UNC SCHOOL OF LAW

FIRST AMENDMENT LAW REVIEW

Volume 19
Issue 2 *Symposium*

Article 5

2021

# Panel Two: The Press, Whistleblowers, and Government Information Leaks

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## Recommended Citation

David S. Ardia, Heidi Kitrosser, David McCraw, Mary-Rose Papandrea & David Schulz, *Panel Two: The Press, Whistleblowers, and Government Information Leaks*, 19 FIRST AMEND. L. REV. 253 (2021).
Available at: https://scholarship.law.unc.edu/falr/vol19/iss2/5

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## PANEL TWO: THE PRESS, WHISTLEBLOWERS, AND GOVERNMENT INFORMATION LEAKS

**Moderator:**
David S. Ardia*

**Panelists:**
Heidi Kitrosser, David McCraw,
Mary-Rose Papandrea, David Schulz**

*The following is a transcript of the second panel, discussing the press, whistleblowers, and government information leaks, of* First Amendment Law Review*'s 2021 Symposium on National Security, Whistleblowers, and the First Amendment.*[1] *The virtual event also featured a keynote address by Mary-Rose Papandrea*[2] *and a second panel on Classification and Access to National Security Information.*[3]

**Ardia:** I'm going to do very brief introductions of the panelists. Honestly, I could go on for the entirety of the panel just doing them justice with regard to their backgrounds on these issues. All four of our panelists today are true experts on this topic. So, we have with us Heidi Kitrosser. She's the Robins Kaplan Professor of Law at the University of Minnesota and currently a visiting professor of law at Northwestern Pritzker School of Law. We also have David McCraw, who's Senior Vice President and Deputy General Counsel at *The New York Times* Company. We have Mary-Rose Papandrea, who probably doesn't need any further introduction, but she is the Samuel Ashe distinguished Professor of Law and Associate Dean for Academic Affairs at the University of North Carolina School of

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[1] This transcript has been lightly edited for clarity. The editors have also inserted footnotes throughout the transcript where there are references to specific cases, statutes, works of scholarship, or other sources.

[2] Mary-Rose Papandrea, *Keynote Address: Examining the Assange Indictment,* 19 FIRST AMEND. L. REV. 213 (2021).

[3] Mary-Rose Papandrea, Margaret Kwoka, David Pozen & Stephen I. Vladeck, *Panel One: Classification and Access to National Security Information,* 19 FIRST AMEND. L. REV. 222 (2021).

Law. And we have David Schulz, Floyd Abrams Clinical Lecturer and Senior Research Fellow at Yale Law School.

My goal here is to really just get the conversation flowing and then stay out of the way. Occasionally, I'll nudge the conversation to keep things moving from topic to topic. We're going to cover a number of different themes. I've given the panelists some sense of what those areas are ahead of time. But, I want to start by tying it together with the earlier panel and placing it in the broader context of the issues that arise as we think about national security, whistleblowers and the First Amendment. I want to start really with an observation and a question. And that is from Bush through Obama to Trump, the government has launched a really unprecedented number of leak investigations and Espionage Act[4] prosecutions based on the disclosure of classified information to the press. The Reporters Committee for Freedom of the Press reports that there were only four leak prosecutions against media sources related to the leaks in the entire period leading up to 2009.[5] But in the decade that followed, the number of prosecutions exploded, by their count, to eighteen through 2019.[6] And I want to ask Heidi to help us understand what is driving this increase. Why has this issue become so common compared to what it was historically?

**Kitrosser:** Well, there is a great deal of debate about that. Dave Schulz and I talk about this in our paper that we wrote for the symposium. My sense is that you could place the answer into two buckets. One is about technology, and one is about normalization. So, the technology part is quite simply that it is so much easier now because of technology to find leakers, to determine the source of stories for which the government wants to find leaks using technological footprints than it ever used to be. You know, every time somebody makes a call, it's quite easy to trace it. Emails are very traceable. Even the classic meeting in a dark alley, reporter-source interaction that we're all so familiar with going back to All the President's Men. Now you're surrounded by surveillance cameras, every time you go in and out of the government building you're swiping your digital pass. So, part of it is technology. And, one anecdote that we put in the

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[4] The Espionage Act, 40 Stat. 217 (1917) (codified in scattered sections of 18, 22, 46 and 50 U.S.C.).

[5] Katie Beth Nichols, *Bringing the Reporters Committee's List of Unauthorized Media Disclosures to Life*, REPS. COMM. FOR FREEDOM OF THE PRESS (Aug. 15, 2019), https://www.rcfp.org/leak-investigations-chart-explainer/.

[6] *Id.*

paper that I think really speaks to this in kind of a chilling way is that Lucy Dalglish, the former head of the Reporters Committee for Freedom of the Press, recounted a meeting that she had with some Obama folks during the Obama administration where they were talking about a reporters' privilege federal statute.[7] And she recounts that one of the aides told her, you know what, you'll get your statute, but we don't need it anymore.[8] We don't need to go to the journalist anymore in order to really get what we're looking for.[9]

So, I think technology is part of the story. But I think there's another part that's maybe more fundamental, and that's normalization. There is a way in which I think each prosecution feeds the next, paves the way, and things get more normalized. And this is the thing that Dave and I really trace in our paper. We talk about how, first of all, when you look back at the drafting and the passage of the Espionage Act, it seems by all accounts that really nobody anticipated it or intended it to be the quasi-official secrets act it's become.[10] So, there just wasn't that expectation. Plus, we didn't have a classification system outside of the military until after World War II. There was no intention or idea that it was going to be what it is. So, it's not surprising when it was for the first time used to go after a reporters' source in the 1950s, there was a lot of consternation. There was a great deal of publicity. There was an outcry. It wasn't used again until the early 1970s with Daniel Ellsberg and Anthony Russo. That also was quite controversial. Plus, that prosecution ended in a lot of embarrassment for the government. It wasn't used again until *Morison*.[11] Then, slowly, as you said, starting in the Bush administration it has been increasingly used. So, I think it gets normalized over time. Also, as we trace in our paper, and, of course, we'll talk more about later, the *Morison* case really paved the way doctrinally for future prosecutions.[12] So, I think that's part of the story as well.

One last thing I'll mention is I should give a nod to the main additional argument that is sometimes made to explain

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[7] Heidi Kitrosser & David Schulz, *A House Built on Sand: The Constitutional Infirmity of Espionage Act Prosecutions for Leaking to the Press*, 19 FIRST AMEND. L. REV. 153, 182 (2021).
[8] *Id.*
[9] *Id.*
[10] *Id.* at 166.
[11] *See* United States v. Morison, 844 F.2d 1057, 1060 (4th Cir. 1988).
[12] Kitrosser & Schulz, *supra* note 7, at 185–203.

this, which is that while technology is the reason, it's not in the way that I said. It's technology because the government has more reason to be concerned now about leaks because of the ability to create these massive leaks like we saw with Chelsea Manning, for example. And certainly, as we've seen with WikiLeaks and Julian Assange. I think that may be part of it. I think that by no means fully explains it, though, in part because most of the prosecutions aren't these massive leaks. I think it's much more the other elements, and then that might provide some additional justification.

**Ardia:** Everyone else on this panel probably has a view on this question as well and a lot of experience with these issues. Are you seeing the same things that are driving this? Actually, if I can ask David McCraw this question, I was really shocked in how candid Edward Snowden was after his leaking about his feelings about the lack of OPSEC, the lack of security that the reporters who were covering national security issues were using in order to protect the identity of their sources. As I say to my students, the Internet giveth and the Internet taketh away. It gives us this perception of anonymity and ephemerality when, in fact, it's just the opposite. These technological tools create a trail that is almost impossible to erase. Is that something that you've seen? You've been your position for a while and seen the evolution of national security reporting. Is that something that comes up in your conversations with reporters?

**McCraw:** I think it was much truer at the time of Snowden. I think Snowden was a bit of a wakeup call. I think Reality Winner was even more of a wakeup call. You'll recall that after Reality Winner was arrested, there was much discussion over whether the reporters had, in fact, caused her detection and ultimate indictment and conviction. I thought there was a lot of finger pointing in that debate, and I'm not sure what the ultimate facts would have shown. But, I do think that the outcome of that was that no reporter who's serious about national security reporting wants to be that person who gets blamed. I think there's much better work being done on that, at least at the publications and outlets that I know of. We obviously spent a lot of time talking about that. We bring in outside experts to talk about how leak investigations are done. It's always a difficult topic. I remember doing a seminar now more than fifteen years ago at *The Times* and having another publication, which wasn't particularly fond of us, say that we were teaching

reporters to act like drug dealers. It was a little unfair, but just a little. So, all of Heidi's points are on point there that it is easier for the government to find people. It's easier for the government to do it without us. I often wonder why that doesn't add up to why don't we have a shield law. Since they don't need us, they might as well get some credit for protecting us.

**Papandrea:** David, I would just like to add, in addition to the great points that Heidi and David M. have made, I also think there might be, and I'm just guessing, some anxiety within the executive branch of their ability to control all of the information, not just since 9/11, but especially since 9/11, just the explosion of the national security state and the number of secrets and who has access to the secrets. The leak prosecutions are one very powerful, but not the only, tool that the executive branch has been trying to wield to keep control over national security secrets. So, for example, when Trump took office, he made everyone dump their cell phones on the table while they worked in the White House or something like that. There's been a crackdown on the ability of government employees to talk to the press, restrictions on when they can do that and the need to get authorization and so on. So, there's a lot of other things going on, and I think these leak prosecutions are part and parcel of those of those efforts.

**McCraw:** And it's really driven by overclassification in a lot of ways. A lot of things that are treated as leaked classified information should never been classified in the first place. As Justice Potter Stewart said in the Pentagon Papers case, overclassification leads to carelessness and cynicism.[13] I see that all the time. You have five million people plus with security clearances. And, as I now have hot keyed into most of the briefs that I write, we have the famous quote from President Obama: "There's classified, and then there's classified."[14] You know, there's stuff that's really secret, and there's stuff that we just say is secret. How is a reporter, how is the source, supposed to deal with that when the President of the United States is telling Fox

[13] N.Y. Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart J., concurring) ("For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion.").
[14] Michael D. Shear, *Obama Says Hillary Clinton Wouldn't Intentionally Endanger U.S. with Emails*, N.Y. TIMES (Apr. 10, 2016), https://www.nytimes.com/2016/04/11/us/politics/obama-hillary-clinton-email-fox-news.html.

News that classification is not at the margins but is, in a much larger swath, a joke?

**Ardia:** Heidi, I really like your point about the normalization, and part of this is cultural. One of the other things that the Reporters Committee study shows is that the outcomes in these prosecutions has shown a substantial increase in the length of sentences that the courts have been imposing.[15] One thing you might take from that is that the information that's being disclosed is more damaging and, therefore, warrants a longer sentence. Though, it's hard to see that. It could just be that what society expects and accepts has changed over time since we lionized Ellsberg. We don't have that same view as a society, and that could be affecting some of this.

**Kitrosser:** Yeah, in terms of the sentencing lengths, I think there are many things going on. But two things that come to mind are, one, in some cases, given the sweeping nature of the Espionage Act, given that there is no possibility of a public interest defense or even an opportunity to really seriously challenge how much if at all national security was at risk, increasingly, you end up having situations where people plea out because they don't really have an alternative. Then, you have no real oversight, or at least you are lacking oversight, with respect to the sentence. So, one thing that comes to mind, for example, is when Shamai Leibowitz, who was one of the first people prosecuted under Obama, was sentenced, the sentencing judge said something that was really stunning. He said something like, I don't even know what was leaked, but I know it was some information.[16]

Then, on the other hand, when you have judges attempting to do comparative analysis, for purposes of sentencing propriety, of past sentences under the Espionage Act, you then run into this problem that the Espionage Act was, of course, predominately designed for classic spying. So, then you have the propriety of sentencing someone for leaking information about troubling FBI surveillance practices to *The Intercept*, [and you're] comparing that to someone who was sentenced for leaking information to Russian spies during the

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[15] Nichols, *supra* note 5.
[16] Josh Gerstein, *Judge gives leaker 20 months, but isn't sure why*, POLITICO (May 24, 2010), https://www.politico.com/blogs/under-the-radar/2010/05/judge-gives-leaker-20-months-but-isnt-sure-why-027212.

Cold War. So, that's among the issues that we have floating around.

**Ardia:** And obviously, the motivation of leakers varies, and we'll come back to this question of whether their intent matters in terms of First Amendment analysis. But, it clearly is the case, when we think about the relationship between the panel earlier today and the panel this afternoon, that in the national security space, other than whistleblowers, it's very difficult for the public to get information about what the government is doing here. For some of these folks who are willing to put their freedom on the line, many of them knowing that the ability to cover their tracks is limited, but they still go forward and do that. What are we to make of that? That there are people within the government who feel strongly enough about disclosing the information that they're willing to put their freedom on the line to do that? And I throw that out to anyone.

**Schulz:** Maybe I could jump in. This goes, really I think, to one of the points in the paper that Heidi and I worked on, and Heidi has been dealing with this issue for over a decade, which is the need for some sort of First Amendment-type protection to be built into Espionage Act prosecutions. As Heidi mentioned, right now, there's no sense that the First Amendment applies at all. And that just can't be as the Espionage Act has morphed from what was intended into a quasi-official secrets act. And, just to go back over a little bit of the history so people understand the point that Heidi was making, this was passed during the First World War.[17] It essentially has not been materially amended in the last 104 years. But it was intended to reach spies, and in World War I and World War II, they were focused on enemy-to-enemy information with a few early exceptions with pamphleteers.

When Congress passed it in 1917, President Wilson wanted some language in about how it could reach the press and leaks to the press, and Congress wouldn't do it. When they amended the statute and modified it in 1950 to separate out what's now Sections (d) and (e) of 793—to separate out people who have information because they got it from a government versus people who are the recipients of leaks—there, again, was concern that this would have an impact on the press and their

[17] The Espionage Act, 40 Stat. 217 (1917) (codified in scattered sections of 18, 22, 46 and 50 U.S.C.).

ability to report on what the government is doing. Language was put into the bill that said nothing here is intended to allow censorship of the press. And Congress, again, seemed to think that was sufficient and that people kind of understood you weren't supposed to use this law to go after the press.

That all has changed, starting with *Morison*, but I think really accelerated after 9/11. And I just want to underscore a point Mary-Rose was making on top of Heidi's good points. I do think 9/11 changed a lot. It changed how deferential judges are willing to be, their concern about the impact of getting it wrong. And to David McCraw's point about "classified and classified," I think that goes right to some points that were made this morning that a problem that we're dealing with right now in trying to figure out how to solve this issue is that judges are unwilling to step in and do this. So, when you have a leak investigation, if someone wants to say, "well, this wasn't really an important leak, you know yes, it was classified, but there was no harm," judges don't want to hear that. They don't want to get involved. They don't want to play the role that they need to play if we're going have some kind of a viable thing.

One other thing which ties into where we are and how you get the First Amendment, the point has been made that technology allows the government to find people very easily now. I think it's not coincidental that in this explosion of prosecutions in the last ten, fifteen years, there hasn't been a single reporter called to testify. In fact, there hasn't been a single reporter subpoenaed except for James Risen, who fought it and fought it and fought it under the Obama administration, ultimately lost in the Fourth Circuit,[18] and then the government didn't call him.[19] While that's a sign of the fact that technology means you don't need the reporter to identify the leaker anymore, it also has the effect of removing a layer of First Amendment protection that used to exist. Back in the old days if the government wanted to prosecute a leaker, they had to find the leaker. And, as one of the Obama administration lawyers mentioned in a similar speech, in the old days you either had to get the leaker to confess or you had to get the recipient of the leak to tell you who it was. If you wanted to do that, you had to go in

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[18] United States v. Sterling, 724 F.3d 482, 499 (4th Cir. 2013).

[19] Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, N.Y. TIMES (Jan. 12, 2015), https://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html?.

and, in most parts of the country, you'd have to deal with the press who would be asserting a First Amendment defense not to tell you who their source was. And the judge would have to do some sort of balancing of public interest. That's all gone. If you don't need the press under the Espionage Act, there's no notion of public interest balancing. So, we're at an important threshold.

And one other minor point is we really have transformed this into an official secrets act. Back in the 1990s, in the Clinton administration, Congress actually passed an official secrets act to deal with these types of leaks in a way the Espionage Act wasn't, and President Clinton vetoed it because he was concerned about the First Amendment implications. In response to that, it was at the very end of his term, Congress comes back the next session and the republicans did not push to put it back in and have President Bush sign it. Instead, they said, well, let's study the issue, and Attorney General Ashcroft came back two years later with his report. He says, I think the Espionage Act gives me all the powers I need to go after leakers, and they have now taken that and run with it all the way up to the point where, if you followed the extradition of Julian Assange in England, one of the things that government had to prove to get him extradited was that the crime he was being charged with here would be a crime in England. The judge goes through at great length the arguments our Department of Justice was making that the Espionage Act crimes that he was charged with are equivalent to the Official Secrets Act in England.[20] So, it's that confirmation we've come full circle, and this is being used as an official secrets act in a way it was never intended.

**Ardia:** So clearly, David McCraw, the explosion in these investigations and prosecutions is an effort to stem the flow of this information, to stop these leaks from taking place. From your perspective, has that been successful? Are you seeing this impact national security reporting in a way that makes it more difficult for your reporters to do their work?

**McCraw:** I think I'm professionally required to answer that, yes. Even though the empirical proof of that is completely nonexistent. Anecdotally, the reporters will tell you that they have sources that don't talk to them. Many of those aren't

[20] United States v. Assange [2021] EWHC (QB) 2 [30]-[51] (Eng.) https://www.judiciary.uk/wp-content/uploads/2021/01/USA-v-Assange-judgment-040121.pdf.

necessarily national security. They may be White House sources and Justice Department sources that aren't national security sources as we think of them. When this question comes up—is there a chilling effect caused by the prosecutions—it takes me back to the different way the chilling effect was discussed in *N.Y. Times v. Sullivan*[21] in 1964 and then in *Branzburg v. Hayes*[22] eight years later. In *Sullivan*, they assume there's a chilling effect from libel suits.[23] They take that as an article of faith that if libel suits are too easy, that the press is going to be chilled. You then get to *Branzburg* and the majority opinion spends a great deal of time saying, well, look, they don't have any proof of this, if they make their record maybe we'll feel differently.[24] And the dissent, takes them on on that.[25] But, it really frames how much a chilling effect in all of these areas touching the press is in many ways more religious belief than empirical belief, and I'm a religious man on this one. I do think it is a chilling effect.

One thing that makes this hard is what kind of reporting we're talking about. What's the scope of the reporting, the fabric of reporting, that's likely affected? In my experience, the WikiLeaks, the Snowden type of information drop is the rare exception, even the kind of things you're seeing in some of the prosecutions where there are suspicious activity reports from Treasury, where there's a volume of documents. Most of the national security reporting that I'm familiar with through my reporters deals with a much more granular, mosaic approach to reporting. They're hearing it from trusted sources in bits and pieces. And, that has continued, I think, in part, because it's done by very high-level people in many cases, and, in part, because it doesn't involve documents. So, there's also sort of an ambiguity about what is classified. You're not looking at a document that has a stamp on it.

And I think it's important to think about the prosecutions. By my count—and, of course, getting the count right is always hard because you've got to know what is media and what's national security—but, if you look at the seven prosecutions during the Trump years besides Assange, [there have been] three people who leaked to *The Intercept*, two who leaked to BuzzFeed,

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[21] 376 U.S. 254 (1964).
[22] 408 U.S. 665 (1972).
[23] *See Sullivan*, 376 U.S. at 278–79.
[24] *See id.* 693–95.
[25] *See id.* at 732–34 (Stewart, J., dissenting).

and one to WikiLeaks. The other one was NBC. I think that pattern is telling in that it tends to be low-level government employees and media outlets that share none of whatever remains of a good feeling of institutional government toward mainstream media. So, I don't think that's random, and I don't think those reporters at those sites are sloppy or more careless. I do think that they're seen as more likely targets.

I guess the last thing I'd say about this goes back to my overclassification point. There's so much that's classified, and so much of what's going on here is putting bits and pieces together to make a story that I'm not always convinced that the leaker even knows that he or she is the leaker. A few years ago, attorneys for a person who ultimately was prosecuted came to my office and said, can't your reporter help us out here? Can't your reporter say that my guy wasn't the one? And I couldn't decide whether their client was lying to them or their client just didn't understand that in conversations classified information comes out. And that goes, in part, to the point David was making earlier, that you have to understand the motivation, what drives people to leak and what would stop them from doing it. Obviously, if you're not even sure you were the source, it's very hard to see the effect of the law to deter that kind of conduct.

**Ardia:** We've been hinting at the First Amendment's operation in this space, and I want to move now to explore that a little bit more directly. One of the things that's quite shocking for someone who looks into the court's view of the First Amendment issues here is that there is a dearth of appellate decisions. There's one appellate court decision from 1988, we mentioned *United States v. Morison*,[26] the decision by the Fourth Circuit. That's it, that's the extent of the appellate treatment of the First Amendment issues under the Espionage Act. That's rather shocking David Schulz, why is that? That was a long time ago.

**Schulz:** Yeah, it was a long time ago, and that was actually the very first case involving a leak to the press that actually went to trial and led to a verdict. As Heidi mentioned, there were a couple earlier, one in the 50s and one in the 70s that kind of fizzled and didn't go forward. And it's an interesting case because the Fourth Circuit upheld the conviction on a very bad

[26] 844 F.2d 1057, 1060 (4th Cir. 1988).

set of facts. In terms of trying to frame the First Amendment or the public interest involved, the facts weren't particularly compelling. Mr. Morison worked for the Navy.[27] He was trying to get a job with *Jane's Defence Weekly*, a big defense magazine, and so he leaked a spy photograph showing the capabilities of U.S. spy plane cameras that we're able to pick out very small things on the ground.[28] This was like something our government considered very secret, keeping concealed the technical capabilities that they have. And he leaked a photo to *Jane's*, and the intent, you know the notion that he knew he was doing something wrong, not only was he trying to get a job when he did this, but he put it in an envelope to the editor that was anonymous.[29] He physically cut off of the photograph the secret designations and sent it in a separate envelop, so, in theory, he couldn't get caught.[30] And how did he get caught? This goes back to the whole thing about the reporter's privilege. He got caught because of old fashioned, gumshoe detective work. The Department of Justice went to *Jane's*, got the photo, there was not a reporter's privilege issue over in England, and they found his fingerprint on it.[31]

So, they had him, they had his bad intent—this knowledge that he was doing something wrong. So, he's convicted, and when he's making these First Amendment arguments that the Espionage Act doesn't have a sufficient intent requirement and that there are other problems with it, the court is able to say, well, to the extent we should be worried about an intent, we have enough bad intent here.[32] And they don't really grapple further with the First Amendment issues. One of the reasons, which Heidi goes into at great length in our paper, is that they view this not as a First Amendment problem, but as a theft of government property, which changes the First Amendment analysis.[33] But, even in that context, two of the judges concur separately to say, you know, the First Amendment concerns would be different here if we were going after *Jane's Weekly* rather than going after the leaker because we have the bad

[27] *Id.*
[28] *Id.* at 1060–62.
[29] *See id.*
[30] *See id.*
[31] *Id.* at 1061–62.
[32] *See id.* at 1068–70.
[33] *Id.* at 1068.

intent and we have other things.[34] Now, that's the state of the law in terms of it.

The next time that the government went after someone for leaking was the AIPAC case[35] that Mary-Rose talked about this morning. It involved a leak to two lobbyists for the American Israel Political Action Committee.[36] There was a lot of concern then because if they were responsible—they were people who received information, not leakers—then it raises all these same issues about what's the First Amendment protection for the press? Are they in any different posture than the press? So, it was intensely litigated at the district court level. The judge handling the case ultimately concluded, well, I'm going to read the Espionage Act to say that the government will have the burden of proving here that this information that was passed on to the defendants, which they then passed on to the government of Israel, that they're going to have to show that the defendants had a bad intent when they passed it on.[37] That was a switch in the law, because the government's argument had been and has always been that the language of the Espionage Act only requires them to show that this was national security information and that a reasonable person would understand that it had the potential to cause harm to United States or to aid an enemy. You don't have to have the intent. It's just sort of like a negligence standard. Anybody would have known not to pass this on. And the judge said that's not good enough given the First Amendment issues here—you're going to have to show an actual intent.[38] The government then dropped the case,[39] basically saying we don't think we can meet that burden.

So, even that First Amendment requirement in terms of how the act gets applied hasn't been reviewed on appeal. Although in an interlocutory motion dealing with some evidentiary rulings, the Fourth Circuit went out of its way to

[34] *See id.* at 1085 (Wilkinson, J., concurring) ("This prosecution was not an attempt to apply the espionage statute to the press for either the receipt or publication of classified materials."); *see also id.* at 1085 (Phillips, J., concurring) ("I agree with Judge Wilkinson's differing view that the first amendment issues raised by Morison are real and substantial . . . .").
[35] United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006).
[36] *Id.* at 607–08.
[37] *See id.* at 626–27.
[38] *See id.* at 626–27, 640–41.
[39] *See* Neil A. Lewis & David Johnston, *U.S. to Drop Spy Case Against Pro-Israel Lobbyists*, N.Y. TIMES (May 1, 2009), https://www.nytimes.com/2009/05/02/us/politics/02aipac.html.

suggest that the district court got it wrong.[40] So, there's a reason to believe that even that level of protection doesn't exist from the First Amendment. Why we don't have other decisions, I think it was touched upon earlier, I think a lot of these plead out. A lot of them go in other directions, and the fact is from a protection of the press point of view, the sort of concerns David McCraw would have, there hasn't been anyone else other than the two AIPAC lobbyists who were recipients of information who've been charged with violating the Espionage Act. It's always the leaker. The leaker is a problem under the First Amendment, but it's one step removed from going after a journalist, which is why now Julian Assange is such a big issue because he's the next one in line who's been accused of being the recipient of information rather than the leaker.

**Ardia:** And I'm hoping we'll get to Assange in a moment or two. I do want to ask Heidi, after *Morison* the district courts have been quick to reject First Amendment arguments at the threshold under a theory that it's conduct and not speech. Someone mentioned earlier, this is thievery. The court says you've stolen something. The First Amendment doesn't have anything to say about that. Is that right under the First Amendment? What is going on in the courts with regard to even being willing to address First Amendment issues?

**Kitrosser:** So, I think there are huge things going on. Part of the story is national security exceptionalism, right? We see that not only in the classified information context, but in other contexts. In the 2010 case of *Holder v. Humanitarian Law Project*[41] there we saw, in a different context, the Supreme Court was very, very quick to say, oh, strict scrutiny, which is normally such a punishing standard, is very easily met in the context of an aid organization that could be deemed to be providing material support to terrorists when they engage in training, etc.,[42] for reasons that were clearly steeped in national security exceptionalism. So, that's part of the story, quite simply. That manifests itself in these cases as this argument that there really isn't even a First Amendment concern here and specifically this argument that, in so far as classified information is involved, conveying the information is no longer simply speaking in a way that triggers First Amendment concerns, but is really more akin

[40] *See* United States v. Rosen, 557 F.3d 192, 199 n.8 (4th Cir. 2009).
[41] 561 U.S. 1 (2010).
[42] *See id.* at 28–39.

to some kind of harmful action, more akin to theft. So, that's part of the story.

I also think part of the story is simply, again, that these things kind of build on each other. Once the court said that in *Morison* then it becomes sort of easier to take, what I think is probably, a judicial intuition that, again, there's just something special about national security and cloak it in that [analogy] of thievery. I also do wonder, and this is just me speculating, but I do wonder to what extent the thievery analogy took hold because the facts of *Morison* lent themselves to that a little more readily because it involved not only a tangible document, but as they've said, it involved somebody literally taking the document off of their coworker’s desk, cutting around the edges, putting it in an envelope, and mailing it away. It wasn't even a photocopy, they actually took the tangible document. So, I wonder to what extent that lent itself further to the analogy. Then other courts just ran with it in a way that was compatible with their intuitions because of national security exceptionalism.

All of that said, I don't think it's right. I mean, it's taken hold. And, obviously, several courts have sort of run with it. So, it's “right” in the sense that a number of courts have sort of embedded it into doctrine. I don't think it is right, though. I think that the minute we take a few steps back and say, well, wait a minute, somebody might have stamped the words classified on this, at least when we're talking about tangible documents, but if we just put that aside for a minute, what are we talking about? We're talking about information that involves foreign affairs and involves matters of public concern. And we're talking about somebody conveying the information. Now, that's not to say they should necessarily prevail. Certainly not to say that they're absolutely protected. No speaker is absolutely protected. Everyone is subject to potential limits compatible with First Amendment standards. But the conveyance of information that under ordinary First Amendment law, punishing that on the basis that the content conveyed is dangerous raises all kinds of alarm bells and should be triggering pretty strict standards. Nonetheless, under this doctrine, under the thievery analogy, etc., we have this world where, in fact, the classification stamp just takes you into a different universe. The First Amendment rules don't apply. So, I think that is very problematic, but that is the reasoning a number of courts have run with.

**Papandrea:** I just wanted to underscore the disconnect that Heidi is illustrating between the limited case law in this area and the rest of the Supreme Court's doctrine. When David McCraw a moment ago was mentioning *N.Y. Times v. Sullivan*, we have this robust commitment to the discussion about public affairs and public officials. And we see this in a number of the Supreme Court's opinions. Everyone agrees leaks are not a good scenario. No one wants leakers to be the way that we find out about information. It's a very flawed system, but a lot of people agree that we have no better system. To say that there is no First Amendment issue is ridiculous. It doesn't mean, as Heidi said, that every leaker should prevail.

As I mentioned this morning, certainly there are some secrets that need to be kept secret, but there is a real disconnect here with our commitment to the robust discussion of public issues. And I'll just highlight something that I prodded the panelists this morning with about whether there actually should be a First Amendment right of access to this information that may help leakers. The idea that actually the public has a right to hear this information is a longshot to ever get accepted, but if it ever were accepted, it's like the structural value of the First Amendment in informing our democracy. Heidi is nodding because she's written a lot about that, so I'm really just borrowing her ideas. But I think that there's a lot of just, again, disconnect with our commitment to informed public discussion.

**McCraw:** I just wanted to underscore what Heidi, Mary-Rose, and Dave were saying about the judges essentially surrendering any role in this process. The Second Circuit had a criminal case decided in 2019 where they drop a footnote thanking these security agencies, the intelligence agencies, for helping them redact their decision and saying that they had neither the expertise nor the inclination as a court to second guess them.[43] I remember when *The New York Times* and the ACLU sued over the targeted killing memo, which we won, in part. The lawyer for the ACLU and I sat in the Second Circuit courtroom while the court met privately with the lawyers for the government. We later found out, because it's in the decision, in

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[43] United States v. Hasbajrami, 945 F.3d 641, 646 n.1 (2d Cir. 2019) ("[W]e have neither the authority, nor the expertise, nor the inclination to overrule classification decisions made by the relevant executive branch agencies. We respect the need for such classification of sensitive national security information, and appreciate the cooperation of the agencies in the effort to limit the need for modifications and redactions.").

that secret session the government refused to identify one of the people who was at the session with the judges, that there was somebody whose identity was classified. And the Second Circuit judges were unable to convince the attorneys for the Justice Department that it would be a nice thing to identify everybody in the room to the judges. In the opinion, the Second Circuit criticized them for that. But he's never identified, and we've seen over and over that kind of deference taking hold. It goes to what, I think, Steve Vladeck was saying this morning, that essentially it's a single branch of government that is deciding these issues. And it happens to be the branch that has the most investment in hiding embarrassment, hiding unlawfulness, and hiding a lot of things that the public should know.

**Schulz:** If I could just say a point on that to follow up, because, Mary-Rose, I think your point about having a constitutional right of access is a really interesting point. We've litigated the issue of the conflict between classification and a constitutional access right in court cases. One that went to the D.C. Circuit, about five years ago, arose out of a Guantanamo habeas hearing where certain videotapes that were classified were admitted into evidence, and *The New York Times* and other press organizations went in to get it, asserting a constitutional right of access.[44] Basically, the argument we made was, look, there's no question that the right of access applies here.[45] It's a court record. There's solid precedent in the D.C. Circuit. And the district court judge agreed with us that there was a right of access. And we said, therefore judge, you have to decide whether it meets the Press-Enterprise standard, a heightened First Amendment standard for the government to keep it secret. The district court judge said, yes, you're right, said they haven't met the standard, and ordered it released.[46]

On appeal, you have a train wreck, right? You have a three-judge decision, one of which says there is no right of access to classified information ever, even in the court,[47] which to me raises lots of separation of powers questions. Can the executive order a trial to be done in secret because they want to have classified information? The court has no role? Another judge said the district got it right on the legal analysis, but on the facts here

[44] Dhiab v. Trump, 852 F.3d 1087, 1089 (D.C. Cir. 2017).
[45] *Id.* at 1090.
[46] *See id.* at 1089.
[47] *See id.* at 1094–98.

it should still be secret.[48] So, you had two judges to reverse. And the third one said, I can't even tell if the right of access should apply here because the teaching the Supreme Court has given us is too ambiguous.[49] Like at what level do we decide the history and the logic? So, it's a train wreck, and it hasn't been decided. I think the problem we face, it goes back to Steve Vladeck's problem. Judges don't want to decide these issues. And, ultimately, I think if you push the constitutional right of access and give it to a judge, even if they accept the existence of the right, the legal analysis is going to come down to, "well, as a judge, what I have to decide is is it properly classified? Because if it's properly classified, then there's a threat to national security, and I should defer to the executive." That turns out to be exactly the same standard under FOIA. You're entitled to get it under FOIA unless it's properly classified, and we've seen how far that has gotten us. So, we have an institutional problem with judges who are not asserting their right to look at this stuff. It goes back to what David McCraw was saying, there's so much classification, and there's so much stuff that even the executive branch recognizes doesn't really need to be kept secret. Judges are unwilling to look at that or to consider the importance to the public of knowing the information. There's no balance that comes into play.

**Ardia:** So, I want to make sure we get a chance to talk a little bit about the Assange prosecution. But, I have a segue into that, and that is the phrase that David and Heidi use in their article about this whole edifice being built on "a house of sand."[50] And now we've got a storm coming through, and it's this prosecution against Julian Assange. Obama, under a lot of pressure, declined to bring a case against Julian Assange, and the Trump administration decided to go forward with it. I was really struck in the earlier panel that they excluded from those charges anything related to the DNC email hack and disclosure. So, that may tell us something about the thinking within the Trump administration. But, Mary-Rose, what do we make of the Trump administration's willingness to plow forward with this, and what might we expect to come?

**Papandrea:** Well, I think I tipped my hand pretty strongly this morning about this case. You know, I do think it's part and

[48] *See id.* at 1098 (Rogers, J., concurring).
[49] *See id.* at 1106–07 (Williams, J., concurring).
[50] Kitrosser & Schulz, *supra* note 7, at 211.

parcel of the Trump administration's attack on the press. And I know that's a bit controversial because many people don't regard Julian Assange as part of the press. I know early on—I think things have changed, David McCraw can speak more to this—the more traditional mainstream media really has distanced itself from WikiLeaks in many ways, and they are different in some ways. But the problem is they're not really different in currently any legally recognizable ways. So, for example, we have a press clause in the First Amendment, but it hasn't really been given any meaning. If it were, we'd have to define who the press is, and I don't know whether Julian Assange and WikiLeaks would or wouldn't fall within that definition. It would be difficult to draw a line that would distinguish WikiLeaks and Julian Assange from the mainstream traditional media and journalists. They are collecting information. They're disseminating information. It's public information. There's value to a lot of this information. So, if a prosecution against Julian Assange goes forward—and, again, I'll be anxious to see what the Biden administration's view is on this—it very much threatens the press because it is not a good set of facts.

I don't think Julian Assange is very sympathetic. It doesn't help that he's an outsider. He's not part of *The New York Times*. People question his motives. And there also is this atmospheric hacking and all of that. So, I would expect very bad law. The case that the press would want would be salutary. They revealed government wrongdoing of NSA hacking or that the NSA is following all Americans, for example, like the Snowden leaks or something like that, something where there was clear public interest that was revealed. And through established news outlets, you know, not through WikiLeaks, then we might have a chance. I don't think it would be for sure that the press would win or the leaker would win, but a chance that the courts would recognize First Amendment protection for publishing national security information of great public value. This question has been left open since Pentagon Papers. Pentagon Papers was a prior restraint case and didn't answer the question of whether the press could be held criminally responsible, after the fact.[51] So, I hate to see this prosecution go forward because I fear what would happen, because the DOJ's assertions that Assange is not a journalist do not reassure me in any way whatsoever.

[51] *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

**Ardia:** Bad facts led to *Morison*. We could see this just steamrolling. Does everyone else share Mary-Rose's pessimism?

**Kitrosser:** Yeah, I would say that I do. I, too, am eager to see what the Biden administration does, and, hopefully, they will decide to follow suit with the approach the Obama administration had taken and just decline to go forward with it and dismiss it. But I share Mary-Rose's concerns absolutely as to what would happen if they do go forward with it. It's potentially a perfect storm of this very unsympathetic set of facts that gives courts an opportunity to say, and perhaps tell themselves even, that this is different. This is not *The New York Times* combined with national security exceptionalism, and [there are] a lot of bad precedent from other contexts, from leaker context for example, that they could import into this. Not to mention some of those troubling concurring opinions that I think were referenced this morning from the Pentagon Papers case. So, I would be very concerned if the Biden administration does decide to go forward with this.

**McCraw:** If I could just follow up on that, and Mary-Rose will remember the last time we did this show, it was in Pasadena for the Ninth Circuit, and I got induced into saying nice things about Julian Assange, which isn't easy. And my reward was to be quoted in his civil brief when he was sued by the DNC, which I wasn't talking about. So, I'm going to not step into that particular sinkhole today. I'm not going to speak about the DNC hack and what WikiLeaks did or didn't do. And this will go back to 2010, which is what the indictment's about. I think the interesting thing about this case, or one of the interesting things about this case is that the point that Mary-Rose highlighted, is when the time comes, if a prosecution ever goes forward in the United States, will the mainstream media be writing an amicus brief? Will they feel the need to wrap their arms around a person who reviles them and they return the favor, in large part?

What was interesting, as you'll recall, was in the first indictment, the only charge that dealt with Julian Assange was assistance given to Private Manning in a failed attempt to get more classified information through disguising of a computer hack.[52] And if you look at the press coverage after that, if you

[52] *See* Indictment, U.S. v. Assange, No. 1:18-cr (E.D. Va. Mar. 6, 2018), https://assets.documentcloud.org/documents/5816933/Assange-Indictment.pdf.

look at the editorials around the country, very few mainstream media editorial pages said that's cool, that's perfectly allowable, that should be protected by the First Amendment. To the contrary, they said over and over again, real journalists don't do that. They don't help their sources hack. They don't help their sources engage in computer intrusion. It was when the first superseding indictment comes out, and Assange is now charged not only with his role in aiding that failed attempt at accessing a secure database, but is actually charged with publishing information,[53] that the editorial pages turned very sharply and realized the problem that this kind of prosecution would cause. As Dave Schulz said earlier, it had been an established hallmark of the Espionage Act prosecutions that they were done on government employees and contractors, not on those who receive information and publish it. So, I think it's a hard case because of the facts. But I think it's going to be very hard for people on the mainstream media, established press side of the world to not see some peril if the prosecution goes forward on the publishing aspect of that indictment.

**Ardia:** David Schulz, you may be drafting one of these amicus briefs on behalf of your clinic.

**Schulz:** Yeah, and, you know, this goes to one of things Heidi and I grappled with in the paper that was written for the symposium, how do you factor in the First Amendment? I do think that, at least absent some congressional action to change the law or to address some of these issues, there will come a day when there is going to be a case against a recipient of information where these issues are going to be resolved. Is there a First Amendment defense? How do the courts deal with a recipient? And Assange may be that case. But I don't think that there is going to be, well, maybe I should watch what I say here, or I'll end up in David McCraw's sinkhole. But I think it's very difficult to come up with a factual distinction that will carry the day to say what Julian Assange did is not what journalists do. It's different in degree, maybe, but not in kind. And maybe the degree is a way to deal with it. But ultimately, there's going to have to be some way of importing the First Amendment concerns here, and it may be the kind of line drawing that we're going to advocate. At some point, you cross the line between

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[53] *See* Superseding Indictment, U.S. v. Assange, No. 1:18-cr-111 (CMH) (E.D. Va. May 23, 2019), https://int.nyt.com/data/documenthelper/1037-julian-assange-espionage-act-indictment/426b4e534ab60553ba6c/optimized/full.pdf#page=1.

being a recipient of information and being an active participant in the wrongdoing.

The example I would point to is there are some cases back in the beginning of this century, I think, I can't remember maybe it was in the 90s. But a case called *Bartnicki* that went to the Supreme Court about whether someone who was the recipient of information that had been illegally obtained through an eavesdrop, listening in on someone's wireless phone, [committed] a crime.[54] The law that made that a crime said if you receive information that has been illegally obtained, you are also guilty if you further disseminate it.[55] It went up to the Supreme Court, and they said, well, that goes too far because there are First Amendment protections.[56]

But then, following *Bartnicki*, there were two cases, *McDermott*[57] and *Peavy*,[58] where this issue was litigated again. In *McDermott*, they allowed the liability for different reasons because there were ethical issues involving a congressman.[59] In *Peavy*, the situation was that a reporter had been the recipient of some of this information.[60] A neighbor recorded his neighbor talking about some insurance scam dealing with a local school district.[61] And the reporter said, this is really interesting stuff—it's newsworthy, involves the school board, but I need more, will you keep recording?[62] Even in light of *Bartnicki* about the innocent recipient being protected under the First Amendment, the Fifth Circuit said no, you became an active participant in this.[63]

And there was a case in the Second Circuit that shows the same principle following the flight T.W.A. 800 crash.[64] That was a big thing because there were a lot of conspiracy theories that it had been shot down by a U.S. missile or a hand-to-ground something, a plane that crashed right after takeoff from Kennedy Airport. In the course of the investigation of that, a reporter was

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[54] Bartnicki v. Vopper, 532 U.S. 514, 517–18 (2001).
[55] *Id.* at 517–521.
[56] *Id.* at 517–18.
[57] Boehner v. McDermott, 441 F.3d 1010 (D.C. Cir. 2006).
[58] Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000).
[59] *See McDermott*, 441 F.3d at 1016–17.
[60] *See Peavy*, 221 F.3d at 164–65.
[61] *Id.*
[62] *See id.* at 163–66.
[63] *See id.* at 188, 193.
[64] United States v. Sanders, 211 F.3d 711, 714–15 (2d Cir. 200).

talking to someone who was working on the reconstruction of the aircraft in a hangar on Long Island and was being fed information that, yes, we found the remnants of an explosive or a missile.[65] So, this is proving the conspiracy. And the reporter said, well, that's not good enough—I can't go on your say so, but if you will get me a piece of this seat fabric that has some of this on that, I can independently test, then maybe we'll have a story.[66] The reporter was prosecuted under a law that says it's a crime to interfere, and where they drew the line was he became an active participant when he asked his source to go back and get him the fabric.[67] So, it may be that we're going have to draw that sort of a line and that we can push Assange safely to that he got too involved. There are allegations against him of aiding, abetting, and conspiring to do a whole series of things that arguably go beyond what a reporter does. That may be that the safest exit ramp if this all comes to a head.

**Kitrosser:** If I could just jump in, David A., for a second. It strikes me in thinking about this Assange question that one of the reasons that the stakes are so high here is because of the way that we have traditionally accepted a really sharp line between source and distributor. And because there are so few cases here, that's not a line that's deeply embedded in the case law so much as it's a line that I think has been sort of respected in practice with, for example, the Department of Justice, until Assange, declining to prosecute distributors, et cetera. Of course, cases in the doctrine like *Bartnicki* suggest that we're much less inclined to find recipients blameworthy. And although I do think it's warranted to draw some line between the two, I do think one of the things that is so troubling about the spate of Espionage Act prosecutions against the leakers themselves in the last twenty years or so is the sense that they essentially have no protections, which is one of the problems that we were talking about in the first half of this conversation. So, I do think the two issues are somewhat tied together, even if there should be some different level of protection. I think one thing that puts so much pressure on the Assange case is this notion that if Assange falls into or if the press generally falls into a category where they're "no better" or treated not much differently than the leakers themselves, then all bets are off. And part of that stems from the fact that the leakers at present are accorded virtually no protection, just to

[65] *See id.* at 715.
[66] *See id.*
[67] *See id.* at 716, 723.

highlight how there is a real connection between the two things. So, I think that's something that's important to keep in mind as well as we keep our eyes on what's going on with Assange.

**Ardia:** So, I do want to ask if you could wave your magic wand and craft the rule that a court would apply in the Assange case and in cases in the future that are brought not against the leaders, but against—and maybe this line is a fuzzy one, as Heidi points out—entities that look like media entities, that look like journalistic entities, what would what rule would you come up with? What do you think would comply with the First Amendment and be workable for the courts to apply in these kinds of cases? I'll let any of you be the first to take a stab at that. My guess is you've already thought about this.

**Kitrosser:** Well, I'll just jump in really quickly. Although I was just stressing the connection between the leakers and the recipients, I don't know that I would make the standard exactly the same. I would be inclined to provide meaningful protections to leakers but, nonetheless, probably more protection to the recipients, such as the press. So, when we're talking about the press, when we're talking about the distributor, I would be nervous really about any lessening of the ordinary First Amendment protections that already apply outside of the classified information context, particularly given, as David McCraw has been stressing, the earthshaking scope of the classification system. If I could wave a magic wand, I would be disinclined to create a special rule that demands anything less.

**Ardia:** So, you're thinking, Heidi, an intent requirement? A balancing of the public interest?

**Kitrosser:** Yes, I'm thinking probably strict scrutiny, but meaningfully applied, not a *Holder vs. Humanitarian Law Project* version. And this isn't really a fit for the incitement context, but perhaps borrowing elements from the incitement context. I think intent probably should be a part of it, and not watered-down intent but intent to actually create the national security disaster that government is prosecuting on the basis of.

**Ardia:** David, David, or Mary Rose want to weigh in on this?

**Papandrea:** Just to piggyback on Heidi, no surprise, I would actually, maybe, go a little farther and embrace the Pentagon Papers standard. Even though Pentagon Papers was a prior restraint case,[68] I would embrace that same standard, which arguably is higher than even strict scrutiny depending on how you think about it. But risk of imminent and serious damage to national security, and not only public interest, that would be part of it if it's a third-party publishing. I think the intent standard, and I've argued this elsewhere, can help us. Rather than try to distinguish among publishers and try to figure out who's a journalist, who's not a journalist, maybe we use the press clause––I'm very much opposed to that. But I do think that intent can be helpful in protecting those who truly are trying to inform the American people rather than those who are trying to aid our enemies. How that works in practice, I appreciate that's tricky, but that would be the way I would go.

**Schulz:** I could go next, because I agree. I would have two things I would do if I had a magic wand. One is to have some sort of intent criteria, whether it's Heidi's or Mary-Rose's, that there would be a burden to show an intent to harm at the liability phase on the government, but that the public interest would have to come in either as a defense by the defendant or at the sentencing phase, in either phase. Some sort of balance along the lines of what Judge Tatel tried to do with the reporter's privilege, where you were balancing when you have a leak investigation, how do you apply the reporter's privilege? He said, well, we've got to balance the importance of the leak against the importance of whatever the crime was and decide. There will be some cases where it's more important for the people to know what was leaked than for the government to prosecute the crime, and I think some sort of balance like that has to come in, which is totally missing at the moment, where a judge is going to have to weigh the importance. I would say that the sorts of things we learned from Snowden—the wiretapping, surveillance, all the things we didn't know are going on—are orders of magnitude different in terms of their public importance from what was disclosed in WikiLeaks. Somehow that needs to factor into both the liability phase as an affirmative defense by the leaker, that this was something the public had a right to know, and at the sentencing stage, potentially.

[68] N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

**McCraw:** There's not much I could add to all of that, other than I'd like to underscore Heidi's point, that I would not look forward to seeing a tampering with the First Amendment standard for the recipients or publisher. I think between *Bartnicki* and what can be drawn from the Pentagon Paper decisions, the protection is strong and right. I think for the government employee who provides the information, there should be an opportunity to argue public interest, probably along the way that Dave Schulz is talking about with harm versus interest.

**Ardia:** Ashley did you have some questions from the virtual audience?

**Fox:** Yes. I think we can start with this one continuing our discussion about the Assange case. If we do see this Assange case go the route of drawing a line when reporters can get too involved in encouraging sources to bring them information, as Professor Schulz suggested could happen, how many problems would that create for investigative journalists as far as feeling that they are limited and, maybe, they have to sit back and wait for sources to come to them as opposed to going out to sources themselves? If anyone wants to take that one.

**Papandrea:** I volunteer David McCraw to say what you would think, and then I'll offer my thoughts. But given that you see this upfront with your journalists, what would happen?

**McCraw:** Yeah, I think that this is one of the problems with the way the Assange indictment is written. Encouraging people, encouraging sources to provide documents is part and parcel of what journalists do. This idea that there's only complete passivity, only the Trump tax returns coming in a brown envelope to Sue Craig's mailbox, if that's the only thing being protected, not a lot's being protected. And it's not actually good for journalism because getting something like that in a brown envelope with no markings on it is great legally and awful journalistically. How do you know it's authentic? So, I think that that there is a broad definition of routine newsgathering that should remain protected, and that includes asking people for proof of what they're saying, if somebody tells you something, asking for the document. I find in the Assange indictment when they're talking about him encouraging by posting something on the Internet—him asking does anybody have these ten documents, I'd love to see them—has none of the hallmarks of

pressure or overbearing somebody's will or threatening it or something, it's really quite remote. But even in the direct reporting situation, I think asking a fully sentiment adult, would you give me a document, with that fully sentiment adult being able to say no, shouldn't cross a First Amendment line.

**Papandrea:** Yeah, I'll just underscore that. Remember, I think everyone on this panel has agreed that there might be a different standard for government employees or contractors and the third-party publishers. Assuming the government can prosecute and does prosecute the original leaker, we can afford to give more protection to the publishers. And even if it means that they cajole and encourage and so on and so forth, unless they're like beating someone up, tying them up, and forcing the disclosure, which is not what we're talking about, I have no confidence that the judiciary could draw a line that would be workable. I do want to point out in the AIPAC prosecution, the conspiracy aiding and abetting charges rested on the provision of inviting the source to a baseball game and providing a fax machine to which the source could send documents.[69] I mean, that is outrageous, but it's also exactly what the government alleged was sufficient to constitute aiding and abetting the leak of the information. So, I don't have any confidence that that line can be drawn. But if they did draw it, I think it would cause just a whole bunch of problems, and it's not necessary to hold the publisher responsible when we can hold the leaker responsible under certain circumstances.

**Schulz:** In response to the question, I certainly acknowledge there are a lot of problems. I guess I was offering that as one way of trying to sever Assange from bigger problems. And I do think there is a difference to be made between a reporter pursuing a story, knowing information, and trying to get support or authentication. It seems to me different in kind than Assange saying, just give me anything you've got. I want this whole file. I want that whole file. I'm on a fishing expedition. That does seem to me to be a different factual scenario that maybe alters the presumptions that should apply in terms of his intent and the government's legitimate ability to protect those secrets.

**Fox:** Thank you, I think those are all great answers. I had another question about the intent that different types of leakers

[69] *See* United States v. Rosen, 445 F. Supp. 2d 602, 609, 644 (E.D. Va. 2006).

might have: should there be a different legal or ethical paradigm applied to people who maybe hack and then leak information as opposed to government employees who have authorized access to information and leak it? And how is this affected by whether the employees are acting as private citizens or whether whistleblowing or communicating with the press is a part of their job description?

**Kitrosser:** Well, I'll take at least the last part of that because I've written a bit about how the First Amendment protection differs depending on whether it's part of the employee's job or not. So, as all the panelists know and many of the people in the audience might know, the Supreme Court did draw a pretty sharp line in the case of *Garcetti v. Ceballos*.[70] This isn't just for national security employees, but for government employees generally, when the Supreme Court said that if you speak in the course of actually doing your job, that receives no First Amendment protection at all.[71] Now, as to how they have drawn that sharp line, I think that's deeply problematic for reasons I won't expand on given the limited time we have left. But suffice it to say, I think that sacrifices a great deal of speech that is of utmost First Amendment value. I will say, in terms of how that relates to national security leakers who leak classified information, in the immediate wake of the *Garcetti* decision, there was some speculation because of some of the language in the case that might mean that there's no First Amendment protection under *Garcetti* for people who come into the possession of classified information as part of their job and leak it because that's information that they wouldn't have had but for their job. I will say the subsequent case of *Lane v. Franks*,[72] I think, actually eliminates that argument and makes pretty clear that just because you came into possession of information due to your job does not mean that when you convey that information you are doing your job.[73] So, I actually think there's a pretty good argument a leaker could make that, almost by definition, if they're leaking information that they're not supposed to be leaking, they're not doing their job. So, in that sense, they're not unprotected by the First Amendment from a *Garcetti* perspective. Rather, the problem they run into is, again, this national security exceptionalism argument that they keep hearing about. So, this

[70] 547 U.S. 410 (2006).
[71] *Id.* at 412.
[72] 573 U.S. 228 (2014).
[73] *See id.* at 238–41.

question of whether you are doing it in the course of doing your job or not, that, I think, is not really the hurdle that they have to worry about.

**Papandrea:** On the hackers, you know, that is a really good question because that has been a problem. It could be an increasing problem, and I do worry about privacy of people whose emails are hacked in that way. It's not distinguishable from *Bartnicki*, just on the facts of it, except that one thing that a lot of people don't focus on in the *Bartnicki* decision is that the decision did say that they didn't need to hold the radio broadcaster liable because they usually can identify who the interceptor was. In the hacking, I think increasingly we're seeing that the government has a lot of trouble identifying who the hackers are, so that is perhaps a distinguishing factor. Dave McCraw, maybe you have thoughts on hacking. I know that the news outlets have their own journalistic ethics on reporting out hacked information. So, in some ways, they're gatekeepers and do not just republish everything that they get if it's hacked. But I understand those are very difficult types of decisions. To me, this whole hacking thing is distinguishable. I think we've been focusing on this discussion more about government employees who have access to this information as part of their jobs. But people who are hacking is a whole different level, and I could imagine it's going to be an increasing societal problem.

**McCraw:** And the First Amendment protection, I feel very strongly that should be the same for the publisher. But I think the ethical considerations are really troubling. When Sony was first hacked by the North Koreans, *The Times*, as a matter of standards, decided not to break stories from that hack. But if others were writing about them, the secrecy was out, and it was newsworthy, we'd write about it. It seemed that was different, a private entity being hacked [as opposed to] the government having its secrets purloined, as it were. But then you get to DNC, and it's very hard to say that the DNC materials, even though hacked, were not of such public interest that you wouldn't write about them. And I think virtually every journalistic organization in the country did so. What I hear most often at *The Times* from editors is that it's very important that we not only make good decisions about what we're publishing—that there is a legitimate news interest in it, a public interest in publishing it—but we also need to tell the story of how it came to be in the public's hands, that the story behind the story is it's the North Koreans because

they're unhappy about a really terrible movie. It's the Russians because they're interfering with the election, and we're going to see more of that. I think the challenge for mainstream news media organizations is to go out and tell that story behind the story, even if they decide to publish some of the information that is received.

**Fox:** Great, thank you. So, I think we'll just close on one final question that I think ties together really all of our topics for today. There are a lot of concerns these days about the state of our democracy, about trust in our government institutions. How does the rise in leak prosecutions that we've seen in recent years relate to that? And how do all of the topics we've covered today––overclassification, leak prosecutions, national security reporting—fit in with the theory of democratic self-governance behind the First Amendment, the idea that the public needs this information for citizens to be able to govern themselves in a democracy. That's a broad question, but I think we can tackle it here in our last couple of minutes. Whoever wants to take a stab at it first.

**Kitrosser:** I'll dive in. That is a very good question, but it is a huge question. So, I'll sort of pick off little bits of it. Certainly, the most intuitive way, of course, in which all of this relates to self-governance is the notion that the people need to have some idea of what's going on in order to be able to govern themselves and hold their representatives accountable. This makes me think of how the Roberts Court gets a lot of plaudits, generally, for being very, very pro free speech. And yet, we have seen, I think, the Court issue some very disappointing decisions when it comes to speech that helps to inform us. So, it's the Roberts Court that issued the *Garcetti* decision, *Holder v. Humanitarian Law Project*, which, although it's not directly about leaking classified information, it kind of gives further steam to the national security exceptionalism that underlies these lower court cases. So, it does worry me that what we see from the Court is this very strong embrace of, "you can say whatever you want, however offensive, however upsetting," which I do support as a matter of First Amendment law, but there is much less importance placed on the ability of people to actually be able to gain information so that they can say informed things and inform each other and govern themselves. I do worry, relating that to the bigger question, that may reflect where we're at culturally in some ways that we see a great deal of importance placed and concerns

expressed about whether or not people are sufficiently able to express themselves. We see concerns raised about cancel culture, for example, and political correctness, which often are wielded against people who say "well, I don't feel free to say things that may offend people and may therefore lead me to be criticized," but there is much less concern expressed about whether people are actually able to gain the information they need to govern themselves. So, that's just a couple of tiny pieces I'm biting off of that very large question. We can obviously speak for hours about different ways to answer it, but those are just a couple of thoughts.

**Papandrea:** Well, I think, Ashley, you answered the question a little bit in the question by saying it's important for people to be informed, and what I worry about is a crackdown on the leakers. I really worry about the disintegrating trust in the press and also just all the problems the press has in doing its job, the financial models for the press to be successful. We're not going to function well unless we have dedicated journalists. I could be an ad for your newspaper, David McCraw. You know, it's not enough to have people on social media sharing their ideas about stuff. They have to get information from people who have the knowledge and the expertise to analyze what is happening and what the government is doing. And, particularly with all of the information that the government is producing, the increase of databases and so on, you have thousands and thousands, millions and millions of documents, [it doesn't help] unless you have dedicated experts going through those materials, helping us to understand what they mean. To me, this is a fundamental part of making sure we have a working democracy. And we've had such a weird system for decades where leakers occasionally would be prosecuted, but not too often. The press, never. They get called traitors, but they rarely actually are prosecuted. But I see this threatened. I'm thrilled that Biden is president now for a lot of reasons, but I think it's likely this administration will be more appreciative of the role of the press. We won't hear President Biden tweeting out fake news and attacking every outlet, throwing garbage on journalists every day, encouraging the supporters to beat up journalists at the rallies. All these attacks, we could have a whole symposium on that. I'm hopeful that, in the next four years, this administration will respect the press. I don't mean to say it will always be rosy. There are always disputes between the executive branch and the press. But remember, this is four years, so we're fighting. We're in it for the

long haul, and the people are turned against the press in a lot of ways. So, I do worry, and I just applaud the work of Heidi, David Schulz, David McCraw and the panelists this morning continuing to research how we can solve this very difficult problem.

**Schulz:** I would just say amen to all of that. Just to tie it together with the panel this morning, I think it was Justice Black in the Pentagon Papers case who said something like, national security is a broad and vague term,[74] and we need transparency with respect to the national security issues we're talking about, in particular, because, with respect to national security, the only real check on government abuse is the people. And when we keep it in secret, we have all sorts of problems. So, everything that was said about the need for this, for democracy to function, is especially true in oversight of our national security forces.

**Fox:** Great. Thank you so much. I think we'll end there. I think we could all sit here and talk about these topics all day. I know I could sit here and listen to these topics all day long. Thank you, and thank you to everyone for coming today.

[74] N.Y. Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring).