

Interview Hot Sheet
Espionage Act of 1917 and Applicability to Journalists
Prepared by: Beth Chesterman, FAC Intern (Nashville)
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OVERVIEW:

The Espionage Act of 1917 was enacted at the beginning of World War I and has only been amended once, in 1950, during the height of the Cold War. Although the government has never prosecuted a journalist for reporting classified information in violation of the Espionage Act, academics generally agree that there are at least three sections of the act that could possibly be used to prosecute a journalist.

Since the enactment of the Espionage Act, at least three cases have occurred that may offer some insight into how a court would rule if deciding an espionage case brought against a journalist. In addition, the outcome of a current espionage case against two non-governmental, professional lobbyists may be insightful as to how a court would rule in an espionage prosecution against a journalist.

There has been an increasing concern that journalists may actually be charged under the Espionage Act after Attorney General Alberto Gonzales commented in an interview in May 2006 that he feels the act applies to journalists. Currently no charges have been filed against any journalist; however, the government is investigating the authors of several articles within the last year which have reported classified information about the “war on terror.”

HISTORICAL BACKGROUND:

Congress’ first attempt at protecting military information was the Defense Secrets Act of 1911. Prior to the Defense Secrets Act of 1911, there were only two federal laws that generally dealt with espionage. One dealt with treason, 35 Stat. 1038 (1909), and one with unlawful entry into military bases, 35 Stat. 1097 (1909).¹

The Espionage Act of 1917 was introduced two days after President Wilson announced that the U.S. would be severing ties with Germany. The U.S. entry into World War I increased concern about possible enemy spying.² Those in favor of the act pointed to instances during the Civil War when newspapers had published Union military plans and jeopardized troop operations. However, opposition to the legislation feared that President Wilson would use the act to suppress criticism of the war.³

¹ Harold Edgar and Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 930, 940 (1973).

² Edgar and Schmidt, *supra*, at 940-41.

³ Edgar and Schmidt, *supra*, at 941.

The original bills gave the executive branch power to restrict publication of government secrets, public access to defense places, and reporting on certain war topics. But lobbying efforts from newspapers convinced the House and Senate to narrow the act's prohibitions.⁴

In 1950, Congress extended the act under §793(e) by prohibiting everyone from communicating national defense information to persons “not entitled to receive it.” The provision also made it criminal to retain national defense information. However, the legislative history behind the amendment is not clear as to whether the provision applies to non-government employees and the amount of culpability that is required.⁵

APPLICABILITY OF THE ACT TO JOURNALISTS:

The Supreme Court has yet to rule on whether it is constitutional to prosecute those who leak to the press under the Espionage Act. Furthermore, no court has ruled on whether it is constitutional to prosecute a journalist under the Espionage Act for revealing classified information to the public.⁶ Nonetheless, many academics agree that if a journalist were to be prosecuted under the act it would most likely proceed under one of the following three provisions.

Under 18 U.S.C. § 793(e), it is a crime to have “unauthorized possession of ... information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation” and “willfully communicate” it to “any person not entitled to receive it.” It is also a crime under 18 U.S.C. § 793(g) to conspire to violate section 793(e).⁷

Furthermore, it is a crime under 18 U.S.C. §798(a)(3) to “knowingly and willfully” publish any classified information “concerning the communication intelligence activities of the United States or any foreign government.”⁸

A violation of any of these three sections carries with it the possibility of a fine or up to ten years in prison.

⁴ Edgar and Schmidt, *supra*, at 946.

⁵ Edgar and Schmidt, *supra*, at 1021.

⁶ Louis Klarevas, *Can the Justice Department Prosecute Reporters Who Publish Leaked Classified Information? Interpreting the Espionage Act*, FindLaw, June 9, 2006, http://writ.news.findlaw.com/commentary/20060609_klarevas.html.

⁷ 18 U.S.C. § 793 (2006).

⁸ 18 U.S.C. § 793 (2006).

PAST ATTEMPTS TO USE THE ACT AGAINST THE PRESS:

Although no court has ruled on the constitutionality of prosecuting journalists under the Espionage Act, there have been several notable press cases since its enactment.

1942 Chicago Tribune

On June 7, 1942, the *Chicago Tribune* published an article following the American World War II victory at the battle of Midway. The article entitled “Navy Had Word of Jap Plan to Strike at Sea” reported that the U.S. Navy was aware of Japanese fleet strength and location. The article implied that the U.S. had broken Japanese naval codes and could read their communications – a fact that the Japanese were not aware about. Both the War Department and the Justice Department felt the disclosure violated the Espionage Act of 1917. In August 1942, the *Tribune* was brought before a federal grand jury. However, because the government was afraid of either further alerting the Japanese or releasing more secret information to the jury, the case was dropped.⁹

1971 Pentagon Papers

In 1971, the government filed suit in *New York Times v. United States* in order to seek an injunction against the *New York Times* and the *Washington Post* and prevent them from printing excerpts of the Pentagon Papers. The Pentagon Papers, actually entitled “History of U.S. Decision-Making Process on Viet Nam Policy,” revealed the U.S. government’s decade-long military and political strategy in Vietnam and the rest of Southeast Asia. Although the Court refused to grant the injunction, it indicted in dicta that after publication a newspaper could be charged criminally under the Espionage Act.¹⁰

Justice Byron White wrote in his concurrence that the legislative history of the Espionage Act indicates that “Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed.”¹¹ Furthermore, he wrote that he would have “no difficulty” in sustaining such a conviction.¹² White’s concurrence was joined by Justice Potter Stewart and Chief Justice Warren Burger wrote that he was in “general agreement” with White on this issue.¹³

Additionally, Justices Thurgood Marshall and Harry Blackmun were both unwilling to rule out the possibility of prosecuting journalists under the Espionage

⁹ Gabriel Schoenfeld, *Has the New York Times Violated the Espionage Act?*, Commentary Magazine, March 2006, <http://www.commentarymagazine.com/production/files/schoenfeld0306advance.html>

¹⁰ *New York Times v. United States*, 403 U.S. 713 (1971).

¹¹ *Id.* at 734.

¹² *Id.* at 737.

¹³ *Id.* at 752.

Act. Blackmun wrote that “First Amendment absolutism has never commanded a majority of this Court.”¹⁴

1988 Morison

Samuel Morison, a part-time civilian analyst at the Naval Intelligence Support Center in Maryland who also worked part-time as an editor of *Jane’s Fighting Ships*, a military defense magazine. Morison was accused of stealing two classified photos from a colleague’s desk that showed Soviet nuclear-powered aircraft under construction. After the photos appeared in *Jane’s Defence Weekly*, Morison was convicted under the Espionage Act and sentenced to two years in prison.¹⁵ In the opinion, the Fourth Circuit wrote that the “First Amendment, in the interest of securing news or otherwise, does not ‘confer a license on either the reporter or his news source to violate valid criminal laws.’”¹⁶

RECENT ATTEMPTS TO USE THE ACT AGAINST THE PRESS:

There is currently a case being tried against two lobbyists for leaking information to media sources and a foreign embassy. The outcome of the trial could have implications for future use of the Espionage Act against journalists. In three other instances, the government is investigating whether to bring charges against newspaper reporters for reporting classified information concerning the “war on terror.”

AIPAC lobbyists Steven J. Rosen and Keith Weismann

In August 2005, Steven J. Rosen and Keith Weismann were indicted for receiving classified defense information from U.S. government officials and communicating it with journalists and the Israeli Embassy. At the time, both were employees at the American Israel Public Affairs Committee, a lobbying organization based in Washington, D.C. The information allegedly exchanged dealt with U.S. policy toward Iran.¹⁷ Lawrence A. Franklin, the former defense department official who leaked the information, was convicted in January 2006 and sentenced to 12 ½ years in prison.¹⁸

The case against Rosen and Weismann marks the first time that U.S. citizens working outside the government have been charged with receiving classified information orally.¹⁹ Thus, because journalists are also professionals working outside of the government, the outcome of this case could impact on any

¹⁴ *Id.* at 761.

¹⁵ Schoenfeld, *supra*, <http://www.commentarymagazine.com/production/files/schoenfeld0306advance.html>.

¹⁶ *United States v. Morison*, 844 F.2d 1057, 1069 (4th Cir. 1988).

¹⁷ Walter Pincus, *Judge in Spy Trial Considers Motions; Difficult Constitutional Issues Cited*, Washington Post, Apr. 22, 2006, at A03.

¹⁸ Michael Barone, *Blowback on the Press*, U.S. News & World Report, May 8, 2006; Pg. 39; Vol. 140, No. 17.

¹⁹ Pincus, *supra*, at A03.

espionage case brought against a journalist. The trial against Rosen and Weismann is set to start August 7, 2006.²⁰

In January 2006, FBI agents showed up at the house of the late journalist Jack Anderson. The FBI wanted to search through his files for any classified information contending that they were looking for information related to the Rosen and Weismann case. Anderson's family is refusing to hand over the documents. The FBI also confronted George Washington University journalism professor Mark Feldstein about Anderson's files in March 2006. Feldstein is currently writing a biography about Anderson and has access to the files and also refused to hand over the documents.²¹

New York Times article on National Security Agency spying

On December 16, 2006, the *New York Times* ran an article by James Risen and Eric Lichtblau entitled "Bush Lets U.S. Spy on Callers Without Courts." The article reported that after September 11, 2001, President Bush had granted the National Security Agency authority to "eavesdrop on Americans and others inside the United States ... without the court-approved warrants ordinarily required for domestic spying."²²

On a May 21, 2006, episode of ABC's *This Week* George Stephanopoulos asked Attorney General Alberto Gonzales about the possibility of prosecuting journalists under the Espionage Act. Gonzales responded that, "There are some statutes on the book which, if you read the language carefully, would seem to indicate that [the prosecution of reporters for publishing classified information] is a possibility. That's a policy judgment by the Congress in passing that kind of legislation. We have an obligation to enforce those laws. We have an obligation to ensure that our national security is protected."²³

In response to Gonzales statement, the Senate Judiciary Committee held a hearing June 6, 2006, in regard to whether members of the press could be prosecuted under the Espionage Act. When asked about whether *Times* reporter James Risen could be prosecuted, Matthew W. Friedrich, an attorney from the Justice Department, refused to comment on the issue. However, he said that

²⁰ Richard Schmitt, *The World; Lobbyists' Lawyers Say Rice Leaked Information; The secretary of State and three other officials are to be subpoenaed. The defense says they told secrets to employees of a pro-Israel group*, Los Angeles Times, Apr. 22, 2006, at Part A; Pg. 24.

²¹ Sheldon Alberts, *A chilling fishing trip: The FBI's attempts to search the files of Jack Anderson, the late columnist who exposed the agency and the U.S. government for decades, has raised the ire of Anderson's family, journalists and the Senate judiciary committee*, Ottawa Citizen, June 11, 2006, at A14.

²² James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, New York Times, Dec. 16, 2006, <http://www.nytimes.com/2005/12/16/politics/16program.html?ei=5090&en=e32072d786623ac1&ex=1292389200>.

²³ Klarevas, *supra*, at http://writ.news.findlaw.com/commentary/20060609_klarevas.html

espionage laws “do not exempt ... any class of professional, including reporters, from their reach.”²⁴

Washington Post article on CIA secret prisons

It has also been suggested that Dana Priest of the *Washington Post* may have violated the Espionage Act by reporting on CIA prisons in Eastern Europe. The November 2, 2005, article entitled “CIA Holds Terror Suspects in Secret Prisons” detailed information the detention of high-ranking al Qaeda suspects.²⁵

The CIA investigated and dismissed an intelligence officer who allegedly gave Priest the information. In April 25, 2006, *National Review* column Andrew McCarthy called for Dana Priest to be charged under the Espionage Act.²⁶

Calls for criminal investigation against Times for bank data story

The Bush administration further lashed out at the *New York Times* for publishing a June 23, 2006, article entitled “Bank Data Is Sifted by U.S. in Secret to Block Terror.” The article, also written by Lichtblau and Risen, detailed a secret program initiated after September 11, 2001, in which international bank records are examined by the government.²⁷

On June 26, 2006, President Bush called the disclosure of the program “disgraceful” and Vice President Dick Cheney said that the “leaks to the *New York Times* and the publishing of those leaks is very damaging.” New York Republican Representative Peter King, the chairman of the House Homeland Security Committee, called for a criminal investigation into the *Times* disclosure calling it “absolutely disgraceful” and “treasonous.”²⁸

²⁴ Pincus, *supra*, at A03.

²⁵ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, *Washington Post*, Nov. 2, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

²⁶ Andrew C. McCarthy, *Reporters and Investigations*, *National Review Online*, Apr. 25, 2006, <http://www.nationalreview.com/mccarthy/mccarthy200604251149.asp>.

²⁷ Eric Lichtblau and James Risen, *Bank Data Is Sifted by U.S. in Secret to Block Terror*, *New York Times*, June 23, 2006, <http://www.nytimes.com/2006/06/23/washington/23intel.html>.

²⁸ Sheryl Gay Stolberg, *Bush Condemns Report on Bank Records*, *New York Times*, June 26, 2006, <http://www.nytimes.com/2006/06/26/washington/26cnd-prexy.html?hp&ex=1151380800&en=f041c93d1f1731c4&ei=5094&partner=homepage>.