, 445 F. Supp. 2d 602, 645 (E.D. Va. 2006) (analyzing section 793 of the Espionage Act and calling it “constitutionally permissible” as applied to defendants Steven Rosen and Keith Weissman); *United States v. Morison*, 844 F.2d 1057, 1080 (4th Cir. 1988) (affirming the conviction of Samuel Morison under section 793).

33 *Columbia Study, supra* note 11, at 965 (“Subsection 794(b) . . . is so limited as to be, in practice, insignificant.”).

34 § 794(a).

35 *See Columbia Study, supra* note 11, at 968 (reasoning that a newspaper that publishes the type of information prohibited by subsection (b) simply to satisfy reader curiosity or to sell newspapers would not violate the subsection).

36 § 793(d), (e); *see also Columbia Study, supra* note 11, at 998–1000.

seem to say and are constitutional, public speech in this country since World War II has been rife with criminality.”<sup>37</sup> The legislative history, however, reveals something else entirely: Congress did not seem to think that Section 793 of the Espionage Act would apply to the press.<sup>38</sup> Both the Attorney General and the Legislative Reference Service, the precursor to the Congressional Research Service, did not believe that section 793 could subject newspapers that were reporting in the normal course of business to criminal sanctions—despite the plain language of the statute.<sup>39</sup> That lulled Congress into the arguably erroneous belief that ordinary citizens were more at risk under section 793 than newspapers. Thus, “[o]verriding all these interpretive issues is the problem of how the sweeping language of [subsections] 793(d) and (e) should be reconciled with the clear message of the 1917 and 1950 legislative histories that publication of defense information for the purpose of selling newspapers or engaging in public debate is not a criminal act.”<sup>40</sup> The only conclusion, the law professors posited, is that subsections (d) and (e) are unconstitutionally vague and overbroad.<sup>41</sup>

While sections 793 and 794 are vague enough to invite constitutional challenges from defendants, section 798, in comparison, has been called a “model of precise draftsmanship.”<sup>42</sup> Section 798 criminalizes anyone who “knowingly and willfully communicates, furnishes, transmits . . . publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States” any of the enumerated national defense information.<sup>43</sup> The section specifically prohibits the publication of codes, ciphers, cryptographic systems, and, most applicable to newspapers, classified information “concerning the communication intelligence activities of the United States or any foreign government.”<sup>44</sup> Communication intelligence is later described as “all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients.”<sup>45</sup>

Section 798 is unique in that it lacks of any harmful intent requirement, and specifically criminalizes published material.<sup>46</sup> Such language makes section 798 more applicable to a well-intentioned newspaper than any other section in the Espionage Act.<sup>47</sup> Even so, section 798 passed without much

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37 *Columbia Study*, *supra* note 11, 1000.

38 *Id.* 1000–1002 & n.181 (“Congress undoubtedly did not understand [subsections] 793(d) and (e) or their precursors to have these effects [of criminalizing journalists] when they were passed or when the problem of publication of defense information was considered on other occasions.”). “The [House and Senate Judiciary Committee] Report[s] make no mention of any general need for military secrecy and does not discuss whether publication by a newspaper for the purpose of informing the public about military affairs would” meet the requirements for prosecution under the Espionage Act. *Id.* 1002 n. 181 (citing H.R. Rep. No. 1942 (1911) and S. Rep. No. 1250 (1911)).

39 *Id.* at 1030.

40 *Id.* at 1001–02.

41 *Id.* at 1000.

42 *Id.* at 1065.

43 18 U.S.C. § 798 (2006) (emphasis added).

44 *Id.* § 798(a)(1), (a)(3).

45 *Id.* § 798(b).

46 See Andrew Croner, *A Snake in the Grass?: Section 798 of the Espionage Act and Its Constitutionality as Applied to the Press*, 77 GEO. WASH. L. REV. 766, 770 (2008-2009) (arguing that these two features of section 798 make prosecution more feasible compared to other section of the Espionage Act).

47 *Id.*

debate in either the House or the Senate,<sup>48</sup> and with support by the American Society of Newspaper Editors.<sup>49</sup>

Why would a trade group representing the largest newspapers in the country approve a law that could potentially limit their coverage? Perhaps they thought section 798 applied only in narrow circumstances. Indeed, a newspaper has little reason to publish cryptographic information, nor does the public demand such information. But any national newspaper that covers the intelligence community invariably reports on communication intelligence. And, it can be argued, any newspaper worth the newsstand price will occasionally reveal classified information.

Most recently, *The Washington Post* and *The Guardian* have been assailed for revealing information about the NSA leaked to them by Snowden. Amidst the revelations, Representative Peter King (R-N.Y.) said on *CNN* that reporters should be prosecuted under the Espionage Act “if they willingly knew that this was classified information.”<sup>50</sup> Further, he said “there is an obligation both moral but also legal . . . against a reporter disclosing something that would so severely compromise national security.”<sup>51</sup>

In June, on *NBC*’s “Meet the Press,” host David Gregory ended his interview with Greenwald by asking why he should not be prosecuted for his apparent collaboration with Snowden.<sup>52</sup> Greenwald, to no one’s surprise, did not take kindly to the question, responding that it was “pretty extraordinary that anybody who would call themselves a journalist would publicly muse about whether or not other journalists should be charged with felonies.”<sup>53</sup>

This was not the first time journalists have been publicly questioned for reporting on classified NSA programs. In 2005, *The New York Times* published a story by Eric Lichtblau and James Risen about another secret NSA surveillance program.<sup>54</sup> *The New York Times* reporters first learned of a “Terrorist Surveillance Program” conducted outside the purview of the Foreign Intelligence Surveillance Court (FISC) in 2004, but initially held their story amidst concerns by the Bush Administration that it would harm national security and undermine intelligence efforts.<sup>55</sup> The story ultimately broke in December 2005 after one of its authors, Risen, considered publishing the information in his

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48 *Id.* at 771.

49 *See Columbia Study, supra* note 11, at 1069.

50 Braden Goyette, *Rep. Peter King: Reporters Should Be Prosecuted For Publishing Leaked Classified Information*, HUFFINGTON POST (June 11, 13), [http://www.huffingtonpost.com/2013/06/11/peter-king-reporters-prosecuted\\_n\\_3424541.html](http://www.huffingtonpost.com/2013/06/11/peter-king-reporters-prosecuted_n_3424541.html).

51 *Id.*

52 Mirkinson, *supra* note 4, (“To the extent that you have aided and abetted Snowden, even in his current movements, why shouldn’t you, Mr. Greenwald, be charged with a crime?”).

53 *Id.*

54 James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all>; *see also* Jack Goldsmith, *Secrecy and Safety*, NEW REPUBLIC (Aug. 13, 2008), <http://www.newrepublic.com/node/64747/> (discussing why *The New York Times* decided to publish stories on the National Security Agency’s (NSA) surveillance programs). The Terrorist Surveillance Program was a cover NSA surveillance program which monitored suspected terrorist’s international phone calls and e-mails without obtaining a warrant. Goldsmith, *supra* note 54.

55 *See* Goldsmith, *supra* note 54 (relaying to the reader that the author had unique access to these backroom negotiations between the White House and *The New York Times* because of his position as the head of the Justice Department’s Office of Legal Counsel between 2003 and 2004).

own book about the Central Intelligence Agency (CIA).<sup>56</sup> The initial disclosure led to more scoops, which led to additional follow-ups about the government's classified surveillance capabilities.<sup>57</sup> The disclosures ultimately won Lichtblau and Risen the Pulitzer Prize.<sup>58</sup>

Their reporting brought both plaudits and considerable backlash. Political pundits sharply criticized *The New York Times* for undermining national security.<sup>59</sup> President Bush, according to one author, "basically accused *The New York Times* of treason."<sup>60</sup> Jack Goldsmith, who led the Office of Legal Counsel at the Department of Justice in 2003 and 2004, suggested in *The New Republic* that *The New York Times* violated section 798 the Espionage Act with its disclosure.<sup>61</sup> But, as Goldsmith noted, "[t]o say that the *Times* committed a crime is not to say that they will be prosecuted for it."<sup>62</sup>

*The Guardian*, *The Washington Post*, and *The New York Times* were not the first newspapers to arguably violate section 798—and they won't be the last.<sup>63</sup> But to this day the government has never used the Espionage Act to bring an indictment against a member of the press.<sup>64</sup> The reason is a matter of policy.<sup>65</sup>

### B. An Evolving Newsmedia

The modern news media has always enjoyed considerable influence in society.<sup>66</sup> And newspapers in particular have been especially integral to a functioning democracy, exposing corruption in politics, government and the private sector.<sup>67</sup> But newspapers were not always the scourge of dirty politicians. Until the 1970s, newspapers—even the best newspapers—were seen as lapdogs to the

56 *Id.* (arguing that *The New York Times* originally decided not to publish Risen's "heretical idea" of publicizing the Terrorist Surveillance Program, but decided to move forward only after Risen decided to move forward with disclosure on his own).

57 *Id.*

58 *Id.*

59 See, e.g., Jon Perr, *Fox and furious friends wanted DOJ to prosecute The New York Times*, DAILY KOS (May 22, 2013, 3:44 PM), <http://www.dailykos.com/story/2013/05/22/1211029/-Fox-and-furious-friends-wanted-DOJ-to-prosecute-the-New-York-Times#> (detailing the numerous talk shows that called for the Justice Department to prosecute *The New York Times* for publishing leaks).

60 Cliff Kincaid, *New York Times Accused of Treason*, ACCURACY IN MEDIA (Jan. 4, 2006), <http://www.aim.org/media-monitor/new-york-times-accused-of-treason/>.

61 See Goldsmith, *supra* note 54.

62 *Id.* at 4.

63 See Steven Aftergood, Letter to the Editor, *The Espionage Act and the "New York Times,"* COMMENT. (June 1, 2006), <http://www.commentarymagazine.com/article/the-espionage-act-and-the-new-york-times/> ("Newspapers and books have routinely purveyed stories involving classified communications intelligence for decades, and in several cases their authors have been rewarded not with prison but with prizes and celebrity status").

64 Emily Peterson, *WikiLeaks and the Espionage Act of 1917: Can Congress make it a crime for journalists to publish classified information?*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/news-media-law/wikileaks-and-espionage-act-1917> (last visited Mar. 9, 2014) ("The U.S. government has never successfully prosecuted anyone other than a government employee for disseminating unlawfully leaked classified information.").

65 See *infra* Part III.

66 Aftergood, *supra* note 63.

67 *Id.*

government, institutions only occasionally willing to challenge the nation's leaders.<sup>68</sup> That mentality changed quickly after two notable events in the 1970s: the publication of the Pentagon Papers and the Watergate scandal.<sup>69</sup>

In 1971, the United States government sought to prevent *The New York Times* from publishing classified documents relating to the United States' involvement in the Vietnam War, also known as the Pentagon Papers.<sup>70</sup> After Judge Gurfein of the United States District Court for the Southern District of New York granted a temporary restraining order against *The New York Times* preventing the newspaper from further publishing classified information,<sup>71</sup> the case moved through the appellate courts with extraordinary speed. On June 30, 1971, just two weeks after Judge Gurfein issued his opinion in the District Court, the United States Supreme Court reversed his ruling and vacated the temporary restraining order.<sup>72</sup> The *per curiam* opinion represented a significant victory for the press and its First Amendment rights, but also signaled a sea change in the relationship between newspapers and the government. And still, while some Justices seemed to understand the importance of an unfettered press—"The press was to serve the governed, not the governors," wrote Justice Black<sup>73</sup>—others were less sympathetic to the media's mission—"It is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties . . . with respect to the . . . possession of stolen property or secret government documents. . . . [—] to report forthwith, to responsible public officers."<sup>74</sup>

Between 1972 and 1976 *The Washington Post* doggedly covered the Watergate scandal, which ultimately led to President Nixon's resignation in 1974. After *Post* reporters Bob Woodward and Carl Bernstein discovered the politically-motivated break-in at the Watergate Hotel in Washington, D.C. and the subsequent cover-up by the Nixon Administration, the adversarial age of newspapers had begun.<sup>75</sup> In the years to follow, *The Washington Post* reinvented the term "investigative journalism" as scores of young men and women were inspired by Woodward and Bernstein to launch journalism careers of their own.<sup>76</sup> Following Watergate, newspapers peaked in both reputation and prestige.<sup>77</sup>

68 Cf. *Columbia Study*, *supra* note 11, at 1077 (citing the publication of the Pentagon Papers as a demonstration that the press "was no longer willing to be merely an occasionally critical associate devoted to common aims").

69 *Id.*

70 *United States v. New York Times, Co. v. United States*, 328 F. Supp. 324, 325 (S.D.N.Y. 1971), *rev'd*, 446 F.2d 1327.

71 *Id.* at 326–31.

72 See *New York Times, Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*) (holding that the government had not met the burden of proof to restrain the freedom of the press).

73 *Id.* at 717 (Black, J., concurring). Justice Black found that the purpose of the press was to censure the government "so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." *Id.*

74 *Id.* at 751 (Burger, J., dissenting). Justice Burger further criticized the haste in which the trial proceeded since it precluded deliberate judicial treatment of the case. *Id.* at 749.

75 See generally *id.*

76 *Id.* (noting Watergate's influence on the practice of investigative journalism and popularized in two books and a movie).

77 See Leonard Downie, *Forty Years After Watergate, Investigative Journalism is at Risk*, WASH. POST (June 7, 2012), [http://www.washingtonpost.com/opinions/forty-years-after-watergate-investigative-journalism-is-at-risk/2012/06/07/gJQArTzILV\\_story.html](http://www.washingtonpost.com/opinions/forty-years-after-watergate-investigative-journalism-is-at-risk/2012/06/07/gJQArTzILV_story.html) (highlighting the rise of investigative journalism and that some journalist became "brand

The profession has since unraveled in ways both uncontrollable and self-inflicted.

First, average daily circulation for U.S. newspapers has declined since 1987.<sup>78</sup> Publishers cite a number of reasons for the decline: advertisers now reach consumers in less expensive ways; high production costs force papers to discontinue service to far-flung coverage areas; a younger generation consumes news from other sources.<sup>79</sup>

Declining circulation negatively affects the rates at which newspapers sell advertising space.<sup>80</sup> And when newspapers make less money in advertising, they make less money in general.<sup>81</sup> And when newspapers make less money in general, they have difficulty affording the very things that make them successful, such as ink, paper, and staff.<sup>82</sup> And soon newspapers start shedding these essentials—first the staff, followed by the ink and the paper.<sup>83</sup> And when that happens, bystanders chronicle this downward spiral by creating blogs with witty names like, *Newspaper Death Watch*,<sup>84</sup> and *Reflections of a Newsosaur*.<sup>85</sup> According to one of those blogs, twelve daily newspapers have shut down since 2007, and at least twenty have dropped daily coverage or adopted online-only models.<sup>86</sup> More will follow.

Second, media credibility is at an all-time low. Indeed, 60 percent of Americans do not trust the mass media to report the news “fully, accurately, and fairly.”<sup>87</sup> This “record distrust” is due in part to election-year politics in 2012.<sup>88</sup> Independent voters and Republicans expressed the most distrust in

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names”).

78 Frank Ahrens, *The Accelerating Decline of Newspapers*, WASH. POST. (Oct. 27, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/26/AR2009102603272.html> (finding that newspaper readership is at its lowest levels in seventy years).

79 *Id.* (reducing delivery service to remote areas saves on fuel and production costs). Online readership remain strong, with *nytimes.com* being the internet’s most popular internet site, with 21.5 million unique visitors per month. *Id.*

80 *Id.* (finding that online readership is highly popular, but advertising space sells for a fraction of the price of print advertisements).

81 *Id.* (describing that *The New York Times* and *The Washington Post* were losing millions of dollars a year due to a drop in ad revenue).

82 *Why Newspapers Can’t Stop the Presses*, REFLECTIONS OF A NEWSOSAUR (Feb. 1, 2009), <http://newsosaur.blogspot.com/2009/02/why-newspapers-cant-stop-presses.html> (asserting that “every newspaper company still needs to print newspapers if it wants to stay in business” and it would be “suicidal” for publishers to permanently stop printing papers).

83 *Id.* (suggesting that large newspapers cannot make enough of a profit from paperless newspapers to keep all of their journalists on the payroll).

84 Paul Gillin, *A Former Publisher’s Take on the Closure of the North Adams Transcript*, NEWSPAPER DEATH WATCH (Jan. 6, 2014), <http://newspaperdeathwatch.com> (containing the subheadline “Chronicling the Decline of Newspapers and the Rebirth of Journalism”).

85 *So Long Again, Chicago Daily News*, REFLECTIONS OF A NEWSOSAUR (Mar. 4, 2014, 5:00 AM), <http://newsosaur.blogspot.com/> (containing the subheadline “Musings—and occasional urgent warnings—of a veteran media executive, who fears our news-gathering companies are stumbling to extinction”).

86 *See* Gillin, *supra* note 84 (keeping an “R.I.P.” list and “W.I.P.”—Works in Progress, using a hybrid online/print or online only format).

87 Lymari Morales, *U.S. Distrust in Media Hits New High*, GALLUP POLITICS (Sept. 21, 2012), <http://www.gallup.com/poll/157589/distrust-media-hits-new-high.aspx> (polling based on a survey conducted over three days in September 2012).

88 *Id.*

the news media and were especially critical of election coverage.<sup>89</sup> But several high-profile scandals have also diminished newspaper credibility in the last three decades: Janet Cooke;<sup>90</sup> Stephen Glass;<sup>91</sup> Jayson Blair;<sup>92</sup> Jack Kelley.<sup>93</sup> Each instance of fabrication eroded the trust newspapers and magazines had built with the American public following Watergate.<sup>94</sup> The fabrications of Blair and Kelley, at *The New York Times* and *USA TODAY*, respectively, hit especially hard.<sup>95</sup> If plagiarism could infiltrate two of the most respected papers in America, what papers were immune?

But the biggest issue facing newspapers today has been the advent of the digital age. Many believe that the internet is killing newspapers.<sup>96</sup> Not true. Online readership continues to excel as millions transition from newsprint to pixels.<sup>97</sup> The problem publishers face is how to make money from online readership, as “ads on newspaper Internet sites sell for pennies on the dollar compared with ads in their ink-on-paper cousins.”<sup>98</sup>

Newspapers, in turn, have blindly grasped for solutions. They first responded by laying off scores of employees as their finances became especially grim.<sup>99</sup> Then publishers attempted to sell off their papers and media conglomerations to whoever would buy them.<sup>100</sup> Newsrooms compensated for

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89 *Id.*

90 Elaine Dutka, *Janet Cooke's Life: The Picture-Perfect Tale*, L.A. TIMES (May 28, 1996), [http://articles.latimes.com/1996-05-28/entertainment/ca-9096\\_1\\_janet-cooke](http://articles.latimes.com/1996-05-28/entertainment/ca-9096_1_janet-cooke) (summarizing how Cooke fabricated the Pulitzer Prize winning story of an 8-year-old heroin addict for *The Washington Post* in 1981).

91 Buzz Bissinger, *Shattered Glass*, VANITY FAIR (Sept. 1998), <http://www.vanityfair.com/magazine/archive/1998/09/bissinger199809> (reporting that twenty-seven of Stephen Glass' forty-one bylines in *The New Republic* featured fabrications).

92 Seth Mnookin, *Scandal of Record*, VANITY FAIR (Dec. 2004), <http://www.vanityfair.com/culture/features/2004/12/nytimes200412> (recounting how Jayson Blair fabricated a large number of stories for *The New York Times*).

93 Blake Morrison, *Ex-USA TODAY Reporter Faked Major Stories*, USA TODAY (Mar. 19, 2004), [http://usatoday30.usatoday.com/news/2004-03-18-2004-03-18\\_kelleymain\\_x.htm](http://usatoday30.usatoday.com/news/2004-03-18-2004-03-18_kelleymain_x.htm) (finding that *USA TODAY* reporter Jack Kelley fabricated portions of at least eight major stories).

94 Cf. Margaret Sullivan, *Repairing the Credibility Cracks*, N.Y. TIMES (May 4, 2013), <http://www.nytimes.com/2013/05/05/public-editor/repairing-the-credibility-cracks-after-jayson-blair.html?pagewanted=1&adxnnl=1&adxnnlx=1394910366-N2vyxJM39jwBK7pcNbFLOA> (wondering if the Times and its reputation has fully recovered from the Jayson Blair scandal).

95 *Id.*; *Distance from the Newsroom Leading the Distance from the Truth*, SCANDALISM (May 1, 2012), <http://journalismscandals.wordpress.com/tag/jack-kelley/>.

96 *The Rebirth of News*, ECONOMIST (May 14, 2009), <http://www.economist.com/node/13649304> (“[T]he impact of the internet, exacerbated by the advertising slump, is killing the daily newspaper.”). The article further posits that online news will soon start to flourish. *Id.*

97 *Id.* (arguing that the internet is creating a new type of news business); see also *Abrens, supra* note 78 (“In September [2009], for instance, Nielsen reported that *The New York Times* was the Internet’s most popular newspaper site, with an average of 21.5 million unique visitors per month.”).

98 *Id.*

99 See *Totals: 2012 Layoff and Buyout*, NEWSPAPERLAYOFFS.COM (last visited Mar. 5, 2014), <http://newspaperlayoffs.com/maps/2012-layoffs/> (counting at least 1,850 layoffs and buyouts at U.S. newspapers in 2012 alone).

100 See, e.g., Phil Rosenthal, *Sam Zell on Tribune Co. Acquisition: ‘I Made a Mistake, I was Too Optimistic’*, CHI. TRIB. (Apr. 15, 2009), <http://newsblogs.chicagotribune.com/towerticker/2009/04/sam-zell-on-tribune-co-acquisition-i-made-a-mistake-i-was-too-optimistic-.html> (telling the story of Sam Zell, an eccentric billionaire who purchased the Tribune Company in 2007).

reduced staffing by seeking contributions from what they called “citizen journalists.”<sup>101</sup> These unpaid contributors may have been citizens, but less likely were they “journalists.” They roamed the streets in search of breaking news, but most often returned with adorable photos of their pets—which newspapers, desperately seeking on-line page views, were quick to publish on their websites.<sup>102</sup>

Needless to say, citizens who were dependent on their newspapers for national and community news were not amused by the photographs, no matter how adorable. Journalistic standards worsened. Print circulation dropped. And newspapers began to hemorrhage both capital and credibility.

### III. ANALYSIS

#### *A. Does the War on Leakers Mean a War on Journalists?*

The 95-year-old Espionage Act has received considerable attention in recent months, notwithstanding its inherent flaws.<sup>103</sup> The U.S. Department of Justice under President Obama has used the Espionage Act to prosecute leakers with more frequency than any other administration in history.<sup>104</sup> The rate with which the Department of Justice prosecutes these crimes is in part due to the advent of technology and the ability to detect a digital trail.<sup>105</sup> But it also suggests a political willingness to treat seriously leaks of classified information.

This willingness is shared by Congress. In 2000, Congress attempted to enact a new criminal statute that would criminalize *all* leaks of classified information.<sup>106</sup> The legislation would not have required the government to prove that the leaker “intended to harm the U.S. Government,” nor would it have “constrained . . . the subject matter of the classified information.”<sup>107</sup> These distinctions would

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101 See Margaret Looney, *Q&A with Marguerite Sullivan: Why Citizen Journalism Makes Media Literacy Crucial*, PBS (Oct. 7, 2013), <http://www.pbs.org/mediashift/2013/10/qa-with-marguerite-sullivan-why-citizen-journalism-makes-media-literacy-crucial/> (suggesting that the public needs to be discerning of the news when anyone can be a citizen journalist, and implying that their rise is due to decrease in advertisement revenue for the mainstream media).

102 See, e.g., *Pets*, DAYTON DAILY NEWS (last visited Mar. 5, 2014), <http://www.daytondailynews.com/s/lifestyles/pets/> (reporting stories with headlines such as “*Can moving traumatize a cat?*”).

103 See *supra* Part II; see, e.g., Press Release, Department of Justice, Former Federal Contractor Petitions to Plead Guilty to Unlawfully Disclosing National Defense Information and Distributing Child Pornography, (Sept. 23, 2013), available at <http://www.justice.gov/opa/pr/2013/September/13-opa-1055.html> (charging the former FBI analyst with providing classified material to journalists). A fifteen-month investigation by the Department of Justice and the U.S. Attorney’s Office for the District of Columbia ultimately uncovered the leaker, Donald John Sachtleben, a former FBI bomb technician who later worked as a government contractor. Former Federal Contractor Pleads Guilty, *supra* note 103. In September, Sachtleben agreed to plead guilty to violating the Espionage Act. *Id.*

104 Phil Mattingly & Hans Nichols, *Obama Pursuing Leakers Sends Warning to Whistle-Blowers*, BLOOMBERG (Oct. 17, 2012), <http://www.bloomberg.com/news/2012-10-18/obama-pursuing-leakers-sends-warning-to-whistle-blowers.html> (reporting on the indictments of six individuals).

105 See Former Federal Contractor Pleads Guilty, *supra* note 103 (stating that Sachtleben was identified as the source through phone records).

106 David Laufman, *Prosecuting Leaks of Classified Information*, HUFFINGTON POST (June 12, 2012), [http://www.huffingtonpost.com/david-laufman/prosecuting-leaks\\_b\\_1585193.html](http://www.huffingtonpost.com/david-laufman/prosecuting-leaks_b_1585193.html). The legislation would have made it a crime to release classified material, punishable by up to three years in prison.

107 *Id.*

have greatly enhanced the reach of the Espionage Act, and would have applied to members of the news media—had President Clinton not vetoed the legislation.<sup>108</sup> The legislation, President Clinton said, “might discourage Government officials from engaging even in appropriate public discussion, press briefings, or other legitimate official activities.”<sup>109</sup>

Congress reignited its debate the following year, directing Attorney General John Ashcroft to review the protections against unauthorized disclosure of classified information and recommend legislative or administrative actions.<sup>110</sup> Ashcroft seemed to identify the flaws in the Espionage Act, but concluded that the Act, as it was written, sufficiently provided a basis to prosecute leakers.<sup>111</sup>

The issue resurfaced again in 2012 after *The New York Times* and the *Associated Press* revealed several classified government initiatives, including details of a devastating cyber-attack against Iran and the identity of an Al Qaeda mole who helped foil a plot to bomb U.S. airliners.<sup>112</sup> In July, members of the U.S. House of Representatives gathered to express their outrage and accuse President Obama of intentionally leaking classified information to bolster his foreign policy credentials.<sup>113</sup> But select members of the House Judiciary Committee reserved some contempt for members of the press who printed the information: “News publications that publicize classified information claim to promote increased government transparency. But I wonder if their real motivation is self-promotion and increased circulation. They claim to be in pursuit of uncovering government wrongdoing but dismiss any criticism that their actions may be wrong or damaging to the country,” said Chairman Lamar Smith in a statement released by the committee, before wondering, almost aloud, “What are the boundaries of free speech? How do we balance this freedom with the government’s need to protect certain information?”<sup>114</sup>

To that extent, the House Judiciary Committee devoted some of its debate to whether the government could prosecute reporters for publishing classified information.<sup>115</sup> At least one expert believed that the government *could* prosecute reporters for publishing classified information: “Under certain circumstances, you can see that if someone acting with impunity and knowledge of the consequences goes ahead and publishes it, that is something that I think would be worthy of prosecution and punishment,” said Kenneth Wainstein, a partner at Cadwalader, Wickersham & Taft, and a national security expert.<sup>116</sup> Wainstein’s statement would have drawn attention had he just been a

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108 See *id.* “The statute therefore would have broadly applied to leaks of classified information to members of the news media.” *Id.*

109 *Id.*

110 *Id.*

111 *Id.* The Attorney General further noted that “there is no comprehensive statute that provides criminal penalties for the unauthorized disclosure of classified information irrespective of the type of information or the recipient involved.” *Id.*

112 *National Security Leaks and the Law: Hearing Before the Subcomm on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 1–2 (2012) (statement of Rep. Sensenbrenner). “We didn’t learn of these secret programs and details through spies or other countries’ diplomats or even from the WikiLeaks scandal. We learned of these secrets from the pages of *The New York Times* and other newspapers.” *Id.*

113 *Id.* at 4 (statement of Rep. Smith).

114 *Id.* (statement of Rep. Lamar Smith, Judiciary Committee Chairman).

115 *Id.* at 41–42 (questioning Professor Stephen Vladeck on the state of law and who can be prosecuted under the Espionage Act, including journalists).

116 Jamie Goldberg, *House Republicans Consider Prosecuting Reporters Over Leaks*, L.A. TIMES (July 11, 2012), <http://>

national security expert in private practice. What made his assertion particularly noteworthy, though, was his previous position within the government: Wainstein once served as the Assistant Attorney General for National Security at the U.S. Department of Justice, where he supervised the very attorneys responsible for investigating and prosecuting leaks.<sup>117</sup>

Under what “circumstances” could the Department of Justice prosecute a newspaper that published classified information? Consider the disclosure by *The New York Times* in 2005 that the U.S. government engaged in domestic spying without approval from the FISC.<sup>118</sup> The published stories earned *The New York Times* a Pulitzer Prize, but also considerable scorn from President Bush. At least two commentators, Jack Goldsmith and Gabriel Schoenfeld, were convinced that *The New York Times* violated section 798 of the Espionage Act by publishing details of the Terrorist Surveillance Program.<sup>119</sup> Both Goldsmith and Schoenfeld argued that the disclosure of the NSA program was the exact type of revelation concerning “communication intelligence activities” prohibited by section 798.<sup>120</sup> Schoenfeld did not stop there: “What the *New York Times* [sic] has done is nothing less than to compromise the centerpiece of our defensive efforts in the war on terrorism,” he wrote, before equating the actions of the *Times* to an Al Qaeda operative relaying the same information to a cohort through a letter written in invisible ink.<sup>121</sup>

And then there is Greenwald, the reporter for *The Guardian*, who seems to have worn the criticism heaped upon him by Congress and fellow members of the press as a badge of honor.<sup>122</sup> Greenwald’s unapologetic flair seems to fuel efforts to prosecute him under the Espionage Act. For example, when asked whether Greenwald and *The Washington Post* reporter Barton Gellman should be prosecuted for publishing Snowden’s leaks, King reserved outrage only for Greenwald.<sup>123</sup>

Of course, any attempt to prosecute Greenwald, *The Guardian* or *The Washington Post* under the Espionage Act would be met by a vigorous legal defense challenging the constitutionality of the section 798.<sup>124</sup> As Holder reminded Congress in his testimony, the U.S. government has never used the Espionage Act to prosecute the press, which makes the Act an unpredictable criminal statute.<sup>125</sup>

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articles.latimes.com/2012/jul/11/nation/la-na-security-leaks-20120712.

117 *National Security Leaks and the Law: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 9.

118 *See supra* Part II.

119 *See* Goldsmith, *supra* note 54 (“[T]he *Times*’s unauthorized disclosure of the Terrorist Surveillance Program and related details about American surveillance capabilities was itself probably a crime.”); Schoenfeld, *supra* note 12.

120 *See* Schoenfeld, *supra* note 12 (relating that the Justice Department has already initiated a criminal investigation); Goldsmith, *supra* note 54.

121 Schoenfeld, *supra* note 12.

122 Jessica Testa, *How Glenn Greenwald Became Glenn Greenwald*, BUZZFEED POLITICS (June 26, 2013), <http://www.buzzfeed.com/jtes/how-glenn-greenwald-became-glenn-greenwald> (“If Glenn feels he’s right about something, he doesn’t care if the entire world hates him.”).

123 Luke Johnson, *Peter King: Prosecute Glenn Greenwald*, HUFFINGTON POST (June 12, 2013), [http://www.huffingtonpost.com/2013/06/12/peter-king-glenn-greenwald\\_n\\_3430048.html](http://www.huffingtonpost.com/2013/06/12/peter-king-glenn-greenwald_n_3430048.html) (“I’m talking about Greenwald,’ King said. ‘Greenwald, not only did he disclose this information, he has said that he has names of CIA agents and assets around the world, and they’re threatening to disclose that. . . . In this case, when you have someone who discloses secrets like this and threatens to release more, yes, there has to be—legal action taken against him.”)

124 *Supra* note 41 and accompanying text.

125 *Supra* note 5 and accompanying text.

However, federal courts have upheld the constitutionality of the Espionage Act in other contexts.<sup>126</sup> Whether section 798 would be unconstitutional as applied to the press<sup>127</sup> or survive a constitutional challenge<sup>128</sup> is hotly contested, but is almost a secondary consideration in the decision to bring charges, as any *attempt* to prosecute a newspaper that published classified information would begin with a policy debate.

Indeed, “there are competing societal interests at stake that until now have induced government to adopt a kind of constructive ambiguity on the matter and, in practice, to renounce the power to penalize press outlets.”<sup>129</sup> Those interests are numerous, and all seem to revolve around the integral role the press has played in a functioning democratic society.<sup>130</sup> The press does more than hustle papers on a street corner, argued secrecy expert Steven Aftergood.<sup>131</sup> The media helps set public-policy agenda and drives congressional oversight.<sup>132</sup> The press acts as an important check against government corruption and exposes unwarranted official secrecy.<sup>133</sup> All tasks occasionally involve the publication of classified information.<sup>134</sup> In sum, efforts to prosecute the press would have a chilling effect on newspapers and spur “unpredictable adverse consequences.”<sup>135</sup>

The Department of Justice has long recognized the role of a free press and has sought to minimize interference accordingly.<sup>136</sup> The Department’s policy toward the press is published in both an internal manual<sup>137</sup> and in the Code of Federal Regulations.<sup>138</sup> Generally, the Department of Justice policy is to “provide protection for the news media from forms of compulsory process, whether civil or criminal.”<sup>139</sup> To that end, U.S. Attorneys may not subpoena a member of the news media “without

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126 See, e.g., *United States v. Rosen*, 445 F. Supp. 2d 602, 627 (E.D. Va. 2006) (concluding section 793(d) was not unconstitutionally vague); *United States v. Boyce*, 594 F.2d 1246, 1251–52 (9th Cir. 1979) (affirming the conviction of Christopher Boyce under section 798 for selling classified information to the Russians); *Gorin v. United States*, 312 U.S. 19, 33 (1941) (affirming the conviction of Mikhail Nicholas Gorin, a citizen of the U.S.S.R. who passed national defense information to the Soviets).

127 See Croner, *supra* note 46, at 798 (arguing that section 798 is facially overbroad and thus unconstitutional).

128 See Goldsmith, *supra* note 54, at 4 (arguing that the Pentagon Papers case did not say journalists could not be held criminally liable under the Espionage Act).

129 Aftergood, *supra* note 63 (“Have prosecutors somehow remained ignorant of the statutes that Mr. Schoenfeld so acutely analyzes? Probably not.”).

130 *Id.* (arguing that the press has an important role in compensating for unwanted government secrecy).

131 *Id.*

132 *Id.* (“Without romanticizing the press or ignoring its evident defects, it seems objectively true that news coverage plays an integral role in the daily operation of government. Both for good and for ill, the news media help to set the public-policy agenda and to drive the congress[sional] oversight process.”).

133 *Id.*

134 *Id.* (arguing that the press is a foil to governmental secrecy, as “not everything that is classified is sensitive”).

135 *Id.*

136 *U.S. Attorneys’ Manual 9-13.400: News Media Subpoenas*, DEP’T OF JUST., (Oct. 2008), [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/13mcrn.htm#9-13.400](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/13mcrn.htm#9-13.400) (“In recognition of the importance of the freedom of the press to a free and democratic society, it is the Department’s policy that the prosecutorial power of the Government should not be used in such a way that it impairs a reporter’s responsibility to cover as broadly as possible controversial public issue.”).

137 *Id.*

138 28 C.F.R. § 50.10 (2012).

139 *Id.*

express authorization of the Attorney General.”<sup>140</sup> Further, the Department specifically instructs its attorneys to “strike the proper balance between the public’s interest in the free dissemination of ideas and information and the public’s interest in effective law enforcement and the fair administration of justice.”<sup>141</sup> That ambiguous standard did not stop Deputy Attorney General James Cole, the number two official at the DOJ, from authorizing a subpoena requesting phone records from *Associated Press* reporters and editors in the recent leak probe.<sup>142</sup> Nor did it stop the DOJ from compelling *The New York Times* journalist James Risen to testify in its prosecution of Jeffrey Sterling, a former employee at the CIA accused of violating section 793 of the Espionage Act.<sup>143</sup> In its Motion in Limine, the Department of Justice argued that Risen received classified information from Sterling and was “therefore a [sic] eyewitness to the charged crimes.”<sup>144</sup> Additionally, the government argued that Sterling violated the Espionage Act when he attempted to disclose national defense information through several newspaper articles and a book *written* by Risen.<sup>145</sup> In light of these events, Attorney General Holder said the DOJ was updating its internal guidelines to “ensure that in every case the department’s actions are clear and consistent with our most sacred values.”<sup>146</sup>

The decision to subpoena Risen, or members of the *Associated Press*, signals to the newspaper industry the willingness of some members of the government to test the limits of its policy, whether or not Holder decides to update the guidelines. In a news story, the *Reporters Committee for Freedom of the Press* called the subpoena the latest in a trend by the government to use journalists’ testimony in cases against government leakers.<sup>147</sup> By the time the Department of Justice initiated its most recent leak prosecution, this time against former CIA officer John Kiriakou, the media almost suspected the DOJ to subpoena their colleagues.<sup>148</sup> All of which made the Department’s decision not to call journalists as witnesses a somewhat surprising move meriting coverage in *Politico*.<sup>149</sup>

While the government has yet to prosecute a member of the press, it may only be a matter of time. Some within the Department of Justice must surely believe the Espionage Act would withstand

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140 *Id.*

141 *Id.*

142 Ryan J. Reilly, *James Cole Authorized AP Subpoenas, Eric Holder Confirms*, HUFFINGTON POST (May 16, 2013), [http://www.huffingtonpost.com/2013/05/15/james-cole-ap-subpoena\\_n\\_3280527.html](http://www.huffingtonpost.com/2013/05/15/james-cole-ap-subpoena_n_3280527.html) (reporting that Attorney General Eric Holder confirmed that Deputy Attorney General James Cole authorized the subpoena because the Attorney General recused himself from the investigation).

143 Government’s Motion in Limine to Admit the Testimony of James Risen at 1, *United States v. Sterling*, 818 F. Supp. 2d 945 (E.D. Va. 2011) (No. 10-485) (serving Risen with a subpoena because Sterling provided the journalist with classified information).

144 *Id.*

145 *Id.* at 2–3 (noting that Sterling was being charged with violation of 18 U.S.C. §§ 793(d) and (e) because he transmitted classified material to Risen).

146 Reilly, *Eric Holder Vows Not to Prosecute Reporters*, *supra* note 5.

147 Clara Hogan, *New York Times Reporter Subpoenaed by U.S. Government*, REPORTER’S COMM. FOR FREEDOM OF THE PRESS (May 24, 2011), <http://www.rcfp.org/browse-media-law-resources/news/new-york-times-reporter-subpoenaed-us-government> (reporting that “Sterling is the fifth known leaker prosecuted by the Obama administration”).

148 See Josh Gerstein, *Feds: No Plans to Call Journalists in Guantanamo Leak Case*, POLITICO (July 5, 2012), <http://www.politico.com/blogs/under-the-radar/2012/07/feds-no-plans-to-call-journalists-in-guantanamo-leak-128130.html> (finding that the indictment merely indicated journalists by an alpha-numeric designation).

149 *Id.*

a constitutional challenge, given the DOJ's success in prosecuting leakers under the Act over the last four years. If the attorneys were thus convinced of the Espionage Act's constitutionality, the decision to prosecute would become a matter of policy.

To this day, the Department policy is to respect the balance between a free dissemination of information and the public's interest in effective law enforcement and the fair administration of justice.<sup>150</sup> That balance has guided the Department for years.<sup>151</sup> But recently, U.S. Attorneys have stretched the limits of that policy in their pursuit against those who leak classified information. Certainly, there exists a wide gap between prosecuting those who affirmatively *leak* classified information and those who *publish* leaked information. But the gap seems to be narrowing by the day.

### *B. Less Credibility Means More Susceptibility*

Newspapers today look and read differently than newspapers did a generation ago. And today's newspapers will certainly look and read differently than the newspapers of the future. Further, most media pundits agree: the future is fast approaching.

A favorite parlor game in journalism circles is to guess the date on which most major newspapers will publish solely in digital form. Ten years? Five years? Likely sooner. Readers will soon access all "newspapers" by internet, on tablets, smartphones, laptops, and any other not-yet-invented digital device. Even today, millions of children will grow up not knowing that newspapers were once printed on paper and with ink that could rub off on one's hands. As newspapers adapt, so too does their standing in society.

An online-only newspaper may not engender the same nostalgia and credibility as its printed cousin. The flag may remain the same. It may employ the same journalists. But someone, somewhere, may trust this version less than a he or she would a printed copy. As papers begin this transition (as some already have), the news media will be there to chronicle the shift. The ensuing publicity will shape—and erode—public opinion of an industry that once held (some of) the public's respect. These changes will be difficult enough to overcome if they are topical only. But if the advent of "citizen journalism" is any indication, the quality of journalism will also suffer from the evolution.

Much has been written about the unauthorized disclosures by WikiLeaks and whether the site, led by the eccentric Julian Assange, could be prosecuted under the Espionage Act for *publishing* classified information provided by a troubled Army intelligence analyst.<sup>152</sup> The question is valid; but this Paper is not about WikiLeaks. The point, though, is that the hard line between a site like WikiLeaks and any major newspaper is less clear now than it was just two years ago. And it will be even less clear two years from now. WikiLeaks may not be *The New York Times*, but "it is an example of a new

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150 See *supra* notes 137–42 and accompanying text (detailing the Department of Justice procedures on subpoenaing journalists).

151 See *supra* notes 137–42 and accompanying text. The current version of the U.S. Attorneys' Manual was last comprehensively revised in 1997. *U.S. Attorney's Manual*, DEP'T OF JUST., [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/index.html](http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html) (last visited Mar. 9, 2014).

152 See, e.g., Jerome A. Barron, *The Pentagon Papers Case and the WikiLeaks Controversy: National Security and the First Amendment*, 1 WAKE FOREST J.L. & POL'Y 49 (2011) (focusing on the tension between the First Amendment and national security by analyzing the Pentagon Papers and the WikiLeaks controversy).

kind of journalistic act made possible by the [i]nternet.”<sup>153</sup> If a site like WikiLeaks becomes wildly popular and citizens routinely circumvent traditional media in favor of unauthorized disclosures, “the news business faces the danger of losing its classic role as the conduit for information and the arbiter of critical processes that hold power to account.”<sup>154</sup> If that happens, the natural reaction among many newspapers will be to become more like WikiLeaks and less like a traditional newspaper, thus eschewing the standards and credibility upon which they were built.

### C. *Where There's a Will, There's a Way*

When newspapers look different than they did years ago, and are trusted less than they were years ago, they will enjoy less political protection than they earned years ago.<sup>155</sup> Maybe then, the Executive Branch will feel emboldened to prosecute the next time a newspaper publishes national defense information without authorization. Just because the Department of Justice maintains its policy toward the press does not mean it will be less inclined to prosecute newspapers under the Espionage Act, as the “proper balance between the public’s interest in . . . information and the public’s interest in effective law enforcement” may look different two years from now than the present day.<sup>156</sup>

If the political will already exists to prosecute reporters who publish leaked information,<sup>157</sup> how will members of Congress react if an online-only paper reveals national defense information? Or a paper without the credibility and cache of *The New York Times*? Or an unapologetic agitator who works for a newspaper in the United Kingdom?

Glenn Greenwald, for better or for worse, represents a new kind of journalist, a far cry from the cigar-chomping, fedora-wearing wretches from yester-year. Greenwald is “a major supporting player in the new century’s definitive spy thriller” entirely because he has transcended the boundaries of a traditional reporter.<sup>158</sup> Bob Woodward and Carl Bernstein gained fame by doggedly pursuing the Watergate scandal. Greenwald, however, achieved notoriety not only by breaking news regarding the NSA, but through his close collaborative relationship with Snowden.<sup>159</sup> Snowden trusted Greenwald and documentary filmmaker Laura Poitras with his leaked material only after communicating with the duo for months by encrypted email.<sup>160</sup> They finally met the twenty-nine-year-old fugitive in Hong Kong, where Snowden invited them to his hotel room and divulged some of this country’s most sensitive intelligence programs. Poitras and Greenwald, wrote *The New York Times*,

are an especially dramatic example of what outsider reporting looks like in 2013. They do not work in a newsroom, and they person-

153 CHARLIE BECKETT & JAMES BALL, WIKILEAKS: NEWS IN THE NETWORKED ERA 96 (2012).

154 *Id.*

155 *Supra* notes 5–8, 87–95 and accompanying text.

156 28 C.F.R. § 50.10(a) (2010).

157 *See* Goldberg, *supra* note 116 (questioning whether it would be possible for the Department of Justice to prosecute reporters for reporting classified information).

158 Testa, *supra* note 122.

159 *Id.* (describing Greenwald’s rise to public awareness).

160 *Id.* (“[Snowden] abandon[ed] a comfortable life in Hawaii to expose [the NSA], fleeing to Hong Kong and Teaming up with intrepid reporters he believes he can trust, including the *Guardian’s* [sic] Greenwald.”).

ally want to be in control of what gets published and when. When The Guardian didn't move as quickly as they wanted with the first article on Verizon, Greenwald discussed taking it elsewhere, sending an encrypted draft to a colleague at another publication. . . . Unlike many reporters at major news outlets, they do not attempt to maintain a façade of political indifference. Greenwald has been outspoken for years; on Twitter, he recently replied to one critic by writing: 'You are a complete idiot. You know that, right?' . . .

Congress, not surprisingly, views this brand of advocacy journalism as both a threat to the natural order and a danger to national security. As such, prosecution may be the only remaining deterrent.<sup>161</sup> Amidst last year's leak probes, Representative Trey Gowdy of South Carolina endorsed subpoenaing journalists to determine their sources for classified information.<sup>162</sup> "Put them in front of the grand jury, . . . You either answer the question or you're going to be held in contempt and go to jail, which is what I thought all reporters aspire to do anyway. I thought that was the crown jewel of the reporter's resume to actually go jail protecting a source."<sup>163</sup> Alternatively, Representative Hank Johnson (D-Ga.) reminded colleagues at the same hearing that some leaks actually revealed government abuses, such as the Abu Ghraib prison scandal.<sup>164</sup> Bruce Brown, the Executive Director for the *Reporters Committee for Freedom of the Press*, urged against histrionics when dealing with leaks: "What's unfortunate is that rather than grappling with this question in a measured, rationale way, whenever disclosures are in the headlines then lawmakers have a tendency to latch on to this area."<sup>165</sup>

If the preening described above is any indication, the political will to prosecute newspapers under the Espionage Act undoubtedly exists.<sup>166</sup> Newspapers are not helping their cause by ceding credibility by the day.<sup>167</sup> Soon, maybe two years from now, maybe five years from now, a Congressional committee may gather and demand that a particular newspaper be charged under the Espionage Act of 1917, and the Department of Justice may decide to do so as a matter of policy, to uphold the "public's interest in effective law enforcement and the fair administration of justice."<sup>168</sup>

#### IV. CONCLUSION

Despite assurances by Attorney General Holder that no reporter would be prosecuted under the Espionage Act for doing his or her job, we are closer than ever to that reality. Whether it happens

161 Peter Maass, *How Laura Poitras Helped Snowden Spill His Secrets*, N.Y. TIMES (Aug. 18, 2013), [http://www.nytimes.com/2013/08/18/magazine/laura-poitras-snowden.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/08/18/magazine/laura-poitras-snowden.html?pagewanted=all&_r=0) (last two alterations in original).

162 See Goldberg, *supra* note 116.

163 *Id.*

164 *Id.* (questioning the current focus on prosecuting leakers, when leaks had occurred under every administration, and can reveal abuses).

165 *Id.*

166 *Supra* notes 103–111 and accompanying text (asserting that there is more of a political will to prosecute journalists, underscored by the administration's current leak prosecutions).

167 *Supra* notes 85–95 and accompanying text (describing how the public has lost confidence in newspapers).

168 See 28 C.F.R. 50.10(a) (2012).

this year, two years from now, or 10, it will happen. And when the Department of Justice decides to cross that threshold, its first defendant won't be a reporter from a traditional news outlet, it will be someone like Greenwald—a journalist by trade but an advocate at heart. In an interview with *The Washington Post* Greenwald admitted he had spoken to attorneys—although he is one himself<sup>169</sup>—about representation in the event of an Espionage Act prosecution, especially given the intensity with which the Obama Administration has prosecuted leakers.<sup>170</sup> “It would be irrational for me to dismiss the possibility,” he said.<sup>171</sup>

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169 Testa, *supra* note 122 (describing Greenwald as a “determined young lawyer” at Wachtell Lipton Rosen & Katz).

170 Greg Sargent, *Glenn Greenwald to Pete King: Bring it on*, HUFFINGTON POST (June 12, 2013), <http://www.washingtonpost.com/blogs/plum-line/wp/2013/06/12/glenn-greenwald-to-pete-king-bring-it-on/>.

171 *Id.*