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Bad "Leaker" or Good "Whistleblower"? A Test

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BAD "LEAKER" OR GOOD "WHISTLEBLOWER"?—A TEST

"[T]he fundamental cause of leaks is a sense of illegitimacy that is bred by excessive government secrecy. How do you address that? You reduce the secrecy. How do you deal with the legitimacy problem? You make sure as few secrets as possible are actually held and you protect those very strongly."[1]

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INTRODUCTION

On August 21, 2013, Private First Class Bradley Manning[2] was sentenced to thirty-five years for providing classified material to WikiLeaks, an online news organization.[3] Although Manning shared

1. *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 76 (2010) [hereinafter Espionage Act Hearing] (statement of Thomas S. Blanton, Director, National Security Archive, George Washington University). Blanton further stated, "I would say leave the Espionage Act back in mothballs where it is right now and should stay. . . . Don't mess with it. Leave it alone." *Id.*

2. The author acknowledges that Bradley Manning has asked to be called Chelsea Manning, but, to avoid confusion, this Comment will use only the male name and pronoun. "*I Am Chelsea" Read Manning's Full Statement*, TODAY (Aug. 22, 2013, 7:35AM), http://www.today.com/news/i-am-chelsea-read-mannings-full-statement-6C10974052.

3. Dion Nissenbaum, *Leaker Manning Gets 35 Years*, WALL ST. J., Aug. 22, 2013, at A6.

information with only the media, the Army eventually charged him with "[a]iding the enemy," alleging that he "knowingly [gave] intelligence to the enemy, through indirect means."[4] A conviction for aiding the enemy carries a possible death sentence, although the prosecution in Manning's case sought merely a life sentence.[5] The charges against Manning for "willfully communicat[ing] . . . or caus[ing] to be communicated . . . information, to a person not entitled to receive it"[6] find their roots in the Espionage Act of 1917[7]—a criminal statute historically "reserved for the treasonous act of giving secret information to an enemy."[8] Under the Obama administration, seven other individuals have been similarly charged, more than all previous administrations combined.[9]

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4. Bradley E. Manning Additional Charge Sheet, U.S. Army 1 (Mar. 1, 2011) [hereinafter Manning Additional Charge Sheet]. Specifically, Manning was charged with violating article 104 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 904 (2012). *Id.*

5. Floyd Abrams & Yochai Benkler, Op-Ed., *Death to Whistleblowers?*, N.Y. TIMES, Mar. 14, 2013, at A35; § 904 (providing a violator "shall suffer death or other such punishment").

6. Continuation Sheet to Manning Additional Charge Sheet, *supra* note 4, at 1–5 (Mar. 1, 2011) [hereinafter Manning Amended Continuation Sheet]. Listed as specifications for offenses under article 134 of the UCMJ, 10 U.S.C. § 934 (2012), the Army alleged several instances in which Manning violated civilian criminal code provisions, including 18 U.S.C. § 793(e). *Id.*; Continuation Sheet to Bradley E. Manning Charge Sheet, U.S. Army 1 (July 05, 2010).

7. Pub. L. No. 65-24, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 792–794, 2388 (2006)). Specifically, Manning's charges under 18 U.S.C. § 793(e) stem from section 1(d) of the Espionage Act. § 1(d), 40 Stat. at 218 (codified as amended at 18 U.S.C. § 793(e) (2006)).

8. Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL'Y J. 51, 75–76 (2012); *see also* Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973) (recounting the legislative evolution of the "espionage statutes," particularly 18 U.S.C. §§ 793–794, from their predecessor provisions in the 1917 Act).

9. David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, 48 HARV. C.R.-C.L. L. REV. 473, 492 (2013) (listing five individuals other than Manning: Thomas Drake, John Kiriakou, Shamai Leibowitz, Stephen Jin-Woo Kim, and Jeffrey Sterling); Aubrey Bloomfield, *8 Whistleblowers Charged with Violating the Espionage Act Under Obama*, POLICYMIC (June 23, 2013), http://www.policymic.com/articles/50459/8-whistleblowers-charged-with-violating-the-espionage-act-under-obama (naming, among others, James Hitselberger and Edward Snowden). For detailed discussion of Snowden, Drake, Leibowitz, and Hitselberger, see *infra* Part I.B–C.

Because previous administrations rarely used the Espionage Act[10] to prosecute individuals who leaked classified information to the media, the statute has faced only sparing judicial review[11] and allows for strict prosecution of seemingly legitimate whistleblowers.[12]

This Comment proposes an amendment to the Espionage Act to reflect the distinction between bad "leaks" and good "whistleblowing." Bad leaks actually harm the nation's defense capabilities or assist its enemies, while good whistleblowing reveals government fraud and abuse and tends to strengthen the public's faith in government. Accordingly, whistleblowing, even in the context of national security, or maybe *especially* in the context of national security, should be afforded greater protection. Further, whistleblowers should be immune from criminal prosecution under the Espionage Act when disclosing government misconduct to the media because the statutory provisions require that the information actually be "used to the injury of the United States or to the advantage of any foreign nation."[13]

This Comment proceeds in four parts. Part I highlights the increasing frequency of whistleblowing in the national security context. Part II discusses the evolving nature of government whistleblowing and the factors that demonstrate the need for greater protection. Part III proposes a new factor-based balancing test to determine when criminal sanctions are appropriate. Finally, Part IV analyzes the Manning case under the proposed factors and concludes that Bradley Manning's criminal prosecution was unnecessary and overly severe.

I. LEAKS OF CLASSIFIED INFORMATION ARE ON THE RISE

The Obama administration has taken a severe stance toward leakers when the disclosed information involves national defense.[14]

10. Chapter 37 of the U.S. Code, titled "Espionage and Censorship," includes additional sections not added by the 1917 Act. *See* 18 U.S.C. §§ 795–799 (2006). This Comment refers to the sections in chapter 37 (§§ 792–799) collectively as the "Espionage Act."

11. *See* United States v. Rosen, 445 F. Supp. 2d 602, 613 (E.D. Va. 2006), (stating that while "[18 U.S.C. §] 793's litigation history is sparse," the statute has survived "challenges on both vagueness and First Amendment grounds").

12. *See* Connor Friedersdorf, *The Obama Administration's Whistleblower Problem*, ATLANTIC (June 30, 2011, 7:10 AM), http://www.theatlantic.com/politics/archive/2011/06/the-obama-administrations-whistleblowerproblem/241262/ (detailing the Obama administration's "tattered reputation" on the subject of prosecuting whistleblowers).

13. 18 U.S.C. §§ 793(a), (d)–(e), 794(a) (2006).

14. *See* Friedersdorf, *supra* note 12 (describing the Obama administration's heavy-handed prosecution of several leakers and its efforts to get *New York Times* reporter James Risen to reveal his sources).

Some recent examples help outline the nature of the problem: When is a leak of classified material harmful to the United States, and when is it actually beneficial?

A. Bradley Manning, WikiLeaks, and the State Department Cables

By the end of 2010, Bradley Manning provided hundreds of thousands of classified U.S. government documents to WikiLeaks.[15] WikiLeaks posted the documents on its website and shared them with other news organizations like *The New York Times* and *The Guardian* newspapers.[16]

The scope of Manning's disclosure was enormous. Based on the information Manning provided, WikiLeaks "released more than 700,000 sensitive or classified documents about U.S. military and diplomatic activity—92,000 on the war in Afghanistan, 392,000 on the Iraq war, and [as of December 1, 2010] nearly 250,000 diplomatic cables . . . ."[17] While the court ultimately found Manning not guilty of aiding the enemy, he was convicted of violating the Espionage Act and faced a potential ninety-year imprisonment.[18]

One of the most controversial items disclosed was a video of a 2007 U.S. airstrike that killed about a dozen people, including two Reuters journalists.[19] Reuters described the event as follows:

> [T]he helicopter mistook a camera for a rocket-propelled grenade launcher. The helicopter opened fire on the small group, killing several people and wounding others. Minutes later, when a van approached and began trying to assist the wounded, the fliers became concerned the vehicle was occupied by militants trying to collect weapons and help wounded comrades escape. The Apache helicopters requested permission to attack the van and waited impatiently. "Come on, let us shoot," said one voice. The fliers were granted permission to engage the van and opened fire, apparently killing several people in and around the vehicle. Two children wounded in the van were evacuated by U.S. ground forces arriving at the scene as the Apache helicopters

15. Brad Knickerbocker, *WikiLeaks 101: Five Questions About Who Did What and When*, CHRISTIAN SCI. MONITOR, (Dec. 1, 2010, 11:42 AM), http://www.csmonitor.com/USA/2010/1201/WikiLeaks-101-Five-questions-about-who-did-what-and-when/Who-is-responsible-for-the-leaks.

16. *Id.*

17. *Id.*

18. Nissenbaum, *supra* note 3.

19. David Alexander & Phillip Stewart, *Leaked U.S. Video Shows Deaths of Reuters' Iraqi Staffers*, REUTERS (Apr. 5, 2010), http://www.reuters.com/article/2010/04/06/us-iraq-usa-journalists-idUSTRE6344FW20100406.

> continued to circle overhead. "Well it's their fault for bringing their kids into a battle," one of the U.S. fliers said.[20]

The video incited anger in people across the globe and spotlighted the realities of an unpopular war. The materials disclosed by Manning also "included details of torture and abuse of Iraqi prisoners [and] secret civilian death counts,"[21] further raising Americans' suspicions about the U.S. military's role in Iraq.

While U.S. officials have claimed "the release of documents has made some nations more hesitant to share intelligence or work with the U.S.,"[22] others have hailed Bradley Manning as a hero for revealing unethical and illegal military conduct.[23] In the end, however, the government charged Manning with, among other things, violating Espionage Act provision 18 U.S.C. § 793(e).[24]

B. Edward Snowden Reveals Secret Surveillance Programs

Edward Snowden, a former Central Intelligence Agency (CIA) and National Security Agency (NSA) employee, leaked top-secret information that unveiled the "systematic surveillance of innocent citizens."[25] Snowden provided the information to *The Guardian*, which published articles revealing secret government surveillance programs, including the interception of U.S. and European telephone metadata and several Internet surveillance programs.[26] As reported by *The Washington Post*, the U.S. government—operating under a broad interpretation of section 215 of the Patriot Act[27]—is "gathering

20. *Id.*

21. Knickerbocker, *supra* note 15.

22. Julian E. Barnes, *What Bradley Manning Leaked*, WALL ST. J. BLOG (Aug. 21, 2013, 10:14 AM), http://blogs.wsj.com/washwire/2013/08/21/what-bradley-manning-leaked/.

23. Daniel Ellsberg, *Daniel Ellsberg: Edward Snowden is a Hero and We Need More Whistleblowers*, DAILY BEAST (June 10, 2013, 7:12 AM), http://www.thedailybeast.com/articles/2013/06/10/daniel-ellsberg-edward-snowden-is-a-hero-and-we-need-more-whistleblowers.html.

24. Manning Amended Continuation Sheet, *supra* note 6, at 1–5.

25. Barton Gellman et al., *Edward Snowden: "I'm Not Going to Hide*," WASH. POST, June 10, 2013, at A1.

26. *See, e.g.*, Glenn Greenwald & Ewen MacAskill, *Revealed: How US Secretly Collects Private Data From AOL, Apple, Facebook, Google, Microsoft, Paltalk, Skype, Yahoo and YouTube*, THE GUARDIAN, June 7, 2013, at 1 (detailing how the NSA's PRISM program collects information from a number of different websites); Dan Roberts & Spencer Ackerman, *US Admits Surveillance of Calls Has Gone on for Years*, THE GUARDIAN, June 7, 2013, at 4 (describing the NSA's large-scale surveillance of telephone communications).

27. Patriot Act § 215, 50 U.S.C. §§ 1861–1862 (2006 & Supp. V 2011).

massive amounts of information that can give a detailed picture of people's networks of associates and who they are communicating with, when and for how long."[28] Government officials claim that the information is necessary to thwart terrorist attacks.[29]

Opinions on Snowden's conduct are far from unanimous. While some would cite the government surveillance programs as prime examples of secret, illegal, and unethical government misconduct ripe for whistleblowing, others find the leak treasonous. Human Rights Watch "urge[d] the Obama administration not to prosecute Edward Snowden . . . until it is prepared to explain to the public, in as much detail as possible, what . . . concrete and specific harms to national security his disclosures have caused, and why they outweigh the public's right to know."[30] Former President Jimmy Carter supports Snowden's revelations because, due to a lack of transparency, "America does not have a functioning democracy at this point in time."[31] Other high-ranking politicians, however, have accused Snowden of treason and Senator Lindsey Graham even said that he should be tracked "to the ends of the earth."[32] Given its divisive nature, it's not surprising that courts also struggle with the issue.

As of January 2014, Snowden remains a fugitive, living in Russia after being granted one-year temporary asylum on July 31, 2013.[33]

C. Other Examples of Leaked Information Relating to National Security

As mentioned, due to its active pursuit of whistleblowers, especially under the Espionage Act, the Obama administration has

28. Ellen Nakashima, *Report: Verizon Giving Call Data to NSA*, WASH. POST, June 6, 2013, at A1.

29. *Id.*

30. *US: Statement on Protection of Whistleblowers in Security Sector*, HUMAN RIGHTS WATCH (June 18, 2013) [hereinafter HUMAN RIGHTS WATCH], http://www.hrw.org/news/2013/06/18/us-statement-protection-whistleblowers-security-sector.

31. Jack Kenny, *Jimmy Carter Defends Snowden, Says U.S. Has No "Functioning Democracy,"* NEW AMERICAN (July 20, 2013, 6:45 PM), http://www.thenewamerican.com/usnews/constitution/item/16043-jimmy-carter-defends-snowden-says-u-s-has-no-functioning-democracy.

32. *Id.*; Jeff Poor, *Lindsey Graham on Snowden: "I Hope We'll Chase Him to the Ends of the Earth,"* DAILY CALLER, (June 23, 2013, 3:38 PM), http://dailycaller.com/2013/06/23/lindsey-graham-on-snowden-i-hope-well-chase-him-to-the-ends-of-the-earth/.

33. Steven Lee Myers, *In Shadows, Hints of a Life for Snowden*, N.Y. TIMES, Nov. 1, 2013, at A1; *see also* Michael J. de la Merced, *Russia: Lawmaker Hints at New Offer for Snowden*, N.Y. TIMES, Jan. 25, 2014, at A8 (reporting that, according to one Russian lawmaker, Snowden may be permitted to stay beyond the initial expiration date of his temporary asylum).

gained a reputation for severity that contradicts the President's campaign-trail dicta.[34] Normally a champion of whistleblower rights, Obama departed markedly from this reputation with his position on national security leaks. Following is a list of three other people charged during Obama's presidency, illustrating the increasing frequency of prosecutions for relatively low-level leaks concerning classified documents.

1. Thomas Drake

A former NSA executive, Thomas Drake was charged, among other things, under Espionage Act provision 18 U.S.C. § 793(e) for retaining top-secret documents and taking them home "for the purpose of 'unauthorized disclosure.'"[35] According to the government, Drake's goal was to leak the government documents to a newspaper reporter, who subsequently published articles revealing "financial waste, bureaucratic dysfunction, and dubious legal practices in N.S.A. counterterrorism programs."[36] Shortly before trial, facing a potential thirty-five-year imprisonment, Drake pleaded guilty to a misdemeanor charge of exceeding his authorized use of a government computer, and the prosecution dropped all other charges.[37]

As the judge noted, the government's pursuit of charges under the Espionage Act, followed by a complete dismissal of those charges, conveyed an "extraordinary" message:

> I find it extraordinary in this case for an individual's home to be searched in November 2007, for the government to have no explanation . . . for a two and a half year delay, for him to then be indicted in April of 2010, and then over a year later, on the eve of trial, in June of 2011, the government says whoops, we dropped the whole case.[38]

2. Shamai Leibowitz

In 2009, Shamai Leibowitz, a former linguist for the Federal Bureau of Investigation (FBI), was charged under Espionage Act

34. *See* Friedersdorf, *supra* note 12 (listing several whistleblowers who have been charged during Obama's presidency and quoting then-candidate Obama, with regard to whistleblowers: "[T]heir acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled.").

35. Jane Mayer, *The Secret Sharer: Is Thomas Drake an Enemy of the State?*, NEW YORKER, May 23, 2011, at 47, 47; Indictment at 1–10, United States v. Drake, No. 1:10-CR-00181-RDB (D. Md. Apr. 14, 2010).

36. *Id.*

37. Transcript of Proceedings: Sentencing at 32, United States v. Drake, No. 1:10-CR-000181-RDB (D. Md. July 15, 2011).

38. *Id.* at 28.

provision 18 U.S.C. § 798(a)(3) for disclosing classified documents to an unnamed blogger.[39] While the United States alleged that Leibowitz leaked hundreds of pages of transcribed conversations that were secretly recorded by the FBI at the Israeli embassy in Washington, D.C.,[40] not even the judge knew what was divulged—let alone how it might have harmed the United States or helped an enemy.[41]

Leibowitz ultimately admitted to leaking five secret documents[42] and received a twenty-month prison sentence.[43] At the time, the sentence "[was] likely to become the longest ever served by a government employee accused of passing national security secrets to a member of the media."[44] In just three years, Leibowitz has lost this distinction. Moreover, the judge had trouble deciding the impact of "sentencing disparity"—the process whereby a judge compares the proposed sentence to similar cases for consistency—"because there were so few other comparable cases to go by."[45] The current trend of regular, aggressive prosecution of whistleblowers may cure this problem.

3. James Histelberger

More recently, in 2012, another contract linguist, James Hitselberger, was also charged with violating Espionage Act provision 18 U.S.C. § 793(e) for having "unlawfully retained national defense information," specifically, classified reports with "sensitive information" about the activities of U.S. armed forces near Bahrain.[46]

39. Information at 1, United States v. Leibowitz, No. AW-09-CR-0632 (D. Md. Dec. 4, 2009). The blogger was later identified as Richard Silverstein. Bloomfield, *supra* note 9. However, Leibowitz has since claimed that Silverstein fabricated the story. Shamai Leibowitz, *The Freedom to Ignore*, LEIBOWITZ BLOG, (June 5, 2012), http://www.shamaileibowitz.com/2012/06/freedom-to-act-and-freedom-to-ignore.html.

40. Scott Shane, *Leak Offers Look at Efforts by U.S. to Spy on Israel*, N.Y. TIMES, Sept. 6, 2011, at A1.

41. Maria Glod, *Former FBI Employee Sentenced in Classified Leak*, WASH. POST, May 25, 2010, at B3.

42. Press Release, Dep't of Justice, Former FBI Contract Linguist Pleads Guilty to Leaking Classified Information to Blogger (Dec. 17, 2009).

43. Josh Gerstein, *Justice Dept. Cracks Down on Leaks*, POLITICO (May 25, 2010, 4:44 AM), http://www.politico.com/news/stories/0510/37721.html.

44. *Id.*

45. Steven Aftergood, *Jail Sentence Imposed in Leak Case*, FED'N AM. SCIENTISTS (May 25, 2010), http://blogs.fas.org/secrecy/2010/05/jail_leak/.

46. Affidavit in Support of Criminal Complaint at 1, United States v. Hitselberger, No. 1:12-CR-00231-RC (D.D.C. Aug. 6, 2012) [hereinafter Hitselberger Complaint Affidavit]; Indictment at 1–3, United States v. Hitselberger, No. 1:12-CR-00231-RC (D.D.C. Feb. 28, 2013) [hereinafter Hitselberger Indictment].

Allegedly, Hitselberger printed several secret documents from a secure computer and donated them as a public collection to the Hoover Institute at Stanford University.[47]

Unlike Manning, Snowden, Drake, and Leibowitz, however, there is no allegation that Hitselberger meant to give the information to the press or media. Instead, Hitselberger is being charged for willfully retaining documents relating to the national defense.[48] According to court documents, officials found classified material in his backpack and in his private living quarters in Bahrain.[49]

The important distinction between some other whistleblowers and Hitselberger is that, unless enemies of the United States are looking through the archives at the Hoover Institute, any potential injury to the nation is far less likely than when the information is published in a popular newspaper or on the Internet. Still, if convicted, Hitselberger faces up to thirty-nine years in prison.[50]

II. THE INCREASING NEED FOR A CLEAR TEST

Because government employees increasingly have access to more information, and more of that information is (mis)classified, the risk of facing criminal penalties and career-ending retaliation for any disclosure is higher than ever.[51] As one U.S. Representative stated: "Indeed, while there's agreement that sometimes secrecy is necessary,

47. Hitselberger Complaint Affidavit, *supra* note 46, at 10–11.

48. *Id.* at 1–2.

49. *Id.* at 6–8.

50. *See* Hitselberger Indictment, *supra* note 46, 1–3 (charging three counts of violating 18 U.S.C. § 793(e), each of which carries a maximum sentence of ten years, and three counts of violating 18 U.S.C. § 2071(a), each of which carries a maximum sentence of three years). As of November 2013, Hitselberger is challenging the § 793(e) as unconstitutionally vague. Defendant's Motion to Dismiss Counts One, Two, and Three of Superseding Indictment Because 18 U.S.C. § 793(e) Is Unconstitutionally Vague As Applied, United States v. Hitselberger, No. 1:12-CR-00231-RC (D.D.C. Mar. 1, 2013). Previous attempts to invalidate § 793(e) on vagueness grounds have failed. *See* United States v. Morison, 844 F.2d 1057, 1071–73 (4th Cir. 1988) (holding that the statute's use of the term willful is not unconstitutionally vague); United States v. Drake, 818 F. Supp. 2d 909, 915–22 (D. Md. 2011) (similarly ruling the terms of § 793(e) are not unconstitutionally vague).

51. Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24 ST. THOMAS L. REV. 399, 402–11 (2012) (emphasizing, among other things, that "the quantity of classified government material is massive today").

the real problem today is not too little secrecy, but too much secrecy."[52]

According to some, the uptick in leak prosecutions is "consonant with other political shifts since 9/11" that have resulted in a "new security bureaucracy."[53] Thus, the prosecutions demonstrate a "normalization and legitimization of a national-surveillance state."[54] Even if this statement is hyperbolic, the need to protect those who leak classified information in the course of revealing impingements upon citizens' rights is evident.

A. More and More Information is Overly Classified

According to the U.S. government, as of October 2012, nearly 5 million people had security clearances that allowed access to classified information.[55] Of those, almost 1.5 million had access to "top secret" information.[56] For fiscal year 2011, "[e]xecutive branch agencies reported [more than 92 million] derivative classification decisions," a twenty percent increase from the prior year.[57] Derivative classification occurs when people include material that has already been classified in a new format and make another classification decision based on the character of the new content.[58] Because the means of electronic communication have expanded so rapidly, derivative classifications have sharply risen despite a concurrent drop in original classifications.[59] But regardless of whether the

52. Espionage Act Hearing, *supra* note 1, at 2 (statement of Rep. John Conyers, Jr.) ("Recall the Pentagon papers case, Justice Potter Stewart put it, when everything is classified, nothing is classified.").

53. Mayer, *supra* note 35, at 48.

54. *Id.* (quoting Professor Jack Balkin of Yale Law School). Balkin cites several other trends in support, noting specifically "the emergence of a vast new security bureaucracy, in which at least two and a half million people hold confidential, secret, or top-secret clearances; huge expenditures on electronic monitoring, along with a reinterpretation of the law in order to sanction it; and corporate partnerships with the government that have transformed the counterterrorism industry into a powerful lobbying force." *Id.*

55. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, 2012 REPORT ON SECURITY CLEARANCE DETERMINATIONS 3 (2012).

56. *Id.*

57. INFO. SEC. OVERSIGHT OFFICE, 2011 REPORT TO THE PRESIDENT 1 (2012).

58. *Id.* at 7.

59. *Id.* at 4–5, 7.

classifications were original or derivative, the result is the same—the sheer volume of classified material is rapidly increasing.[60]

Compounding the problem is the persistent overclassification of information.[61] Much of this material and information classified by the U.S. government is undeserving of protection. And although many government officials are aware of the problem, little has been done to solve it.[62] Some estimates show that as much as ninety percent of documents are wrongly classified.[63] And while revealing classified material alone will not always result in an Espionage Act conviction, it can surely trigger charges, significantly increasing the government's leverage when negotiating plea agreements with accused leakers.

B. Complete Discretion Fosters Random Prosecutions That Destroy Fair Notice to Whistleblowers

It used to be that whistleblowers could expect some level of safety from prosecution when disclosing questionable government conduct to the press.[64] Consequently, many of the government's most questionable policies were revealed by whistleblowers who leaked classified material. For example, whistleblowers have helped unveil the scope of abuses at Abu Ghraib prison,[65] the CIA's use of secret prisons to interrogate terrorism suspects,[66] the use of waterboarding to torture suspects,[67] and the warrantless wiretapping of Americans by the NSA.[68]

60. *See id.* In fiscal year 2011, original classification decisions fell forty-three percent to 127,072, while derivative classifications rose twenty percent to 92,064,862. *Id.*

61. McCraw & Gikow, *supra* note 9, at 486–87.

62. *Id.*

63. *See* Espionage Act Hearing, *supra* note 1, at 74 (statement of Thomas S. Blanton, Director, National Security Archive, George Washington University) (referencing overclassification estimates).

64. *See* McCraw & Gikow, *supra* note 9, at 473–74 (describing an unspoken bargain where "[l]eaks of government information took place, secrets were judiciously disclosed, national security was not obviously harmed, and the courts and Congress remained on the sidelines").

65. Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, 42–44. Alarmingly, the most severe sentence handed down to the abusers was ten years imprisonment. *Abu Ghraib Torture and Prisoner Abuse*, MARTINFROST.WS, http://martinfrost.ws/htmlfiles/abu_ghraib2.html, (last visited Oct. 7, 2013).

66. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

67. Brian Stelter, *How '07 ABC Interview Tilted a Torture Debate*, N.Y. TIMES, Apr. 28, 2009, at A1.

68. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

While the government is progressively willing to pursue people like Private First Class Manning and Edward Snowden, it has been reluctant to prosecute high-level leakers who often reveal far more damaging material. The poster boy for administration-approved leaking is Bob Woodward, who in his book *Obama's Wars,* revealed previously unknown CIA and NSA operations and their code names.[69] The information was considered so highly sensitive "that [Director of National Intelligence Mike] McConnell, under orders from President George W. Bush, barred [President-elect] Obama's own transition chief, John Podesta, from sitting in at the briefing."[70] According to Woodward, "only those 'designated to take a top national security cabinet post' could attend" because the meeting would include discussions about highly classified "sources and methods."[71] Yet Woodward described the meeting in detail and neither Woodward nor any official present at the meeting was ever prosecuted for the brazen leak.[72]

As one reporter put it: "At a time when the Obama administration is . . . prosecuting like never before government leakers of classified information, the Woodward book puts in a bad light the secrecy system that presidents can turn on or off at will, not always obviously in the national interest."[73] Instances like this—where the government flaunts its unfettered prosecutorial discretion—throw the system's failures into sharp relief.

III. A PROPOSED TEST FOR DETERMINING WHEN TO APPLY CRIMINAL SANCTIONS

The rise in prosecutions for leaks of national defense information illustrates the need for Congressional action to amend the Espionage Act. Several other bodies that considered the issue agree. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information provide: "No person may be punished on national security grounds for disclosure of information if . . . the

69. McCraw & Gikow, *supra* note 9, at 494 (citing Michael Isikoff, *"Double Standard" in White House Leak Inquiries?*, NBCNEWS.COM (Oct. 18, 2010, 6:26 AM), http://www.nbcnews.com/id/39693850/ns/us_news-security/t/double-standard-white-house-leak-inquiries/#.UjoOUrxgNN8).

70. *Id.* (quoting Isikoff, *supra* note 69).

71. Jack Goldsmith, *Classified Information in Woodward's "Obama's Wars,"* LAWFARE (Sept. 29, 2010, 7:50 AM), http://www.lawfareblog.com/2010/09/classified-information-in-woodwards-obama%E2%80%99s-wars/.

72. McCraw & Gikow, *supra* note 9, at 494.

73. Goldsmith, *supra* note 71 (questioning why Woodward and his sources were never prosecuted for this disclosure by an administration that so aggressively asserts the "state secrets privilege" in courts).

public interest in knowing the information outweighs the harm from disclosure."[74] The Johannesburg Principles prohibit prosecutions when the "purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions."[75]

Similarly, the recently released Tshwane Principles describe specific circumstances that would provide an accused leaker with a "public interest defence [sic]."[76] Thus, even when someone discloses classified national defense information, they would still be immune from punishment or retaliation unless the harm outweighed the public's interest.[77] The Tshwane Principles list five factors to be considered by prosecutorial and judicial authorities, including:

> (i) whether the extent of the disclosure was reasonably necessary to disclose the information of public interest;
>
> (ii) the extent and risk of harm to the public interest caused by the disclosure;
>
> (iii) whether the person had reasonable grounds to believe that the disclosure would be in the public interest;
>
> (iv) whether the person attempted to make a protected disclosure through internal procedures and/or to an independent oversight body, and/or to the public . . . ; and
>
> (v) the existence of exigent circumstances justifying the disclosure.[78]

Human Rights Watch recommends that prior to levying criminal charges against a whistleblower, "the U.S. government should be prepared to balance the actual harms threatened to national security against the public's strong interest in revelation of wrongdoing,"

74. Article 19, *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, at princ. 15 (Nov. 1996).

75. *Id.* at princ. 2(b).

76. *Global Principles on National Security and the Right to Information: ("The Tshwane Principles")*, at princ. 43 (June 12, 2013). The Tshwane Principles state that "(i) Criminal penalties should apply only to the disclosure of narrow categories of information that are clearly set forth in law; (ii) The disclosure should pose a real and identifiable risk of causing significant harm; (iii) Any criminal penalty, as set forth in law and as applied, should be proportional to the harm caused; and (iv) The person should be able to raise the public interest defence [sic]." *Id.* at princ. 46.

77. *Id.* at princ. 43.

78. *Id.* at princ. 43(b).

noting that "confidential government complaint mechanisms can be ineffective in the face of a pervasive regime of secrecy, high-level approval of the problem, or even bureaucratic inertia."[79] The organization suggests that the government use its discretion to refrain from prosecution "with a view towards protecting democratic oversight and preventing serious human rights abuses."[80]

But what factors should the prosecution consider in deciding when to prosecute and when to allow whistleblowers' leaks of sensitive information that reveal wrongdoing? This Comment proposes a factor-based balancing test designed to weigh the information's substantive news value against its significance to the military and national security. While many of these factors may already impact a judge's or jury's ultimate findings as to guilt or innocence, the important distinction is that these factors should be assessed by prosecutors before criminal charges are *filed*—especially when charges are brought under the Espionage Act and thus carry the risk of severe prison sentences.

Factor 1: What is the information's "primary" value?

Is the information more useful to a citizen in a democratic republic? Or to opposing military forces (including cyber armies and terrorist organizations). A simpler way to ask these questions is: Is it news worthy? Or is it spy worthy? Most Americans would not be interested in the specific locations of military installations or an army platoon, but a spy would. Most Americans are, however, interested in whether their government is monitoring their Facebook activity, whereas a spy may be less so.

Factor 2: Who received the information?

Was the information given to a journalist or posted on the Internet? Or was it provided directly to another nation's government or to known terrorist groups? When a whistleblower reveals sensitive information on the Internet, there is a possibility that enemies may benefit. But the more obvious result will be that everyone will benefit, and any benefit to the enemy will be outweighed by the widespread knowledge of the information. This benefit is further bolstered by the government's understanding that what once was secret is now public. On the other hand, if the leaker gives the information to only a small group of people without intent to further publish or distribute the material, the likely inference is that only *that* group of people could benefit from the information, meaning no public good is achieved.

79. HUMAN RIGHTS WATCH, *supra* note 30.

80. *Id.*

Factor 3: Is the information predictive?

Did the whistleblower reveal past events, like a previous drone strike or instances of illegal surveillance? Or did the information reveal details about future events, such as planned military deployments or upcoming covert operations? If the disclosed material lacks any information that may be used to counter potential government intelligence efforts, then the threat of injury to the United States is slim, if not unfounded.

Factor 4: Was the information properly classified?

Even if the information is classified as top secret, there is at least a substantial chance, if not a likelihood, that the classification overstates the information's threat to the United States. If the information is unclassified, there should be a presumption that it is public knowledge, and criminal charges should only be used for the most egregious and obvious cases. The proper level of classification is important because the classification level is selected based on the potential threat to the United States. Thus, if the material is incorrectly classified as top secret, the balancing test will be unfairly shifted in the government's favor.

Factor 5: Was the information filtered prior to disclosure?

If the whistleblower screens the material and chooses not to reveal everything in their possession, it is more likely that their intent was to prevent as much harm as possible while still uncovering illegal or unethical actions. Although this factor would shed little light on the potential harm resulting from what was actually revealed, it may help illuminate the whistleblower's intent and help tip the scale.

IV. BRADLEY MANNING'S CASE ANALYZED UNDER THE PROPOSED TEST

The application of these factors to Bradley Manning's case demonstrates the government's overly harsh prosecutorial tactics and frames Manning as a whistleblower, not a leaker.

Factor 1: What is the information's "primary" value?

The primary value of the information leaked by Manning is difficult to assess due to its sheer volume, but the most impactful information revealed severe human rights violations by the United States, such as prisoner abuse and civilian deaths attributable to the wars in Afghanistan and Iraq.[81] While much of the leaked information

81. *See supra* Part I.A.

may reflect poorly upon the United States politically, nothing has been shown to have actually aided the enemy.

In Manning's case, the government argued that the WikiLeaks documents "helped al Qaeda's recruiting efforts" by illustrating the United States' disregard for human life, referencing the helicopter attack of civilian journalists.[82] But this type of attack is precisely the type of human rights violation that *should* be exposed by whistleblowers and are vital for basic government accountability. This information is far more "newsworthy" than "spy worthy" and any "aid" flowing to al Qaeda via the United States' disregard for civilian life during war cannot be pinned on Manning but on the United States military.

Factor 2: Who received the information?

Manning disclosed the classified information to WikiLeaks—an organization dedicated to promoting transparency—that later posted the documents on its website and shared them with *The Guardian* and *The New York Times*. Manning did not give any classified information directly to any foreign national, foreign government, or known enemy of the United States. Manning's disclosures were intended to benefit the public—to inform people around the world about what their governments are doing—and not to provide a specific nation or group with any strategic advantage.

Factor 3: Is the information predictive?

The information disclosed by Manning was not predictive in nature but rather recitals of past events and diplomatic cables, none of which were "top secret" and many of which were redacted prior to publication.[83] The documents certainly conveyed sensitive information and may have jeopardized the United States' political position in many regions, but nothing revealed specific missions, dates, times, plans, blueprints, or technology that could be used against the United States by its enemies. The most damaging information was contained in the video footage from a helicopter attack that occurred in 2007, three years prior to any disclosure by Manning. But by revealing only

82. Tom Ramstack, REUTERS, *U.S. Soldier WikiLeaks Breach Helped al Qaeda Recruiting-Witness* (Aug. 12, 2013), http://www.reuters.com/article/2013/08/12/usa-wikileaks-manning-idUSL2N0GD11O20130812.

83. Scott Shane & Andrew W. Lehren, *Leaked Cables Offer a Raw Look Inside U.S. Diplomacy*, N.Y. TIMES, Nov. 29, 2010, at A1 ("[Of the 251,287 cables], [m]any are unclassified, and none are marked 'top secret,' the government's most secure communications status. But some 11,000 are classified 'secret,' 9,000 are labeled 'noforn,' shorthand for material considered too delicate to be shared with any foreign government, and 4,000 are designated both secret and noforn.").

past events, Manning minimized the information's value to enemies of the United States and promoted healthy public debate about the government's practices and policies.

Factor 4: Was the information properly classified?

In Manning's case, none of the information leaked was classified as "top secret," and many of the cables were not classified at all.[84] The government would point out that 24,000 cables were classified as "'noforn,' shorthand for material considered too delicate to be shared with any foreign government," "secret" or both.[85] Yet because none of the leaked documents met the high threshold of "top secret," disclosure should not trigger charges for "aiding the enemy" and the threat of the death penalty. Such a disproportionate response sends a message that any information—even that which does not reach the level of "top secret"—is more valuable than the life of a soldier. Surely information whose disclosure could trigger such harsh repercussions should be classified at a higher level like "top secret."

Factor 5: Was the information filtered prior to disclosure?

Manning shared hundreds of thousands of documents with WikiLeaks, making any meaningful postdownload censorship by Manning unlikely. But what Manning chose not to download from Army computers is a type of filtering process itself. Manning took no "top secret" information, demonstrating a choice to protect the nation's most sensitive information. Further, by working with WikiLeaks—which coordinated with reputable newspapers throughout the world to protect sensitive information prior to publication[86]—Manning made a distinct effort to minimize the harm to the United States while maintaining the benefit of public disclosure.

Thus, all five factors militate towards Manning's position as a "good" whistleblower, revealing government abuses and questionable, if not illegal, practices and policies. Because Manning's disclosures were more newsworthy than spy worthy, the government should have refrained from charging Manning with aiding the enemy and unfairly leveraging the possible prison sentences.

84. *Id.*

85. *Id.*; *see supra* note 83.

86. James Ball, *Unredacted US Embassy Cables Available Online After WikiLeaks Breach*, THE GUARDIAN, Aug. 31, 2011.

Conclusion

Open access to information is necessary to protect against abuse by public officials and to encourage citizens to exercise their rights and help shape the policies that govern their lives. Still, legitimate security interests require that some information remain beyond the public's reach. But bare claims of national security cannot be used to justify unethical and illegal conduct. Thus, the Espionage Act should be amended to include a factor-based balancing test to guide prosecutors in determining when ever-serious charges under the Espionage Age are appropriate.

To close, Justice Jackson's warning regarding Congress's "war power" deserves repeating here:

> No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.[87]

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87. Woods v. Cloyd W. Miller Co., 333 U.S. 138, 146 (1948) (Jackson, J., concurring).

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