

**AIDING THE ENEMY OR PROMOTING DEMOCRACY?
DEFINING THE RIGHTS OF JOURNALISTS AND
WHISTLEBLOWERS TO DISCLOSE NATIONAL SECURITY
INFORMATION**

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*[T]he only effective restraint upon executive policy and power
in the areas of national defense and international affairs may
lie in an enlightened citizenry—in an informed and critical
public opinion which alone can here protect the values of
democratic government.*

— Justice Potter Stewart¹

¹ N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (per curiam).

I. INTRODUCTION

The Espionage Act of 1917²—a law originally created to fight acts of espionage³ and treason⁴—is increasingly being used to prosecute whistleblowers who, in an effort to raise public awareness, disclose to the media questionable government activity.⁵ Consequently, the government has used the Espionage Act to deter whistleblowers from disclosing any information involving national security.⁶ However, not all national security disclosures have the purpose or effect of harming our country. In fact, placing substantial restrictions on the disclosure of this kind of governmental information may be even more harmful. Although secrecy is important in preserving the nation's security, public disclosure of certain information or conduct is necessary for a healthy democracy because it adheres to fundamental notions of democracy and significantly increases government accountability.⁷ In contrast, nondisclosure of government information creates greater opportunity for the government to engage in activities that are illegal, immoral, and publicly unpopular.⁸ Additionally, by substantially restricting disclosure,

² Originally 50 U.S.C. § 31 (1917), the Espionage Act has been amended numerous times over the years. It is currently codified at 18 U.S.C. §§ 792–799 (2012).

³ “Espionage” is defined as: “The practice of using spies to collect information about what another government or company is doing or plans to do.” BLACK’S LAW DICTIONARY 490 (abridged 9th ed. 2010).

⁴ “Treason” is defined as “The offense of attempting to overthrow the government of the state to which one owes allegiance, either by making war against the state or by materially supporting its enemies.” *Id.* at 1292.

⁵ See Sarah Wood Borak, *The Legacy of “Deep Throat”: The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No Fear Act of 2002*, 59 U. MIAMI L. REV. 617, 618 (2005) (explaining that “whistleblower motivations include a desire to effect change and to improve government transparency and accountability”); Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL’Y J. 51, 75 (2012) (explaining that the Espionage Act is “a statute typically reserved for the treasonous act of giving secret information to an enemy”); Jesselyn Radack, *Torturers Roaming Free, John Kiriakou Tried for Espionage—The Latest in the War on Whistleblowers*, GOV’T ACCOUNTABILITY PROJECT (Oct. 18, 2012), <http://www.whistleblower.org/blog/42-2012/2307-torturers-roaming-free-john-kiriakou-tried-for-espionage-the-latest-in-the-war-on-whistleblowers>; see also Daniel Ellsberg, *Secrecy and National Security Whistleblowing*, HUFFINGTON POST BLOG (Jan. 13, 2013), http://www.huffingtonpost.com/daniel-ellsberg/secrecy-and-national-secu_b_2469058.html (arguing that the “unpatriotic, even traitorous” appearance of “telling secrets” of national security “reflects the general presumption—even though it is very commonly false—that the secrecy is aimed not at domestic, bureaucratic or political rivals or the American public but at foreign, powerful enemies, and that breaching it exposes the country, its people and its troops to danger”).

⁶ Moberly, *supra* note 5, at 73.

⁷ *Id.* at 113–14; Borak, *supra* note 5, at 617–20.

⁸ See Moberly, *supra* note 5, at 118–21.

the government can conceal such conduct in order to avoid public criticism.⁹ Thus, public disclosure of certain government information is also necessary to prevent governmental abuse.

The increased prosecutions of whistleblowers not only demonstrates the government's complete disregard for the benefits of certain disclosures, but also its failure to recognize the fact that whistleblowers are not the only participants of disclosure. In fact, by nationally publishing disclosed information, the media plays an even greater role than whistleblowers in the distribution of classified government information. Without national or world-wide publication—whether through newspapers, online, television, or radio—such information would pose little to no threat because the likelihood of unwanted readers acquiring the information would be slim. Despite this fact, the government prosecutes only whistleblowers but allows journalists to widely distribute without fear of consequence the same information that the government is attempting to protect, namely, information that it believes to be harmful to national security.¹⁰

This Note argues that the government should cease taking steps to prevent *all* disclosures of national security information to the public. Instead, the government should be required to allow disclosures that benefit the public good. The public good is served by allowing disclosure that creates open public discourse—which leads to an informed public body—and by limiting disclosure that is likely to cause national harm. The government can regulate disclosure in this way by reducing the existing penalties for *good-faith* whistleblowing and by creating penalties for journalists who *recklessly* publish information that is likely to cause substantial harm. These changes in penalties for both whistleblowers and journalists can be implemented by amending the Espionage Act so as to include consequences only for true acts of espionage as well as for the reckless publication of imminently harmful national security information.

In order to successfully prosecute a whistleblower under such language, the government should have to prove a couple different factors. First, it should present evidence on the nature of the information being disclosed, specifically whether disclosure could produce imminent harm or threat of harm. If the government cannot show that the disclosure would create such harm or threat thereof, the whistleblower's act should not be punishable by the Espionage Act. Second, the whistleblower should be given the opportunity to show that, at the time of the disclosure, he did not act with purpose or intent to harm the United States. If, on the other hand, the whistleblower can prove that his intent was solely to create public awareness of a governmental act that he perceived to be illegal or unjust, a punishment under the Espionage Act would

⁹ *Id.* (referring to this as permitting the government to hide illegal conduct “behind a veil of secrecy, even in the name of national security”).

¹⁰ *See infra* Part II.C.1.

be inappropriate.¹¹ In order to successfully prosecute a journalist or a member of the media, the nature of the information published must again be evaluated. However, in the case of a journalist, the government should not only have to show that the information he published was harmful, but also that the journalist had reason to believe the information was harmful. If a journalist can, in response, produce evidence showing reasonable efforts made to verify the accuracy of the information and to investigate the potential harm of disclosure before publication, a conviction under the Espionage Act would again be unfitting.

Amending the Espionage Act to consider these factors will not only promote the benefits of good-faith disclosure but will more effectively protect national security from harmful disclosures. Inevitably, this discussion will raise some First Amendment concerns pertaining to the ability of the government to restrict the rights of the media. It must be noted, however, that this Note argues that the government should only be able to challenge media publications in cases dealing with imminent national security issues and when necessary to protect the public good.

Part II of this Note provides some background information. It first explains the significance and timeliness for this discussion. It then identifies the underlying themes involved, namely, the rights to free speech and press and the importance of preserving national security. As will be discussed, the First Amendment provides no protection for disclosure of government information by a whistleblower. Therefore, a whistleblower must look for other avenues of protection. This Note will show that these avenues are very limited.

Parts III and IV both analyze the limitations faced by these whistleblowers. Part III identifies the failure of the only current legal safeguard—commonly known as the reporter's privilege—to adequately protect whistleblowers. Further, it demonstrates the use of the Espionage Act to prosecute whistleblowers for disclosing allegedly harmful information but not those who widely distribute the same information—the journalists. Part IV suggests that the public good requires disclosures that will benefit public discourse or that will hold the government accountable for its actions. Accordingly, some legal protection should be created for good-faith whistleblowers but should not ignore the potential for harm to national security. Therefore, any protection to whistleblowers and journalists should balance the benefits of nondisclosure (i.e. the need for secrecy) with the benefits of disclosure (i.e. the need for government accountability). That is to say, the public good is served when the public is both secure from harm by foreign

¹¹ It should be noted here that this author does not suggest that a whistleblower should be held entirely unaccountable for disclosing national security information. This author is only arguing that a conviction *under the Espionage Act* for these disclosures is severe and inappropriate. A whistleblower may face other repercussions for these disclosures, including termination or suspension from his employment. *See infra* Part II.A. This author does not suggest that such consequences are also inappropriate.

nations as well as secure from harm by its own government. Consequently, journalists must also face legal consequences when recklessly publishing information that may negatively affect the public good.

Finally, Part V recommends that Congress implement the preceding suggestions by amending the Espionage Act, and Part VI concludes the Note with a brief summary of the arguments presented.

II. BACKGROUND

The term “whistleblower” has been defined as a government employee who “discloses information that s/he reasonably believes is evidence of illegality, gross waste or fraud, mismanagement, abuse of power, general wrongdoing, or a substantial and specific danger to public health and safety.”¹² Furthermore, an informal distinction exists between “good” and “bad” whistleblowing.¹³ “Good” whistleblowing is disclosure of information, usually to the media, by persons attempting to reveal the wrongdoings of government officials.¹⁴ This type of whistleblowing typically exposes individual misconduct or abuse of power and is generally supported by both the public and the government.¹⁵ “Good” whistleblowing is rarely criticized because it does not involve disclosing national security information.¹⁶ On the other hand, “bad” whistleblowing—also known as “leaking”—deals with the dissemination of confidential information involving or affecting national security.¹⁷ “Bad” whistleblowing is not only discouraged but is strongly opposed by most governments.¹⁸ Examples of “bad” whistleblowing include disclosure of confidential information revealing the current position of troops or an active war plan.¹⁹ “Bad” whistleblowing is more complex than “good” whistleblowing because, although frowned upon by the government, there are instances in which disclosure of such confidential information is beneficial to the public good. In these instances, “bad” whistleblowing can be necessary to maintain an

¹² *What is a Whistleblower?*, GOV'T ACCOUNTABILITY PROJECT, <http://www.whistleblower.org/about/what-is-a-whistleblower> (last visited Oct. 6, 2013).

¹³ Moberly, *supra* note 5, at 73.

¹⁴ *Id.*

¹⁵ Wes Ritchie, *Why IMMI Matters: The First Glass Fortress in the Age of WikiLeaks*, 35 SUFFOLK TRANSNAT'L L. REV. 451, 463–64 (2012).

¹⁶ *See, e.g., id.* at 476; Mark Fenster, *Disclosure's Effects: WikiLeaks and Transparency*, 97 IOWA L. REV. 753, 782 (2012); Mary-Rose Papandrea, *Balancing and the Unauthorized Disclosure of National Security Information: A Response to Mark Fenster's Disclosure's Effects: WikiLeaks and Transparency*, 97 IOWA L. REV. BULL. 94, 112 (2012), available at http://www.uiowa.edu/~ilr/bulletin/ILRB_97_Papandrea.pdf.

¹⁷ Moberly, *supra* note 5, at 73.

¹⁸ *See Ritchie, supra* note 15, at 465–66.

¹⁹ *See Ellsberg, supra* note 5.

enlightened and informed public—the very essence of a democratic state. But where do we draw the line between potential harm to the nation and thoughtful public debate? It is this question that has made “bad” whistleblowing become a continuing source of controversy for the courts, Congress, and the Executive office.²⁰

A. *The Reporter’s Privilege*

Inherent in whistleblowing is the relationship between the whistleblower and the media. Whistleblowers generally disclose information revealing improper government activity or policy to “parties that can influence and rectify the situation” including, most notably, the media.²¹ Whistleblowers rely on the media to raise public awareness of these wrongful activities not only because of the media’s ability to do so, but because of the repercussions that a whistleblower may face if he does so himself.²² In addition to disciplinary actions imposed by employers,²³ the government can prosecute the whistleblower and will likely do so in situations involving the disclosure of national security information.²⁴ Consequently, several jurisdictions have enacted laws allowing the media to shield the identity of its sources, many of whom are whistleblowers.²⁵ This shield is commonly known as the reporter’s privilege.²⁶

²⁰ See Sandra Davidson & David Herrera, *Needed More than a Paper Shield*, 20 WM. & MARY BILL RTS. J. 1277, 1298–99 (2012); William E. Lee, *The Demise of the Federal Shield Law*, 30 CARDOZO ARTS & ENT. L.J. 27, 31–35 (2012). For a detailed discussion, see Moberly, *supra* note 5, at 72–111.

²¹ *What is a Whistleblower?*, *supra* note 12.

²² Ellsberg, *supra* note 5 (explaining that, in addition to an “internalized commitment to keep official secrets from outsiders,” employees have strong incentives not to disclose information, which includes “loss of access to meetings and information, loss of clearance, demotion or loss of promotion, loss of job or career, loss of retirement benefits, harm to marriage or to children’s prospects that comes with loss of income, even danger of prosecution and prison”).

²³ See Borak, *supra* note 5, at 619 (discussing that many whistleblower protection laws have been aimed at protecting whistleblowers from employer retaliation). Borak argues that laws with these aims inadequately provide protection to whistleblowers and continue to “curtail a whistleblower’s potential for success.” *Id.*

²⁴ See Moberly, *supra* note 5, at 88–89 (President Obama does not appear to believe all whistleblowers are bad, “just the ones who publicly disclose classified information when they blow the whistle.” Moberly states, “[t]o put it bluntly, when it comes to national security, Obama would rather protect secrecy than protect whistleblowing.”).

²⁵ See, e.g., Lee, *supra* note 20, at 35–37 (explaining that the definitions of “journalist” or “news media” contained in these statutes differ between states).

²⁶ A reporter’s privilege may also be referred to as a “shield law.” For an updated list of the most recent federal and state actions pertaining to a reporter’s privilege, see *Reporter’s Privilege/Shield Laws*, MEDIA L. RESOURCE CTR., <http://www.medialaw.org/topics-page/reporters-privilege-shield-laws> (last visited Oct. 6, 2013).

Specifically, the reporter's privilege gives journalists the ability to refuse to identify their confidential sources during certain court proceedings.²⁷ Moreover, the journalist can refuse to produce additional unpublished information obtained from the source.²⁸ It must be noted, however, that there is currently no federal reporter's privilege and the currently recognized state privileges vary greatly in scope and application.²⁹ Additionally, it remains unclear exactly who or what is protected by the privilege.³⁰

If the reporter's privilege is invoked, the case almost certainly involves a "bad" whistleblower given the unlikelihood that the government would pursue prosecution of "good" whistleblowers. Accordingly, the reporter's privilege is likely aimed specifically at protecting "bad" whistleblowers.³¹ It is unclear, however, the extent to which the privilege actually protects these whistleblowers. Although the privilege allows a reporter to refuse to identify his source, it does not prevent the whistleblower's identity from being revealed through other means.³² Thus, if evidence outside of the journalist's testimony implicates the whistleblower, the whistleblower may still be prosecuted for the disclosure regardless of the journalist's refusal to testify against him. In this instance, the potential consequences for the whistleblower include disciplinary action by an employer, criminal charges by the government, or both.³³ In the same instance, however, the journalist will not suffer any repercussions because

²⁷ Jonathan Peters, *WikiLeaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form*, 63 FED. COMM. L.J. 667, 671–72 (2011).

²⁸ *Id.*

²⁹ Lee, *supra* note 20, at 29; Geoffrey R. Stone, *Secrecy and Self-Governance*, 56 N.Y.L. SCH. L. REV. 81, 100 (2012) (explaining that even with the Supreme Court's rejection of a First Amendment journalist-source privilege and no federally recognized privilege, forty-nine states and the District of Columbia have recognized some form of a reporter's privilege, whether by statute or common law).

³⁰ Peters, *supra* note 27, at 668. There is substantial recent debate about the reporter's privilege and determining who qualifies as a journalist and what constitutes media. With the increasing use of the Internet, the definitions of "journalists" and "media" become vague. This determination is important for the reporter's privilege because we must be able to recognize exactly to whom the privilege applies. For example, do bloggers count? Surely we cannot hand out this privilege to every person who publishes information on the Internet—or can we? This question deserves much discussion but is outside the scope of this Note. For a greater overview of this discussion, see generally Lee, *supra* note 20, at 30–37; Peters, *supra* note 27, at 671–79.

³¹ The fact that a reporter's privilege will serve to protect national security whistleblowers may be the reason why a federal shield law has not yet become recognized. See, e.g., Peters, *supra* note 27, at 669 (arguing that organizations like WikiLeaks that serve as a "threat to national security" may not be provided any protection under a reporter's privilege because they do not engage in "journalism").

³² See, e.g., *infra* text accompanying notes 35–49 (detailing the case of Jeffrey Sterling who continues to face trial without testimony from a journalist that would identify him as a source).

³³ See Ellsberg, *supra* note 5; *supra* text accompanying note 22.

members of the media are not held responsible for distributing sensitive information.³⁴

A good example of the unreliability of the reporter's privilege is the case of Jeffrey Sterling, a former C.I.A. officer. Sterling was indicted under the Espionage Act and is still pending trial in front of the United States District Court for the Eastern District of Virginia.³⁵ Sterling allegedly leaked government information to a journalist, James Risen, who later published that information in a book entitled *State of War*.³⁶ Risen was subpoenaed to testify against Sterling once during the grand jury proceeding and then again after Sterling was charged.³⁷ Both times, however, Risen refused to reveal his confidential source, claiming a First Amendment protection from doing so.³⁸ The District Court agreed and entered an order protecting Risen from testifying under the reporter's privilege.³⁹ The court reasoned that because the government had additional evidence to make its case against Sterling, Risen's testimony "was not crucial" to its case.⁴⁰ The government appealed the court's order to the United States Court of Appeals for the Fourth Circuit arguing that precedent made it "clear" that no such privilege may be applied.⁴¹ Before beginning deliberation, the Fourth Circuit noted that a reporter's privilege has yet to be recognized by any federal courts of appeal and that the limited precedent for using the privilege is as "clear as mud."⁴²

On July 19, 2013, the Fourth Circuit ruled that Risen must testify in Sterling's case.⁴³ In so holding, the two-judge majority found that the First

³⁴ See Stone, *supra* note 29, at 91 ("[I]n the entire history of the United States the government has never prosecuted the press for publishing classified information relating to the national security." Stone goes on to say, "[o]f course, this does not mean such prosecution is impossible.").

³⁵ See Michael Calderone & Dan Froomkin, 'Reporter's Privilege' Under Fire from Obama Administration Amid Broader War on Leaks, HUFFINGTON POST, http://www.huffingtonpost.com/2012/05/18/reporters-privilege-obama-war-leaks-new-york-times_n_1527748.html, (last updated May 18, 2012, 5:58 PM); Charlie Savage, *Appeals Panel Weighs Question on Press Rights*, N.Y. TIMES, May 19, 2012, at A14, available at http://www.nytimes.com/2012/05/19/us/politics/appeals-panel-weighs-press-rights-in-case-involving-reporter-james-risen.html?_r=0.

³⁶ Savage, *supra* note 35, at A14.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* (referring to the Supreme Court of the United States' language in *Branzburg v. Hayes*, 408 U.S. 665 (1972)); see *infra* Part III.A.

⁴³ Charlie Savage, *Court Tells Reporter to Testify in Case of Leaked C.I.A. Data*, N.Y. TIMES, July 20, 2013, at A1, available at <http://www.nytimes.com/2013/07/20/us/in-major-ruling-court-orders-times-reporter-to-testify.html?pagewanted=all>.

Amendment “does not protect reporters who receive unauthorized leaks from being forced to testify against the people suspected of leaking to them.”⁴⁴ Specifically, the Court found that Risen’s testimony was necessary because his firsthand experience with Sterling could not have been obtained by any other means.⁴⁵ The dissenting judge, however, opined that “the majority’s articulation of the reporter’s privilege, or lack thereof,” compels every reporter to identify his or her confidential sources in a criminal trial “absent a showing of bad faith by the government.”⁴⁶ The dissent explains that such a practice “exalts the interests of the government while unduly trampling those of the press, and in doing so, severely impinges on the press and the free flow of information in our society.”⁴⁷ While the majority’s opinion is not controlling in other jurisdictions, it is now legal precedent in a jurisdiction with a significant presence of national security agencies and employees.⁴⁸ Further, the prosecution of Sterling continues on today.⁴⁹ Accordingly, the Fourth Circuit’s holding is a significant win for President Barack Obama’s “war on leaks.”⁵⁰

B. The “War on Leaks”

Due to the inability of the reporter’s privilege to effectively protect whistleblowers, as demonstrated by Sterling’s case, the current Administration has more than doubled the number of whistleblowers previously prosecuted under the Espionage Act.⁵¹ Further, while the government’s interest in prosecuting whistleblowers is to prevent disclosure of information that could be harmful to the United States, no legislative method is currently in place to deter the media from widely publishing that same harmful information. Therefore, absent any regulation of information published by the media, prosecuting whistleblowers for disclosing national security information cannot adequately serve the government’s interest of preventing harmful disclosure.

Nevertheless, the Obama Administration has been increasingly persistent in prosecuting whistleblowers and attempting to force journalists to

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Josh Gerstein, *CIA Leak Case May Not Spare Reporters*, POLITICO.COM (July 22, 2012, 11:50 PM), <http://www.politico.com/blogs/under-the-radar/2012/07/cia-leak-case-may-not-spare-reporters-129755.html> (explaining that Sterling’s case is suspended while awaiting a ruling by the Fourth Circuit on several interlocutory appeals made by the government). To follow Sterling’s case, see generally *USA v. Jeffrey Alexander Sterling: Selected Case Files*, PROJECT ON GOV’T SECRECY, <http://www.fas.org/sgp/jud/sterling/index.html> (last updated Oct. 23, 2013).

⁵⁰ See *infra* Part II.B.

⁵¹ See *infra* Part II.B and text accompanying note 71.

testify against them.⁵² This aggressive and “unprecedented crackdown over leaks” has been termed Obama’s “war on whistleblowers”⁵³ or more commonly, the “war on leaks.”⁵⁴ The Obama Administration’s reaction to recent disclosures of national security information highlights the disparity that exists between journalists and their sources regarding the ability to disclose information.⁵⁵

As a senator, President Barack Obama strongly supported legislative proposals extending more protection to whistleblowers.⁵⁶ He even co-sponsored the Free Flow of Information Act of 2007, which provided for a federal reporter’s privilege.⁵⁷ Accordingly, when he became President, both the House and the Senate seriously considered this proposal⁵⁸ and even introduced a second bill, the Whistleblower Protection Enhancement Act of 2009.⁵⁹ President Obama initially expressed great support for such protections.⁶⁰ Subsequently, however, the President began pushing for a “harder line with national security leaks,” specifically pertaining to “bad” whistleblowing.⁶¹ In 2009, the President “objected to the scope of the privilege envisioned by the [proposed Free Flow of Information Act] and requested the Senate to require judges to defer to executive branch judgments on matters of national security, rather than to make their own independent judgments on such issues.”⁶² Due to the competing interests of Congress and the President,⁶³ as well as the complex

⁵² See Moberly, *supra* note 5, at 75–80; Calderone & Froomkin, *supra* note 35.

⁵³ Moberly, *supra* note 5, at 53; Sam Ross-Brown, *The Changing Face of Espionage*, UTNE READER (Oct. 17, 2012, 12:47 PM), <http://www.utne.com/politics/the-changing-face-of-espionage.aspx#axzz2kH0NMkKD>.

⁵⁴ Calderone & Froomkin, *supra* note 35.

⁵⁵ Papandrea, *supra* note 16, at 111–12.

⁵⁶ Moberly, *supra* note 5, at 52.

⁵⁷ S. 2035, 110th Cong. (2007); *see also* Lee, *supra* note 20, at 32; Stone, *supra* note 29, at 100.

⁵⁸ Lee, *supra* note 20, at 32.

⁵⁹ H.R. 1507, 111th Cong. (2009); *see also* Stone, *supra* note 29, at 99 (explaining that this bill “still languishes in committee”). This bill was re-introduced twice in 2011. H.R. 3289, 112th Cong. (2011); S. 743, 112th Cong. (2011).

⁶⁰ See Stone, *supra* note 29, at 99.

⁶¹ Lee, *supra* note 20, at 32. *But cf.* *National Security Whistleblowers Not Effectively Protected by New White House Directive*, NAT’L WHISTLEBLOWERS CTR. (Oct. 11, 2012), <http://www.whistleblowers.org/index.php?option=content&task=view&id=1426> (In October 2012, President Obama did issue a Presidential Policy Directive which allegedly was supposed to provide greater rights for national security whistleblowers; however, this directive only provides for a final review by the agency head and does not preclude federal prosecution.).

⁶² Stone, *supra* note 29, at 100.

⁶³ With the vast disclosures released by WikiLeaks in 2010, any support of protection to whistleblowers—particularly from the Executive—greatly disappeared. *See* Lee, *supra* note 20, at 28–29; Peters, *supra* note 27, at 669.

and lengthy debate that would have to occur for a new proposal, Congress tossed aside the pending legislation to make room for “more pressing matters” like health care reform.⁶⁴

With a federal standard still under consideration, Congress continues its struggle to determine what and who the reporter’s privilege would protect.⁶⁵ The executive branch has made matters more difficult by expressing strong opposition to the courts’ ability to define the scope and applicability of the privilege.⁶⁶ First, the executive branch is concerned that the reporter’s privilege will not be applied consistently across all courts, thus creating “a recipe for confusion and inconsistency.”⁶⁷ Second, such a standard would allow judges to identify what information is important or harmful to national security.⁶⁸ The executive branch argues, however, that the task of identifying issues important to national security is a power reserved to the President alone; therefore, having the courts make such determinations would significantly infringe upon an important executive power.⁶⁹ Nonetheless, the courts are consistently placed in the position to define such a standard.

While the “war on leaks” is not altogether new, the persistence of the Obama Administration in prosecuting more and more whistleblowers has brought these problems to the forefront.⁷⁰ In only one term, the Obama Administration has charged—and is still charging—more individuals under the Espionage Act for leaking classified information than all previous presidential administrations combined.⁷¹ For example, John Kiriakou was charged in

⁶⁴ Lee, *supra* note 20, at 32.

⁶⁵ See *id.* at 32–33 (explaining that the core debate, not surprisingly, exists between the Republicans and Democrats in Congress and that the Obama Administration attempted to reach a compromise with key Senate Democrats on how to handle national security leaks).

⁶⁶ See *id.* at 32; Stone, *supra* note 29, at 100.

⁶⁷ Lee, *supra* note 20, at 32 (quoting a statement made in a letter written by Attorney General Michael B. Mukasey and J.M. McConnell, Director of National Intelligence).

⁶⁸ *Id.*

⁶⁹ *Id.* (defining such a task as “a classic executive branch function, one which the judiciary is ill-equipped to make”).

⁷⁰ President George W. Bush has also been noted as taking a hard line with national security leaks. However, President Bush never prosecuted any whistleblowers under the Espionage Act. See Moberly, *supra* note 5, at 53–54.

⁷¹ As of June 2013, the Obama Administration has charged seven individuals under the Espionage Act for leaking governmental information to the media. See Charlie Savage, *Manning is Acquitted of Aiding the Enemy*, N.Y. TIMES, July 31, 2013, at A1, available at http://www.nytimes.com/2013/07/31/us/bradley-manning-verdict.html?pagewanted=all&_r=0. However, only six of these individuals have been prosecuted so far. See Moberly, *supra* note 5 at 53 (explaining that Obama’s Department of Justice has prosecuted six people who “allegedly disclosed sensitive information to non-governmental entities (such as the media) under the Espionage Act, a statute typically used to prosecute disclosure of national secrets to foreign governments—more such prosecutions than all previous administrations combined”); Calderone & Froomkin, *supra* note 35. For more information about each of the six people prosecuted by the

January 2012 for releasing classified information regarding the interrogation of detainees at Guantanamo Bay.⁷² More recently, Bradley Manning was convicted of, among other things, six counts of violating the Espionage Act for disclosing to WikiLeaks sensitive government information including diplomatic cables and videos of questionable U.S. military airstrikes.⁷³ However, Manning did escape an “aiding the enemy” charge despite the prosecution naming him an “anarchist” and a “traitor.”⁷⁴ After facing up to 90 years in prison,⁷⁵ the 25-year-old U.S. Army Private First Class received a 35-year sentence.⁷⁶

Additionally, the Obama Administration is currently exploring ways to charge other individuals, such as Edward Snowden and Julian Assange, under the Espionage Act. Edward Snowden, a former U.S. National Security Agency (“NSA”) analyst, leaked to the media information regarding NSA programs that gathered data on telephone calls and emails in order to track potential terrorist activity.⁷⁷ Consequently, at least two charges have been filed against

Obama Administration, see generally Dana Liebelson, *Six Americans Obama and Holder Charged Under the Espionage Act (and One Bonus Whistleblower)*, POGO BLOG (Jan. 27, 2012), <http://pogoblog.typepad.com/pogo/2012/01/six-americans-obama-and-holder-charged-under-the-espionage-act-and-one-bonus-whistleblower.html>. Prior to the Obama Administration, only three people had been prosecuted under the Espionage Act. Chris Hedges, *Supreme Court Likely to Endorse Obama’s War on Whistleblowers*, TRUTHOUT.ORG (Mar. 12, 2012, 9:12 AM), <http://truth-out.org/news/item/7219:supreme-court-likely-to-endorse-obamas-war-on-whistleblowers>. One of those cases was dismissed, the defendant in the second case pled guilty, and the defendant in the third case was convicted but later pardoned after spending two years in prison. *Id.*

⁷² Ross-Brown, *supra* note 53 (explaining that “because Obama has declined to investigate war crimes under Bush 43, Kiriakou remains the only person to be charged in connection with torture at Guantanamo Bay—for any reason”).

⁷³ Savage, *supra* note 71. After spending over 1,000 days in prison, Bradley Manning’s two-month long trial began in early June 2013. See Ed Pilkington, *Bradley Manning Lawyer Alleges Slow Trial is ‘An Absolute Mockery’ of Rights*, THE GUARDIAN (U.K.) (Sept. 27, 2012, 5:40 PM), <http://www.guardian.co.uk/world/2012/sep/27/bradley-manning-lawyers-absolute-mockery>; Update 2/20/13: *55 Events to Mark Bradley Manning’s 1000 Day Imprisoned Without Trial*, BRADLEYMANNING.ORG (Feb. 20, 2013), <http://www.bradleymanning.org/news/update-22013-55-events-to-mark-bradley-mannings-1000-day-imprisoned-without-trial>.

⁷⁴ Savage, *supra* note 71.

⁷⁵ *Id.* Manning’s maximum possible sentence was recently reduced from 136 years. Richard A. Serrano, *Bradley Manning’s Lawyers Seek Lesser Sentence*, L.A. TIMES (Aug. 12, 2013, 12:25 PM), <http://www.latimes.com/news/nation/nationnow/la-na-nn-bradley-manning-defense-opens-20130812,0,7010966.story>.

⁷⁶ Charlie Savage & Emmarie Huetteman, *Manning Sentenced to 35 Years for a Pivotal Leak of U.S. Files*, N.Y. TIMES, Aug. 22, 2013, at A1, available at <http://www.nytimes.com/2013/08/22/us/manning-sentenced-for-leaking-government-secrets.html?pagewanted=all>.

⁷⁷ See Lindsey Boerma, *Edward Snowden: Traitor, Whistleblower or Defector?*, CBSNEWS.COM (Aug. 12, 2013, 6:00 AM), http://www.cbsnews.com/8301-250_162-57598041/edward-snowden-traitor-whistleblower-or-defector/; see also *Edward Snowden’s*

Snowden under the Espionage Act.⁷⁸ However, since Snowden fled the U.S. and was granted temporary asylum by Russia, no court proceedings have occurred.⁷⁹ Additionally, it has been reported that the Department of Justice is currently seeking to charge Julian Assange, the founder of WikiLeaks, for acting as Bradley Manning's accomplice and for participating in several other disclosures through the WikiLeaks website.⁸⁰ Before charges were filed against Edward Snowden, Assange was expected to become the Administration's seventh victim charged under the Espionage Act.⁸¹ Furthermore, recent events have sparked debate over the potential prosecution of a former Navy SEAL, Matt Bissonnette, who was involved in the shooting of Osama bin Laden.⁸² Bissonnette published a book, *No Easy Day*, which gave a firsthand account of that mission, thus revealing classified information.⁸³ A decision has not yet been made on whether Bissonnette will be prosecuted, but the chances look slim.⁸⁴

Father to Visit him in Russia 'Soon,' BBC NEWS (Aug. 11, 2013), <http://www.bbc.co.uk/news/world-us-canada-23659661>.

⁷⁸ Boerma, *supra* note 77.

⁷⁹ See Anna Aruntunyan & Doug Stanglin, *Snowden Thanks Russia for Asylum, Says 'Law is Winning,'* USA TODAY (Aug. 1, 2013, 4:07 PM), <http://www.usatoday.com/story/news/nation/2013/08/01/nsa-edward-snowden-russia-temporary-asylum/2607737/>.

⁸⁰ See Raffi Khatchadourian, *Manning, Assange, and the Espionage Act*, NEW YORKER (May 20, 2011), <http://www.newyorker.com/online/blogs/newsdesk/2011/05/manning-assange-and-the-espionage-act.html>. Due to some jurisdictional issues and the fact that Assange is not a U.S. citizen, an Espionage Act charge would be difficult to procure. See *id.*

⁸¹ See *id.*

⁸² Julian E. Barnes & Evan Perez, *Ex-SEAL's Prosecution Unlikely*, WALL ST. J. ONLINE (Sept. 12, 2012, 2:23 PM), <http://online.wsj.com/article/SB10000872396390443696604577645924269918282.html>.

⁸³ *Id.* (Bissonnette's book was published on Sept. 4, 2012).

⁸⁴ *Id.* (explaining that prosecution of Bissonnette seems unlikely). The Obama Administration has been accused of leaking information of the raid on Osama bin Laden for a political advantage in the President's recent re-election. Particularly, while the Administration vigorously condemned Bissonnette for revealing classified information, it stated that it likely will not seek prosecution of one of the men who participated in the killing of bin Laden—one of the most celebrated victories claimed by the Obama Administration. See Rowan Scarborough, *Details of bin Laden Raid Leaked First by Obama Aids*, WASH. TIMES (Sept. 16, 2012), <http://www.washingtontimes.com/news/2012/sep/16/details-of-bin-laden-raid-leaked-first-by-aides/?page=all>. In addition to Bissonnette, seven other men on the Navy SEAL team that participated in the mission to kill bin Laden leaked classified information to the creators of a Navy SEALs-based video game *Medal of Honor: Warfighter*. While it has been said that these men have all faced discipline, it has only been within the military itself. The men face no jail time. *Seven SEALs from bin Laden Team are Punished for Sharing Military Secrets with Creators of Video Game Medal of Honor*, MAILONLINE (U.K.) (last updated Nov. 10, 2012, 7:56 PM), <http://www.dailymail.co.uk/news/article-2230296/7-Navy-SEALs-team-6-punished-sharing-military-secrets-Medal-Honor-video-game-creators.html>.

The increased prosecutions as well as the inadequate protection of the reporter's privilege highlight several notable points. First, they demonstrate the vast consequences that a whistleblower faces for disclosing national security information. In contrast, a journalist faces no consequences for publishing the *same* information. It is true that some journalists have been jailed for refusing to identify their sources; however, no journalist has been punished for publishing national security information.⁸⁵ Second, these cases also illustrate the unreliable protection that the reporter's privilege provides to both whistleblowers and journalists. Due to the inconsistent application of the privilege across courts, whistleblowers cannot expect to remain anonymous and journalists cannot expect to protect their sources. Finally, these cases illustrate the role that a journalist plays in disclosure. For example, the information disclosed by Sterling was likely known only because of its publication in Risen's book. These points highlight the need to reevaluate the purpose of prosecuting whistleblowers and to determine whether it conforms to the original purpose behind the Espionage Act—to protect national security.⁸⁶ However, if the goal is to protect national security, some freedoms—press and speech—become somewhat restricted. Therefore, in order to resolve these issues, the importance of national security and First Amendment freedoms should first be discussed.

C. *An Informed and Secure Public*

A free media is fundamental to democracy.⁸⁷ Its primary function is to serve as a government “watchdog,” ensuring that the citizenry is fully informed of the workings and on-goings of the government.⁸⁸ A well-informed public is in the best position to discuss and criticize government conduct. This discussion acts as a check on the government, holding it accountable for its actions and policies and preventing abuse of power.⁸⁹ The ability of the media

⁸⁵ Savage, *supra* note 43.

⁸⁶ See Moberly, *supra* note 5, at 75.

⁸⁷ Carl Gershman, *Democracy as Policy Goal and Universal Value*, 6 WHITEHEAD J. DIPL. & INT'L REL. 19, 23 (2005). Gershman explains that a fundamental benefit of democracy is that it holds the government accountable for its policies and prevents abuse of power. He further explains that “[t]here is simply no way to control or eliminate corruption if people don't have access to the fundamental institutions of democracy,” including “a free media that can expose corruption” He continues that democracy cannot automatically eliminate corruption, “[b]ut without democracy [reduction of corruption and good governance are not] possible . . . and legal restraints leads inevitably to inefficient, overbearing, unresponsive, and corrupt governmental behavior.” *Id.*

⁸⁸ Jonathan Donnellan & Justin Peacock, *Truth and Consequences: First Amendment Protection for Accurate Reporting on Government Investigations*, 50 N.Y.L. SCH. L. REV. 237, 246–47 (2006).

⁸⁹ *Id.* at 247; Gershman, *supra* note 87, at 23.

to report government activities—freedom of press—and the ability of the public to discuss these activities—freedom of speech—are rooted in the First Amendment.⁹⁰

However, while the First Amendment protects most forms of public discourse, it does not protect the dissemination of all information.⁹¹ In fact, the First Amendment protects the right to speak and to publish, but it does not protect the right to know.⁹² In other words, there is no constitutional right of public access to government information.⁹³ Further, while such information can be essential to public discourse, few debate the necessity of keeping some information secret—particularly when it concerns information that may be harmful to the nation’s security.⁹⁴ Thus, when determining what government information can be disclosed and who can disclose it, two interests that are essential to a well-functioning democracy have been considered: (1) protection of First Amendment freedoms, and (2) protection of national security.⁹⁵

1. First Amendment Protections

The First Amendment freedoms of press and speech are the main tools against government repression and, therefore, are indispensable to democracy.⁹⁶ Government misconduct prompted the construction of the First Amendment,⁹⁷ which was also the first to be ratified.⁹⁸ Nevertheless, Joyce Gemperlein, of the Student Press Law Center, explains that “the First Amendment is a living document that is continually being debated and reinterpreted—and, sadly, violated—as our nation and the world we live in grow and change.”⁹⁹

Freedom of the press is particularly significant for journalists. Historically, the government exercised greater control over what was permitted to be published and, accordingly, prohibited any publications criticizing government action.¹⁰⁰ Consequently, the publication of this kind of material

⁹⁰ See Donnellan & Peacock, *supra* note 88, at 246–47.

⁹¹ Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939, 959 (2009).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *id.* at 939, 955.

⁹⁵ Peters, *supra* note 27, at 671–72; Stone, *supra* note 91, at 939.

⁹⁶ Davidson & Herrera, *supra* note 20, at 1277.

⁹⁷ Savage, *supra* note 35, at A14.

⁹⁸ Joyce Gemperlein, *Free Speech, Free Press: A Short History and Discussion of These First Amendment Guarantees*, STUDENT PRESS L. CTR., <http://www.splc.org/fafuture/2004/first/background.php> (last visited Oct. 6, 2013).

⁹⁹ *Id.*

¹⁰⁰ *The First Amendment in History*, ILL. FIRST AMENDMENT CTR., <http://www.illinoisfirstamendmentcenter.com/history.php> (last visited Oct. 6, 2013).

resulted in imprisonment or other severe punishments.¹⁰¹ Freedom of the press was designed to remove this fear and allow journalists to publish as they wish, thus creating an opportunity for the public to speak freely about their grievances against government policies or conduct.¹⁰² As Thomas Jefferson once stated, “‘free press’ is not primarily about freedom of expression, it is about maintaining the proper ‘basis’ of America[n] government,” that being, of course, thoughtful public discourse.¹⁰³

The leading United States case challenging freedom of the press involved Daniel Ellsberg and the Pentagon Papers in 1971.¹⁰⁴ The Pentagon Papers were top-secret documents describing the details of the United States’ involvement in Vietnam.¹⁰⁵ Daniel Ellsberg had assisted the U.S. government in writing these documents but later handed them over to Neil Sheehan, a reporter for the *New York Times*.¹⁰⁶ After a few stories detailing parts of the Pentagon Papers were published, the government pursued a court order preventing the *Times* from publishing any additional information gathered from those government documents.¹⁰⁷ In a separate action, the government attempted to prosecute Ellsberg under the Espionage Act.¹⁰⁸ However, that case was ultimately dismissed due to improper conduct by the prosecuting attorneys.¹⁰⁹

In the meantime, the government’s case against the *New York Times* worked its way up to the Supreme Court of the United States.¹¹⁰ After a ruling by the district court in favor of the *Times*, the government appealed its case to the United States Court of Appeals for the Second Circuit.¹¹¹ The Second Circuit remanded the case and ordered the district court to determine whether new information offered by the government presented an immediate national

¹⁰¹ See *id.*; Davidson & Herrera, *supra* note 20, at 1277.

¹⁰² P.A. Madison, *Original Meaning: Freedom of Speech or of the Press*, FEDERALIST BLOG (Oct. 18, 2008), http://www.federalistblog.us/2008/10/freedom_of_speech_and_of_the_press/.

¹⁰³ Jeffrey Feldman, *The Real Meaning of ‘Free Press,’* HUFFINGTON POST (Nov. 3, 2007, 3:43 PM), http://www.huffingtonpost.com/jeffrey-feldman/the-real-meaning-of-free-_b_71007.html.

¹⁰⁴ Moberly, *supra* note 5, at 79–80; Gemperlein, *supra* note 98.

¹⁰⁵ Moberly, *supra* note 5, at 120.

¹⁰⁶ *Id.* at 79.

¹⁰⁷ Gemperlein, *supra* note 98 (Gemperlein explains that this was the first time in U.S. history that any executive had received such an order against a publication for national security reasons); see also *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 725 (1971) (Brennan, J., concurring) (per curiam).

¹⁰⁸ Moberly, *supra* note 5, at 90.

¹⁰⁹ DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* 455–56 (2003).

¹¹⁰ *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), *rev’g* *United States v. N.Y. Times Co.*, 444 F.2d 544 (2d Cir. 1971), *rev’g* *United States v. N.Y. Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971).

¹¹¹ *N.Y. Times Co.*, 403 U.S. at 714.

security threat sufficient to support an injunction on the paper.¹¹² The *Times* appealed to the Supreme Court of the United States, which granted certiorari joining it with another decision that had barred the *Washington Post* from publishing similar information.¹¹³ The Court analyzed both cases together under *New York Times Co. v. United States*,¹¹⁴ which later became known as the “Pentagon Papers Case.”¹¹⁵ The result was a per curiam opinion including six concurrences and three dissents.¹¹⁶ The Court noted that prior restraints¹¹⁷ on First Amendment rights are presumed unconstitutional and subsequently held that the government did not meet its burden to justify the injunction.¹¹⁸ Thus, the injunctions placed on both newspapers prohibiting publication of the stories constituted a straightforward violation of the First Amendment.¹¹⁹

In order to reach its decision, the Court compared the newspapers’ First Amendment rights with the Executive’s interest in preserving national security.¹²⁰ The concurrences and dissents covered a wide spectrum, asserting theories of absolute free press at one end and complete deference to the Executive at the other. As Justice Warren Burger wrote in his dissent, “[o]nly those who view the First Amendment as an absolute in all circumstances . . . can find such cases as these to be simple or easy.”¹²¹ But there were indeed Justices who found this case that easy. For example, falling under the “absolute free press” side of the spectrum, Justice Hugo Black stated the following:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in

¹¹² See Kyle Lewis, *WikiFreak-Out: The Legality of Prior Restraints on WikiLeaks’ Publication of Government Documents*, 38 WASH. U. J.L. & POL’Y 417, 432 (2012).

¹¹³ *N.Y. Times Co.*, 403 U.S. at 714. See *United States v. Wash. Post Co.*, 446 F.2d 1327 (D.C. Cir. 1971), *aff’d*, *N.Y. Times Co.*, 403 U.S. 713 (1971); see also Lewis, *supra* note 112, at 429–32.

¹¹⁴ *N.Y. Times Co.*, 403 U.S. 713.

¹¹⁵ *New York Times Co. v. United States*, OYEZ.ORG, http://www.oyez.org/cases/1970-1979/1970/1970_1873 (last visited Feb. 18, 2013).

¹¹⁶ See *N.Y. Times Co.*, 403 U.S. 713.

¹¹⁷ “Prior restraint” is defined as: “A governmental restriction on speech or publication before its actual expression.” BLACK’S LAW DICTIONARY, *supra* note 3, at 1031. In this case, the prior restraint was the injunction being sought by the government. Black’s Law Dictionary further states that “[p]rior restraints violate the First Amendment unless the speech is obscene, is defamatory, or creates a clear and present danger in society.” *Id.*

¹¹⁸ *N.Y. Times Co.*, 403 U.S. at 714.

¹¹⁹ *Id.*

¹²⁰ See *N.Y. Times Co.*, 403 U.S. 713. Note that, while in some places this decision grouped “free speech” in with “free press” under “First Amendment protections,” most of the Court’s analysis pertained specifically to “free press” only; again, demonstrating the lack of consideration for the rights of whistleblowers. See *id.*

¹²¹ *Id.* at 748 (Burger, J., dissenting).

our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam [W]ar, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.¹²²

On the issue of national security, Justice Black also explained that the protection of "security" is too broad and vague to be used to disturb a fundamental right like free press.¹²³ In addition, he argued that, "[t]o find that the President has 'inherent power' to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make 'secure.'"¹²⁴ On the other hand, Justice Harry A. Blackmun pointed out in his dissent that the First Amendment "is only one part of an entire Constitution," and that Article II of the Constitution gives the Executive sole power in the governance of foreign affairs and issues of national interest.¹²⁵

Moreover, nearly all of the Justices conceded the importance of keeping some national security information secret.¹²⁶ However, even while recognizing the President's power to do so, a majority of the Justices found that an argument for the protection of national security was insufficient to trump free press.¹²⁷ For example, Justice William O. Douglas argued in a separate concurrence that, while important to an effective national defense, "[s]ecrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors"; he argued instead that "[o]pen debate and discussion of public issues are vital to our national health. On public questions there should be

¹²² *Id.* at 717 (Black, J., concurring).

¹²³ *Id.* at 719.

¹²⁴ *Id.*

¹²⁵ *Id.* at 761 (Blackmun, J., dissenting).

¹²⁶ *See id.* at 714 (plurality opinion).

¹²⁷ *Id.* (plurality opinion).

‘uninhibited, robust, and wide-open’ debate.”¹²⁸ Additionally, Justice Potter Stewart explained in his concurrence that the areas of national defense and security are powers uniquely held by the Executive and unchecked by any other branch.¹²⁹ Recognizing the absence of such a check, Justice Stewart then argued that the only effective restraint to be placed upon the Executive is that of an “enlightened citizenry”—which can only exist through an unfettered free press.¹³⁰

As a result of these concerns, the case was ultimately decided in favor of the press.¹³¹ Specifically, the Court’s holding seemed to be based upon two main arguments. First, a majority of the Justices argued that the government did not meet its burden of proving that releasing this information would create substantial damage to public interest.¹³² Here, the Justices claimed that a mere possibility of a national interest threat was insufficient to prevent the press from publishing this material.¹³³ Instead, the Court held that the government has the burden of proving that publishing such information would result in “‘grave and irreparable’ injury to the public interest.”¹³⁴

Second, a majority of the Justices argued that it would flagrantly violate separation of powers for the Court to give the President complete authority to strike down, via the courts, any publication he deems adverse to national security.¹³⁵ In other words, by asking the Court to enjoin the press from publishing information that it does not want published, the Executive is attempting to bypass the legislative process and ask the Court to make law that Congress has not yet implemented.¹³⁶ In support of this argument, the Court

¹²⁸ *Id.* at 724 (Douglas, J., concurring).

¹²⁹ *Id.* at 727–28 (Stewart, J., concurring).

¹³⁰ *Id.* at 728.

¹³¹ *Id.* at 714 (plurality opinion).

¹³² *See id.* (plurality opinion).

¹³³ *See id.* at 726 (Brennan, J., concurring) (“Our cases . . . have indicated that there is a single, extremely narrow class of cases in which the First Amendment’s ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation ‘is at war’ . . . during which times ‘[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.’”); *id.* at 730 (Stewart, J., concurring) (“I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.”).

¹³⁴ *Id.* at 732 (White, J., concurring); *see also id.* at 726–27 (Brennan, J., concurring).

¹³⁵ *See id.* at 714 (plurality opinion).

¹³⁶ *See id.* at 742–43 (Marshall, J., concurring) (“It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are

cites situations where Congress explicitly refused to create such laws.¹³⁷ For example, Justice Thurgood Marshall pointed to at least two occasions where Congress “specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful.”¹³⁸ Justice Marshall went on to say that “[w]hen Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues—to overrule Congress.”¹³⁹ Therefore, absent evidence from the government that the information was detrimental to the public interest and absent specific power created by Congress, the Court held that the government could not prohibit the *Times* from publishing stories pertaining to the Pentagon Papers.¹⁴⁰

Overall, the Pentagon Papers Case illustrates the broad protection afforded to journalists under the First Amendment. Since that decision, there has been no other instance in the U.S. where the government has prosecuted a member of the press for publishing leaked governmental information pertaining to national security.¹⁴¹ However, because the case against Daniel Ellsberg was dismissed, the Court did not have the opportunity to clarify the legal rights that a whistleblower has with regards to disclosing this kind of information.¹⁴² Therefore, this case left unclear the protections afforded to whistleblowers who disclose national security information to journalists. One might expect that, because the Court in the Pentagon Papers Case placed such a high value upon the freedom of the press over that of the President’s power in national security, the Court would interpret freedom of speech for whistleblowers in the same light. However, the First Amendment has not yet been interpreted to provide

violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.”).

¹³⁷ See *id.* at 720–22 (Douglas, J., concurring); *id.* at 733–40 (White, J., concurring); *id.* at 743–47 (Marshall, J., concurring).

¹³⁸ *Id.* at 745–46 (Marshall, J., concurring). The first occasion that Justice Marshall cites to was before the Espionage Act was enacted when Congress declined a proposal that would give the President, in time or threat of war, the authority “to directly prohibit by proclamation the publication of information relating to national defense that might be useful to the enemy.” *Id.* at 746; see also *id.* at 721–22 (Douglas, J., concurring); *id.* at 733–34 (White, J., concurring). The second occasion that Congress refused to extend this privilege to the Executive was in response to a proposal by the United States Commission on Government Security suggesting that “Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified “secret” or “top secret,” knowing, or having reasonable grounds to believe, such information to have been so classified.” *Id.* at 747 (Marshall, J., concurring). Justice Marshall explained in his opinion that “[t]he Government is here asking this Court to remake that decision. This Court has no such power.” *Id.*

¹³⁹ *Id.* at 745–46 (Marshall, J., concurring).

¹⁴⁰ See *id.* at 714 (plurality opinion).

¹⁴¹ See Lewis, *supra* note 112, at 419; Stone, *supra* note 29, at 91.

¹⁴² See Moberly, *supra* note 5, at 90. Again, the case against Daniel Ellsberg was ultimately dismissed due to ethical violations of the prosecutor. *Id.* at 79.

any such protection to whistleblowers due to national security concerns and deference to the Executive.¹⁴³

2. National Security

While the Supreme Court of the United States recognized in the Pentagon Papers Case the importance of having an informed public and an accountable government,¹⁴⁴ it has not extended these policies to support actions of whistleblowers. This is in large part because whistleblowers are usually government employees¹⁴⁵ and, thus, are in a prime position to access sensitive national security information. Consequently, the Court has generally found that government employees have no First Amendment right to disclose such information.¹⁴⁶ In fact, the government takes affirmative steps in preventing such disclosure. For example, many employees are required to sign nondisclosure agreements prohibiting them from sharing any information learned on the job.¹⁴⁷ Absent a nondisclosure agreement, the government can require an employee to waive his constitutional rights to free speech and press if related to information gathered solely by way of being a government employee.¹⁴⁸ The Supreme Court of the United States has held that such

¹⁴³ See *id.* at 104–05 (explaining that disclosure of national security information by government employees is not protected speech).

¹⁴⁴ See *N.Y. Times Co.*, 403 U.S. at 717 (Black, J., concurring) (“The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people.”); *id.* at 724 (Douglas, J., concurring) (“Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion issues are vital to our national health.”); *id.* at 728 (Stewart, J., concurring) (arguing that, because these executive powers lack the traditional checks and balances of government, “the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government”).

¹⁴⁵ Terry Morehead Dworkin, *Whistleblowing, MNCs, and Peace*, 35 VAND. J. TRANSNAT’L L. 457, 461 (2002) (explaining that “[t]he most commonly accepted modern definition of whistleblowing is ‘the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action’”).

¹⁴⁶ See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that a speech made by a government employee in the course of his official duties is not protected by the First Amendment); *Snepp v. United States*, 444 U.S. 507, 511 (1980) (holding that a former C.I.A. agent violated his nondisclosure agreement by publishing information relating to his work at the C.I.A. without prior approval). Although the published information was not classified, the Court held that the C.I.A. had an interest in protecting the appearance of secrecy. *Id.* at 510–12; see also Moberly, *supra* note 5, at 104–05; Papandrea, *supra* note 16, at 99.

¹⁴⁷ Papandrea, *supra* note 16, at 101.

¹⁴⁸ Stone, *supra* note 29, at 88.

restrictions do not violate the employee's First Amendment rights due to the government's compelling interest in protecting national security.¹⁴⁹

It is relatively undisputed that the public places great value in the nation being secure. Accordingly, we are generally willing—although not always wanting—to sacrifice some individual liberties in order to promote better security (e.g. submitting to random searches at the airport). We are also generally accepting of the government's preservation of secrecy with regards to most national security decision-making because it will likely create more effective security measures and results.¹⁵⁰ Public uncertainty begins to occur, however, when the Executive starts to test these boundaries and increase the scope of liberties that the public is required to sacrifice.

As Commander-in-Chief, the President has a great deal of control over national security decision-making.¹⁵¹ This being the case, there has been several historic attempts made by the executive branch to stifle free speech in order to maintain secrecy particularly during times of war.¹⁵² For example, during World War I President Woodrow Wilson advocated the enactment of both the Espionage Act of 1917¹⁵³ and the Sedition Act of 1918,¹⁵⁴ which made it unlawful for any person to criticize the government, the war, the draft, the President, and so on.¹⁵⁵ Subsequently, the government prosecuted over 2,000 people under these laws.¹⁵⁶ However, during the Vietnam War, a consensus developed that this kind of suppression towards public criticism was unjust even in war time.¹⁵⁷ Therefore, the government tried a different approach to silencing public criticism, which was to withhold information from the public altogether.¹⁵⁸

¹⁴⁹ See *Garcetti*, 547 U.S. at 421–23; *Snepp*, 444 U.S. at 511–13.

¹⁵⁰ See Moberly, *supra* note 5, at 91.

¹⁵¹ See U.S. CONST. art. II, § 2, cl. 1.

¹⁵² See Stone, *supra* note 91, at 939–40.

¹⁵³ 18 U.S.C. §§ 792–799 (2012) (originally enacted as 50 U.S.C. §§ 31–39 (1917)).

¹⁵⁴ Act of May 16, 1918, 40 Stat. 533 (1918), *repealed by* Act of Mar. 3, 1921, 41 Stat. 1359 (1921).

¹⁵⁵ Stone, *supra* note 29, at 82–83.

¹⁵⁶ *Id.* at 83.

¹⁵⁷ *Id.* Geoffrey Stone explains this change as a “consensus, which reflected a profound shift in American values and law” and that

has held to the present, with the result that the Bush administration—unlike the Adams, Lincoln, and Wilson administrations—did not even attempt to prosecute critics of its policies. This is an important milestone in American history. We should not let it pass unnoticed or in any way take it for granted. Viewed historically, it is a significant triumph for the rule of law.

Id.

¹⁵⁸ *Id.*

As Richard Moberly¹⁵⁹ argues, the bottom line in situations involving national security issues is clear: “National security secrets are, by definition, information to which the average private citizen does not have access,” thus, falling “outside the First Amendment’s umbrella.”¹⁶⁰ Based on this analysis—which is consistent with the previous Court decisions¹⁶¹—the First Amendment does not protect a whistleblower’s ability to disclose national security information to the public.¹⁶² However, as was demonstrated by the Pentagon Papers Case, the Court has interpreted the First Amendment to allow a journalist to publish national security information to the public once obtained by a whistleblower.¹⁶³

These findings present an interesting dichotomy. On the one hand, private citizens have been found to have no right to access national security information.¹⁶⁴ Yet, on the other hand, journalists have expansive freedom to publish any national security information obtained—*i.e.*, a “virtual carte blanche to publish or otherwise disseminate whatever they [can] get their hands on.”¹⁶⁵ In effect, these findings prohibit whistleblowers from disclosing information to the press but allow journalists to widely distribute any secrets obtained from whistleblowers to the public. While journalists continue to enjoy this uninhibited ability to publish disclosed information to the public, whistleblowers have been forced to bear the brunt of the resulting consequences. This is because, in addition to the absence of a First Amendment protection, there are currently no other measures in place to protect whistleblowers.¹⁶⁶ To make matters worse, the government has used the Espionage Act to specifically target disclosures made by these whistleblowers.

III. NO PROTECTION FOR WHISTLEBLOWERS

As stated above, there are no current laws—including the First Amendment—that provide protection to whistleblowers for disclosing governmental information. Instead, the laws currently recognized only enable greater prosecution of whistleblowers and they do so regardless of the

¹⁵⁹ Richard Moberly is a Professor of Law at the University of Nebraska College of Law. Professor Moberly teaches Employment Law and has completed extensive research in employee whistleblower protection and the law of secrecy. *Resident Faculty: Moberly*, UNIV. NEB. C. L., <http://law.unl.edu/facstaff/faculty/resident/rmoberly.shtml> (last visited Oct. 6, 2013).

¹⁶⁰ Moberly, *supra* note 5, at 105.

¹⁶¹ See *supra* text accompanying notes 146–149.

¹⁶² See Stone, *supra* note 91, at 960–62.

¹⁶³ See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); Stone, *supra* note 91, at 960–62.

¹⁶⁴ See Moberly, *supra* note 5, at 105.

¹⁶⁵ Papandrea, *supra* note 16, at 112.

¹⁶⁶ See *infra* Part III.

circumstances surrounding the disclosure (*e.g.*, regardless of the type, purpose, or effect of the disclosure).¹⁶⁷ Part III of this Note analyzes these laws. The first section discusses the adequacy of the reporter's privilege. While the purpose of the privilege is to preserve the confidentiality of reporters' sources¹⁶⁸—many of which are whistleblowers—it rarely accomplishes this goal. The second section discusses the Espionage Act, which is increasingly being used to prosecute whistleblowers.¹⁶⁹ The Act allows for the prosecution of any individual who discloses classified information to a journalist; however, the Act does not provide for the prosecution of a journalist who chooses to publish that material for the world to see.¹⁷⁰ Thus, the reporter's privilege and the Espionage Act provide no protection for whistleblowers, but instead only create an avenue for their prosecution.

By failing to provide protection to whistleblowers, these laws also fail to recognize the benefits that disclosure has to offer, particularly the generation of thoughtful public debate and the encouragement of government accountability. Furthermore, by providing an unlimited ability for journalists to publish classified government information, these laws cannot truly protect the nation's security. Therefore, because neither the benefits of disclosure—thoughtful public debate and government accountability—nor the benefits of nondisclosure—protection of national security—are satisfied here, these laws fail to promote the overall public good.¹⁷¹

A. *The Failure of the Reporter's Privilege to Protect Whistleblowers*

Although the government does not prosecute journalists, it has increasingly attempted to frustrate their ability to publish information by forcing them to testify against their sources.¹⁷² More importantly, however, this practice serves to deter whistleblowers from coming forward with important

¹⁶⁷ See *infra* Part III.B.

¹⁶⁸ Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24 ST. THOMAS L. REV. 399, 435 (2012). Bejesky explains that the purpose of a "reporter's privilege" is to "shield the identity of confidential sources from disclosure during court processes." *Id.* He argues that this privilege "is essential because [it] stimulates an uncensored 'free flow of information,' supports the public's 'right to know' government activities, and emends populace understanding of policies"; thus, he recognizes it as a "right implicit in gathering the news." *Id.* However, although the goal behind the privilege may be to encourage news gathering, the idea is to protect the sources of the news. See *Branzburg v. Hayes*, 408 U.S. 665, 698–99 (1972) (describing a reporter's privilege as a "constitutional protection for press informants," but one that is not recognized by the U.S. Constitution or common law).

¹⁶⁹ See *supra* Part II.B.

¹⁷⁰ See *infra* Part III.B.

¹⁷¹ See *infra* Part IV.

¹⁷² See *supra* text accompanying notes 35–49 (explaining the government's attempts at forcing James Risen to testify against his alleged source, Jeffrey Sterling).

information. Accordingly, several states have provided a reporter's privilege exception that protects journalists from being forced to reveal their sources in most court proceedings.¹⁷³ The purpose of the reporter's privilege is to create a confidential relationship between the journalist and the whistleblower in order to provide whistleblowers a safe avenue to report information and to encourage the free flow of information among the public.¹⁷⁴ While some jurisdictions allow for such a privilege, a uniform standard has not yet been defined,¹⁷⁵ and while Congress has made several attempts at creating a federal reporter's privilege, no such measure has been enacted.¹⁷⁶ Ultimately, the uncertainty of the scope and application of the reporter's privilege has created a great amount of confusion and provided very little benefit.

In 1972, the Supreme Court of the United States discussed the reporter's privilege in *Branzburg v. Hayes*.¹⁷⁷ *Branzburg* combined the cases of two journalists who refused to testify against their sources during grand jury proceedings.¹⁷⁸ In the first case, a journalist by the name of Paul Branzburg published an article with photographs detailing the making of hashish.¹⁷⁹ In order to get the information and photographs, Branzburg had promised the individuals who made the hashish that he would not reveal their identities.¹⁸⁰ On a separate instance, Branzburg had also published an article revealing the intricate details of the "drug scene" in Frankfort, Kentucky.¹⁸¹ After each of these articles was published, Branzburg was subpoenaed to appear in front of a grand jury to testify about the unlawful activities he observed.¹⁸² Both times he refused to testify asserting protection under the First Amendment and the reporter's privilege as recognized by Kentucky.¹⁸³

¹⁷³ Stone, *supra* note 29, at 100 (explaining that forty-nine states and the District of Columbia have recognized some form of a reporter's privilege either by statute or common law).

¹⁷⁴ Bejesky, *supra* note 168, at 435–36.

¹⁷⁵ Peters, *supra* note 27, at 672.

¹⁷⁶ Congress unsuccessfully attempted to pass the Free Flow of Information Act of 2007. See *supra* text accompanying notes 57–64. Later, Congress made two failed attempts to pass the Free Flow of Information Act of 2009. Peters, *supra* note 27, at 672. Currently, Congress has introduced a new version, the Free Flow of Information Act of 2011, yet its chances for success also appear slim. Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1589–90 (2012). In addition to the Free Flow of Information Act, in 2009 Congress introduced a Whistleblower Protection Enhancement Act, which "still languishes in committee." Stone, *supra* note 29, at 99. For a detailed discussion of Congress attempts to pass some of these bills, see generally *id.* at 98–101.

¹⁷⁷ 408 U.S. 665 (1972).

¹⁷⁸ *Id.* at 668, 672.

¹⁷⁹ *Id.* at 667–68 (defining hashish as a product of cannabis).

¹⁸⁰ *Id.* (noting that the photographs showed only the hands of the individuals).

¹⁸¹ *Id.* at 669–70.

¹⁸² *Id.* at 668–71.

¹⁸³ *Id.*; see also KY. REV. STAT. ANN. § 421.100 (West 1952), which provides:

In the second case another journalist, Paul Pappas, was called to report on civil disorders caused by the Black Panthers in New Bedford, Massachusetts.¹⁸⁴ In order to gain entry into a news conference at the Black Panther headquarters, Pappas agreed to record and photograph only limited and pre-approved discussions and activities of the group.¹⁸⁵ A couple months later, Pappas was subpoenaed before the grand jury to testify about illegal activities that had occurred during that conference.¹⁸⁶ However, he refused to testify and “claim[ed] that the First Amendment afforded him a privilege to protect confidential informants and their information.”¹⁸⁷

The Supreme Court of the United States granted certiorari to both *Branzburg* and Pappas and joined the cases together.¹⁸⁸ In doing so, the Court held that the First Amendment did not allow a journalist to refuse to testify against his sources during grand jury proceedings.¹⁸⁹ Several reasons were provided in support of this holding. First, the Court noted the purpose and significance of grand jury proceedings. It explained that all persons have a civic duty to testify when called upon to do so in such a proceeding.¹⁹⁰ This duty, the Court explained, cannot be avoided simply because the person is a reporter.¹⁹¹ The Court further stressed that a grand jury proceeding serves compelling government interests by assisting successful investigations and prosecutions of criminal activities.¹⁹² Second, the Court noted that forcing journalists in these cases to testify against their sources would not intrude upon their rights to free speech or press because it does not restrict what the reporter can or cannot

No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.

¹⁸⁴ *Branzburg*, 408 U.S. at 672.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 672–73.

¹⁸⁷ *Id.* at 673.

¹⁸⁸ *Id.* at 665.

¹⁸⁹ *Id.* at 684–86.

¹⁹⁰ *Id.* at 682–83.

¹⁹¹ *Id.*

¹⁹² *Id.* at 686–87.

publish.¹⁹³ Finally, the Court expressed its reluctance to create law in an area that Congress and state legislatures would be more equipped to handle.¹⁹⁴

While the Court in *Branzburg* addressed only grand jury proceedings, some scholars have argued that the holding extends to all court proceedings.¹⁹⁵ However, the Court seems to suggest that the identification of a source may be required only when it is the journalist's civic duty to do so, or when it is necessary to investigate criminal activity or conduct a successful prosecution.¹⁹⁶ Based upon this reasoning, if the Court's decision is extended to all court proceedings, it would always be the case that journalists will be forced to reveal the identities of their whistleblowers. This is because the journalist is always going to be the main or only witness to the transfer of information between the whistleblower and himself. More importantly, that testimony will be considered essential to the successful investigation and prosecution of that whistleblower. In other words, if extended beyond grand jury proceedings, the *Branzburg* decision will always compel journalists to give up the identity of their sources. As a result, applying *Branzburg* to all court proceedings would substantially reduce the already limited protection to whistleblowers.

On the other hand, it could be argued that *Branzburg* may not apply to whistleblowers at all because the actions of whistleblowers are fundamentally different from the actions of the "sources" in *Branzburg*. There, the sources were engaging in criminal activity—involving drugs and violence—that most would argue has no beneficial effect. Whistleblowers, however, may be participating in criminal activity, but, unlike the criminal activity in *Branzburg*, this activity is largely beneficial. First, disclosure of government information

¹⁹³ *Id.* at 681 (“[T]hese cases involve no intrusions upon speech . . . no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold.”).

¹⁹⁴ *Id.* at 706; *see id.* at 703–06 (explaining that it would be a long and complicated process to create such a privilege; if left to the Court, it would have to consider on a case-by-case basis: (1) who qualifies as a journalist; (2) it would have to engage in extensive preliminary factual and legal determinations such as “Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?”; and (3) it would have to distinguish, by weighing the importance of governmental interests, “between the value of enforcing different criminal laws”—a value judgment that should be left to the legislature, not the courts); *see also* Stone, *supra* note 29, at 96–97. Geoffrey Stone argues that the Court came to its decision in *Branzburg* for two reasons: first, because it was “reluctant to invalidate a law merely because it has an *incidental* effect on First Amendment freedoms”; and second, because the court would have had to determine who qualifies as a “journalist” in order to receive this First Amendment protection. Stone, *supra* note 29, at 96–97. This determination would be extremely difficult considering the expansive technology today. For example, the Court would have to determine whether bloggers are considered journalists and thus granted the same protections; if this were the case, an unlimited number of individuals could claim a reporter's privilege. *See id.*

¹⁹⁵ *See* Bejesky, *supra* note 168, at 455–56.

¹⁹⁶ *See supra* text accompanying notes 191–92.

and conduct is essential to public discourse because it promotes democracy and “stimulates an uncensored ‘free flow of information,’ support[ing] the public’s ‘right to know’ government activities, and emend[ing] populace understanding of policies.”¹⁹⁷ This “free flow of information” would not be possible without whistleblowers. Therefore, whistleblowers form the very core of an informed public, which is the foundation of a strong democracy.¹⁹⁸ Second, whistleblowers—as government employees—are in a prime position to provide the public with important government information.¹⁹⁹ This information, being outside the reach of ordinary citizens, is essential to maintain an enlightened public.²⁰⁰ Further, the kind of information disclosed by whistleblowers is more likely to inflict greater scrutiny upon the government, which will ultimately limit corruption and lead to a stronger democracy.²⁰¹

In whatever manner the decision in *Branzburg* is interpreted, it is unlikely that the reporter’s privilege will provide much protection to whistleblowers. First, if interpreted as requiring a journalist to disclose his source in all court proceedings, the whistleblower’s identity will almost always be revealed. Moreover, even if whistleblowers are distinguished from ordinary criminals like the ones in *Branzburg*, the privilege does not prevent other evidence from being used against the whistleblower. This is illustrated in the case against Jeffrey Sterling.²⁰² In that case, the district court judge allowed the journalist, James Risen, to invoke his reporter’s privilege and refuse to testify against Sterling but only because separate and sufficient evidence had been presented by the government, making Risen’s testimony superfluous.²⁰³ In those cases, the application of the reporter’s privilege is also superfluous because any protection it may have provided is at that point nullified.

It should be noted that the application of a reporter’s privilege does not affect protections for journalists. If a journalist is compelled to identify his source, he nevertheless remains free to publish any information obtained from

¹⁹⁷ Bejesky, *supra* note 168, at 435; *see also* Fenster, *supra* note 16, at 773.

¹⁹⁸ *See supra* Part II.A.

¹⁹⁹ Papandrea, *supra* note 16, at 102 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968) (“[G]overnment employees often are the ones ‘most likely to have informed and definite opinions’ about matters of public concern relating to their employment.”)).

²⁰⁰ *See id.*; *see also* Ellsberg, *supra* note 5 (explaining that a government employee—particularly in the national security area—has earned and is to be entrusted with the ability to keep “secrets of state,” and he does so accordingly. Therefore, these habits of keeping secrets “will allow a good deal of . . . discretion in disregarding formal rules of the classification system when it comes to sharing information with others who have not been explicitly authorized to receive it,” such as the press, “when this is in the interest of furthering the policies or interests of one’s agency boss or the president.”); *see also* *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942) (“The protection of the public requires not merely discussion, but information.”)).

²⁰¹ Lewis, *supra* note 112, at 420.

²⁰² *See supra* text accompanying notes 35–49.

²⁰³ *See supra* text accompanying notes 35–49.

that source. However, by compelling a journalist to testify against his source, the Court deters important and good-faith whistleblowing. Consequently, the courts make less information available to all journalists and substantially limits the free flow of information to the public. Furthermore, because public disclosure of certain governmental information encourages free flow of information and increases government accountability, deterrence of good-faith disclosure by whistleblowers is contrary to the public good.²⁰⁴ Accordingly, because neither the First Amendment nor a reporter's privilege can provide adequate protection to these whistleblowers, statutory reform should strongly be considered.²⁰⁵ Currently, however, the only federal statute applicable to "bad" whistleblowers is the Espionage Act, which is used solely as a basis for their prosecution.

B. The Espionage Act and the Prosecution of Whistleblowers

The Espionage Act is an inappropriate method of prosecuting "bad" whistleblowers because it does not effectively protect national security. Moreover, the Espionage Act also does not consider the advantages that disclosure provides to public discourse or government accountability.²⁰⁶ Nevertheless, whistleblowers have increasingly been prosecuted under sections (d) and (e) of this act.²⁰⁷ Specifically, those sections prevent any person "entrusted with"²⁰⁸ or with "access to" or "control over"²⁰⁹ any document "relating to the national defense" from disclosing that document to "any person not entitled to receive it."²¹⁰ These sections do, however, require that the possessor of the information have "reason to believe [the information] could be used to the injury of the United States or to the advantage of any foreign nation."²¹¹ However, neither Section (d) or (e) require the government to prove the whistleblower's *intent* at the time of the disclosure, nor does it require that the government show that the disclosure *actually* threaten or harm the nation—it only requires that the possessor had reason to believe it *could*.²¹²

²⁰⁴ See David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 459 (1983) ("Honest, accurate criticism of government produces a greater public good in democracy than artificial respect fostered by suppression.").

²⁰⁵ Recall that the Court in *Branzburg* believed the legislature to be the best avenue for creating such a protection. See *supra* text accompanying note 194; see also Papandrea, *supra* note 16, at 112–13.

²⁰⁶ Papandrea, *supra* note 16, at 99–100.

²⁰⁷ See *supra* text accompanying notes 71–72.

²⁰⁸ 18 U.S.C. § 793(d) (2012).

²⁰⁹ *Id.* § 793(d)–(e).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See *id.*

Accordingly, the act has been interpreted as only requiring some showing of any potential for damage to the United States²¹³—not an extraordinarily difficult standard for the government to meet.²¹⁴

While having paved the way for an easy prosecution of a whistleblower, there is no section in the Espionage Act that criminalizes publication of the “potentially damaging” disclosed information and no journalist has ever been charged for doing so.²¹⁵ The Espionage Act does, however, criminalize *any* person who “copies, takes, makes, or obtains” anything “connected with national defense.”²¹⁶ One may argue that a journalist may be prosecuted under this language by copying or taking information connected with national defense and subsequently publishing it. However, even if that were the case, this particular section creates an additional requirement not provided for in sections (d) and (e): it requires that the person who “copies, takes, makes, or obtains” the documents must do so with the *intent* to harm the United States, or with *reason to believe* that such harm will occur.²¹⁷ Thus, under the Espionage Act, a journalist would have an opportunity to assert a good-faith defense that he did not intend or have reason to believe the information would cause harm—a defense not afforded to the whistleblower. This distinction, however, is pointless because, as stated previously, no journalist has ever been charged under any section of the Espionage Act.

Overall, the current language of the Espionage Act leaves any whistleblower faced with such a charge hopeless. It does not consider any benefits of disclosure nor does it properly address the benefits of nondisclosure.²¹⁸ It does not consider the benefits of disclosure because it prevents whistleblowers from disclosing any and all information—good or bad—thus, significantly stifling thoughtful public debate. Further, the whistleblower will be punished even if his intent was to promote public awareness and *not* to harm the United States. Therefore, in order to encourage greater government accountability and thoughtful public debate, the Espionage Act should consider both the intent of the whistleblower and the harm of the disclosure.

²¹³ Papandrea, *supra* note 16, at 100; Christina E. Wells, *Contextualizing Disclosure's Effects: WikiLeaks, Balancing, and the First Amendment*, 97 IOWA L. REV. BULL. 51, 59 (2012), available at http://www.uiowa.edu/~ilr/bulletin/ILRB_97_Wells.pdf.

²¹⁴ Papandrea, *supra* note 16, at 107. It seems that the government could always make some argument for “potential” damage of any disclosed information. Whether or not “potential” damage is sufficient to restrict beneficial disclosure is the question.

²¹⁵ Lewis, *supra* note 112, at 419; Stone, *supra* note 29, at 91. See *supra* text accompanying note 141.

²¹⁶ 18 U.S.C. § 793 (b) (2012).

²¹⁷ *Id.* § 793(a)–(b).

²¹⁸ See Papandrea, *supra* note 16, at 99–100.

Additionally, the Act does not properly address the benefits of nondisclosure because it does not include any consequences for publishing national security information.²¹⁹ Subsequently, a journalist may, without consequence, widely distribute information that could prove to be harmful to the United States. Thus, in order to better protect national security, the Espionage Act should also address disclosure through publication. If read in this way, it would effectively increase national security, government accountability, and public debate, thus, substantially furthering the overall public good.

IV. THE PUBLIC GOOD: REQUIRING SECRECY AND GOVERNMENT ACCOUNTABILITY

As has been established, revealing classified information is not protected speech under the First Amendment.²²⁰ Furthermore, the reporter's privilege provides a whistleblower no shield against prosecution.²²¹ The absence of any such protection is most likely based upon the government's interest in protecting national security by maintaining secrecy of its affairs.²²² However, while the protection of national security is an important component of disclosure, it is not the only factor that must be considered. In addition to the potential negative effects disclosure may have on national security, it also provides several benefits. Accordingly, in determining whether or not to disclose national security information, both positive and negative effects should be weighed.

For instance, some scholars balance the harm of national security disclosure with its effects on thoughtful public debate.²²³ Thus, in examining the WikiLeaks disclosures, Mark Fenster²²⁴ argued that, where potential for harm is present and no notable public movement has resulted, disclosure serves no benefit to public discourse.²²⁵ Therefore, disclosure would be no good. However, while the effect of disclosure on public discourse should be considered, this test lacks consideration of another important benefit of

²¹⁹ See 18 U.S.C. §§ 793–799.

²²⁰ Papandrea, *supra* note 16, at 103. See *supra* Part II.

²²¹ See *supra* Part III.A.

²²² See Moberly, *supra* note 5, at 88–89; see also *supra* text accompanying note 24.

²²³ Papandrea, *supra* note 16, at 99, 104.

²²⁴ Mark Fenster is a Professor of Law at the Levin College of Law at the University of Florida and has completed extensive scholarship in the area of government transparency. See Mark Fenster, LEVIN C. L. UNIV. FLA., <http://www.law.ufl.edu/faculty/mark-fenster> (last visited Oct. 6, 2013).

²²⁵ Papandrea, *supra* note 16, at 111 (referencing Fenster, *supra* note 16, at 800–02); see also Bejesky, *supra* note 168, at 414.

disclosure—government accountability. As Mary-Rose Papandrea²²⁶ stated in her response to Fenster’s argument: “The lack of political movements is not irrelevant, but if the need for government accountability is measured solely by whether a political movement has resulted, most government operations will be cloaked in secrecy.”²²⁷ Promotion of public discourse is not only an end in of itself, but it is a means to creating greater accountability by deterring the government from secret wrongdoings and preventing tyranny and oppression.²²⁸ Thus, not all confidential information needs to be “newsworthy” for it to benefit the public good. Instead, disclosed information is equally, if not more, important to the public good when it encourages proper government action, even if the information does not generate a popular controversy.²²⁹

Part IV of this Note analyzes the importance of maintaining government secrecy as well as promoting government accountability through the course of disclosure. The first section of this Part discusses the interest of the government in maintaining secrecy by preventing harmful disclosure. It also argues, however, that the government currently over-classifies harmful information, thus withholding more than necessary to protect national security. Such behavior could unreasonably stifle the free flow of information. Therefore, in order to successfully withhold information, the government should be required to demonstrate that a certain degree of harm may result from the disclosure. Yet, because harmful disclosure may still occur, whistleblowers and journalists must also take steps to prevent harm and maintain secrecy when necessary. The second section in this Part discusses the importance of government accountability. It argues that too much secrecy is detrimental to democracy because it creates significant opportunity for public ignorance and government misconduct. Thus, disclosure is necessary when it would serve as a check on governmental activities.

As a result, the public good would best be served by good-faith disclosures that would not only benefit public discourse, but also hold the government accountable. In these situations, journalists and whistleblowers should be provided greater leniency in disclosing or publishing national security information. However, such disclosures should not be permitted if they would instead result in “‘grave and irreparable’ injury to the public interest,”²³⁰

²²⁶ Professor Papandrea is a Professor at Law at the Boston College Law School and, before becoming a professor, she specialized in First Amendment and media defense litigation in Washington, D.C. *Mary-Rose Papandrea*, B.C. L. SCH., http://works.bepress.com/mary-rose_papandrea/ (last visited Oct. 6, 2013).

²²⁷ Papandrea, *supra* note 16, at 111.

²²⁸ Gershman, *supra* note 87, at 23; Stone, *supra* note 91, at 962.

²²⁹ See Stone, *supra* note 29, at 94.

²³⁰ *N.Y. Times Co. v. United States*, 403 U.S. 713, 732 (1971) (White, J., concurring) (arguing that journalists should be allowed to publish national security information unless the government can prove that it would otherwise result in “‘grave and irreparable’ injury to the public interest”). See *id.* at 726–27 (Brennan, J., concurring) (arguing that “only governmental allegation and proof

or even a somewhat lesser standard, such as imminent harm. This standard would also eliminate the need for a uniform reporter's privilege or other forms of whistleblower protection under the First Amendment. Part V of this note will further this discussion by recommending that Congress implement this standard through modification of the Espionage Act.

A. *Secrecy*

As mentioned above, there are great advantages to be gained by maintaining a certain level of government secrecy. A significant burden on the ability of the government to maintain secrecy could lead to less effective national security practices and policies.²³¹ By definition, the President has complete control over national security information and broad authority to keep that information confidential.²³² However, "once that information gets into the hands of the press the government has only very limited authority to prevent its further dissemination."²³³ At that point, disclosure of information identifying the location of terrorists, detailing our nation's top defense initiatives, or revealing the location of top-secret governmental facilities would leave our country vulnerable and defenseless. In addition, certain information, if disclosed, may place individual lives at risk.²³⁴ This includes information that may identify covert agents or other individual sources of foreign intelligence.²³⁵ Such disclosure may result in serious and imminent harm to the United States.²³⁶ Therefore, the Executive has a substantial interest in confining important national security information to the executive branch only.

The infamous WikiLeaks disclosures illustrate the need for government secrecy. WikiLeaks is a website founded by Julian Assange that posts government information leaked from sources all over the world.²³⁷ The site prides itself on the anonymity of its sources.²³⁸ The sources are virtually unidentifiable due to the intricate online system that WikiLeaks has created. In order to protect its sources, WikiLeaks uses "'banking-grade' and 'military-

that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order" upon the press from publishing national security information).

²³¹ Fenster, *supra* note 16, at 776.

²³² See *N.Y. Times Co.*, 403 U.S. at 92; Stone, *supra* note 29, at 90.

²³³ *N.Y. Times Co.*, 403 U.S. at 92.

²³⁴ See Wells, *supra* note 213, at 59; Bejesky, *supra* note 168, at 457–58.

²³⁵ See Wells, *supra* note 213, at 59; Bejesky, *supra* note 168, at 457–58.

²³⁶ See Papandrea, *supra* note 16, at 110.

²³⁷ Davidson & Herrera, *supra* note 20, at 1278–79 (recognizing WikiLeaks as "the world's first stateless news organization").

²³⁸ *About: What is Wikileaks?*, WIKILEAKS.ORG, <http://wikileaks.org/About.html> (last visited Oct. 16, 2013).

grade' encryption" and "keeps no logs of any source submission activity."²³⁹ WikiLeaks further provides instructions of how to submit material in net cafés and wireless hot spots in order to avoid traceability, in case "infiltrated by an external agency."²⁴⁰ Clearly, WikiLeaks works hard to make its sources entirely unidentifiable and undetectable.

As to the material it provides, WikiLeaks not only reports the classified government information, but it posts the actual unedited leaked documents online and works with traditional news sources to expand public awareness of those documents.²⁴¹ For example, WikiLeaks has posted a vast amount of documents relating to U.S. national security. One of its well-known disclosures included a video obtained by Bradley Manning showing a U.S. Army Apache helicopter firing a lethal attack on civilians in New Baghdad.²⁴² Other postings included classified documents from the war in Afghanistan and the Iraq War, cables between the State Department and its diplomatic mission about the war, and files concerning detainees held as suspected terrorist at the Guantanamo Bay military prison.²⁴³ Some argue that these kinds of disclosures pose permanent threats to military efforts and to diplomatic decisions.²⁴⁴ With such a high level of security for its sources, a whistleblower might not think twice about offering completely unredacted national security documents.

When thinking of specific harms that could result from this broad exposure, the first thing that comes to mind is usually physical attacks on the United States or its military. However, while harms threatening the physical integrity of our country and its individuals may be easier to identify, they are not the only injury that could occur from national security disclosures.²⁴⁵ Disclosure risks additional kinds of harm that are "much less tangible."²⁴⁶ Because national security information is "crucial to present day foreign-policy decisions,"²⁴⁷ certain kinds of disclosure may jeopardize relations between the United States and other nations.²⁴⁸ For example, foreign nations may become less cooperative with the United States and discussions may become less honest and effective.²⁴⁹ On the other hand, if a greater amount of secrecy is maintained, other nations may become more cooperative or forthcoming, and

²³⁹ Ritchie, *supra* note 15, at 460.

²⁴⁰ *About: What is Wikileaks?*, *supra* note 238.

²⁴¹ Lewis, *supra* note 112, at 420.

²⁴² Fenster, *supra* note 16, at 762.

²⁴³ *Id.* at 762–63.

²⁴⁴ *Id.* at 767.

²⁴⁵ Papandrea, *supra* note 16, at 111.

²⁴⁶ *Id.*

²⁴⁷ Bejesky, *supra* note 168, at 402.

²⁴⁸ Papandrea, *supra* note 16, at 110.

²⁴⁹ *Id.*

discussions and negotiations will remain open and frank.²⁵⁰ The problem that occurs here, however, is that it is not an easy task to identify what kind of harm exists, what the harm can affect, or the amount of harm that might occur.²⁵¹ Harm of national security can range in duration and in gravity.²⁵² It may also be the case that the immediate effects of disclosure are harmful, but in the long run, the disclosure will serve to strengthen national security.²⁵³ Unfortunately, such effects are difficult to measure or predict.

1. The Inadequacy of the Current Standards Defining Harm

There are different ways in which the government measures the level of harm that a particular disclosure may cause. For example, the executive branch uses a classification system.²⁵⁴ In this system, documents within executive control are classified by level based on the anticipated harm of its unauthorized disclosure.²⁵⁵ The levels of classification increase accordingly from “confidential,” to “secret,” to “top secret.”²⁵⁶ The standards used to assign levels of harm have varied between administrations.²⁵⁷ For example, the Bush Administration called for the classification of any information where “public disclosure ‘reasonably could be expected to result in damage to the national security.’”²⁵⁸ The Obama Administration, on the other hand, implements the same standard as used by the Clinton Administration, which denied classification when there was a “significant doubt” as to whether or not to classify a document.²⁵⁹

However, both the “reasonably expected” standard of the Bush Administration and the “significant doubt” standard of the Obama Administration are unhelpful for determining what constitutes a sufficient harm.²⁶⁰ Each administration and each government official may vary greatly on

²⁵⁰ *Id.*

²⁵¹ *Id.* at 110–11.

²⁵² *Id.* at 111.

²⁵³ *Id.*

²⁵⁴ See Fenster, *supra* note 16, at 784.

²⁵⁵ Fenster, *supra* note 16, at 785.

²⁵⁶ *Id.* at 756.

²⁵⁷ *Id.* at 785 (“Beginning in 1940, nearly every President has issued an executive order that establishes the somewhat different approach each administration has taken to classification.”).

²⁵⁸ Stone, *supra* note 29, at 89.

²⁵⁹ *Id.* at 98.

²⁶⁰ *Id.* at 89 (explaining that the “reasonably expected” standard of the Bush Administration was “inherently vague and plastic,” and that “[i]t is impossible to know from this standard how likely, imminent, or grave the potential harm must be”); *id.* (explaining that while the Obama Administration standard is not significantly better than the Bush standard, it is “a significant step in the right direction”).

what information or harm applies under these standards. Regardless, it is generally argued that every administration, due to its broad authority, tends to over-classify documents irrespective of the degree of anticipated harm that may occur from disclosure.²⁶¹ Therefore, such classification methods are virtually meaningless when it comes to identifying the importance or harm of disclosure.

Even if these classification methods provided some leniency for disclosures involving lower risk of harm, the Espionage Act applies to all disclosures regardless of harm. Although the statute itself does not mention a level of harm, some courts have interpreted the Espionage Act to require a showing that the harm be at least “potentially damaging” to U.S. national security and that no evidence of actual harm is necessary.²⁶² Practically speaking, this means that the government may prosecute a whistleblower for disclosure of just about anything so long as it has *any* potential for damage regardless of how unlikely or minimal the damage may be. Like the standards used by the presidential administrations, this gives the government substantial opportunity to conceal national security information. Therefore, under this standard, the government would have the ability to withhold anything and everything from public disclosure.²⁶³

While standards requiring potential or a reasonable expectation of damage may be vague, a standard requiring the existence of “actual harm” is just as difficult to prove.²⁶⁴ In many instances the direct effects of disclosure on military operations or other national security measures are not apparent; instead, there is only speculation as to what harm may have occurred.²⁶⁵ Further, there is rarely clear evidence of the effects that disclosures have on diplomatic relations between the United States and other nations.²⁶⁶ Contrary to the “potentially damaging” standard, where the government need only prove minimal possible harm, an “actual harm” standard could be extremely difficult for the government to show, even in the face of substantial and imminent harm.

Overall, prevention of harmful disclosure is necessary to protect national security. Subsequently, the Executive, being in a position to know what is best for our nation’s security, should have significant control when it comes to regulating disclosure. Nevertheless, the current standard used to determine what is harmful results in over-classification, thus, preventing more disclosure than is necessary to protect national security. Further, while

²⁶¹ See *id.* at 89.

²⁶² Wells, *supra* note 213, at 60 (referring to the interpretation by a United States District Court for the Eastern District of Virginia in *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006)).

²⁶³ See Stone, *supra* note 29, at 95 (arguing that the government should not be allowed to classify information solely because of a potential threat to national security).

²⁶⁴ Wells, *supra* note 213, at 60.

²⁶⁵ Fenster, *supra* note 16, at 789–91.

²⁶⁶ See *id.* at 791–95.

requiring proof of actual harm would be excessive, the current standard under the Espionage Act requires virtually no effort from the government to show that any harm can or will result from disclosure. With these standards in place, the benefits of disclosure are greatly limited. Therefore, in order to prevent disclosure, the government should be required to show that disclosure would produce some significant harm to the public good. Such harm does not have to be “actual” but could be shown by evidence of the gravity, duration, and type of harm that could occur. Without such evidence, however, the government should not have full discretion to withhold information that could contribute to the public good.

2. The Responsibility of Journalists and Whistleblowers to Reduce the Potential for Harm

In order to protect the national security, the potential harm of disclosure should not be considered by the government alone. Before even reaching the point in which the government will have to produce evidence of harm to a court, the parties who disclosed the information—the whistleblower and the journalist—should have already considered its possible repercussions. While government accountability and public discourse are necessary for an effective democracy, if national security information is disclosed without first taking into account its advantages and disadvantages, both whistleblowers and journalists have potential to cause unnecessary harm.

A whistleblower has the potential to cause substantial harm if he discloses information when he is not aware of the full extent of its meaning.²⁶⁷ In other words, information that may appear to uncover wrongful government activity may be viewed differently once placed into a broader context. Therefore, it may be only after conducting research and viewing additional information that a whistleblower is adequately able to determine its true harm or benefit.²⁶⁸ Similarly, since the Executive has a greater vantage point of all information pertaining to national security, it is better apt than the whistleblower to determine the severity of the harm caused by disclosure.²⁶⁹ Without full range of information, a whistleblower’s disclosure may cause more harm than he had anticipated or intended. Therefore, before disclosure of national security information, the whistleblower must consider these risks and take the time to form a good-faith opinion about whether the disclosure will truly benefit the public good.

Moreover, a journalist has the potential to create harm because of the constant risk of obtaining false or harmful information.²⁷⁰ Blindly accepting

²⁶⁷ See Bejesky, *supra* note 168, at 406–08.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 406–07.

²⁷⁰ *Id.* at 408.

and subsequently reporting on any given piece of information further increases the possibility of harm. To make matters worse, classified information may be more difficult to verify.²⁷¹ Thus, journalists have the responsibility to *reasonably* investigate and verify information before choosing to publish it.²⁷² Only after such efforts are made to verify the accuracy of the information should the journalist then publish it.²⁷³ On the other hand, once steps of verification are taken, if the journalist has reason to believe that disclosure of the information may create substantial harm, then he has an obligation not to publish the information or to first seek prior government approval.

While we all would like to believe that the media always takes such precautions, journalists today are generally too quick to publish information “at face value”—usually for the purpose of public entertainment and without regards to its accuracy or its beneficial value.²⁷⁴ Adding insult to injury, the likelihood of harmful disclosures are increased by the vast technological advances in today’s media due to the lack of verification used by publishers. For example, with the expansive use of the internet, large websites like WikiLeaks are able to distribute national security information to the entire world in the blink of an eye. After posting disclosures online, these stories can be updated several times a day. This quick and easy method of posting and updating stories may lead to disclosure of information without sufficient verification.²⁷⁵ If these online sources continue to post information particularly sensitive to national security, then there is nothing the government can do to rectify any damage that may occur.²⁷⁶ Therefore, these kinds of online sources have the potential of making harmful information even more devastating to

²⁷¹ See Papandrea, *supra* note 16, at 109.

²⁷² *Id.*

²⁷³ See *Time, Inc. v. Hill*, 385 U.S. 374, 409–10 (1967) (Harlan, J., concurring in part and dissenting in part). Justice John Marshall Harlan argued that

a State should be free to hold the press to a duty of making a reasonable investigation of the underlying facts Other professional activity of great social value is carried on under a duty of reasonable care and there is no reason to suspect the press would be less hardy than medical practitioners or attorneys for example. The ‘freedom of the press’ guaranteed by the First Amendment, and as reflected in the Fourteenth, cannot be thought to insulate all press conduct from review and responsibility for harm inflicted.

Id.

²⁷⁴ Bejesky, *supra* note 168, at 413–14.

²⁷⁵ Lewis, *supra* note 112, at 426 (“[N]ew media and online journalism have proven able to out-innovate newspapers and progress journalism. For example, new media, unlike traditional media, ‘is particularly well suited to obsessively follow a story until it breaks.’”).

²⁷⁶ See *id.* at 459–60 (arguing that “[t]he only type of attack to which WikiLeaks is vulnerable is a government shutdown of a country’s entire Internet”).

national security. As Robert Bejesky²⁷⁷ explains, such reckless publication of potentially inaccurate information fully defeats the purpose of provoking meaningful public debate.²⁷⁸ Therefore, before publishing any information relating to national security, whether online or in print, a journalist should first make reasonable, good-faith efforts to verify its accuracy and determine its potential for harm.

The practices of WikiLeaks and other independent journalists illustrate some examples of reasonable, good-faith efforts of verification. First, WikiLeaks not only posts articles dealing with the information that it obtains, but also posts the actual document.²⁷⁹ Julian Assange, the founder of WikiLeaks, explains that this method allows readers to view news stories and then compare the stories to the original documents in order to determine for themselves whether the story was accurately reported.²⁸⁰ Second, WikiLeaks claims that it publishes only information it deems to “expose gross government and corporate dishonesty.”²⁸¹ In order to determine the truth and accuracy of the information, WikiLeaks looks over each document to check for signs of forgery, to independently verify its facts, and, in some instances, to submit the document for collaborative group review.²⁸² In addition to the staff at WikiLeaks, some independent journalists first meet with government officials to verify information and determine the full potential for harm before publishing certain materials.²⁸³ However, whether or not such precautionary measures are taken, journalists are not held accountable for the information contained in their final work product.²⁸⁴ Consequently, there are no incentives for journalists to take steps to verify the accuracy of their stories. Therefore, procedures should be created to encourage journalists to take reasonable steps to verify the accuracy of information, and if failure to take these steps should

²⁷⁷ Robert Bejesky has a M.A. in Political Science and Applied Economics and an L.L.M. in International Law. Bejesky has taught courses in international law at several universities and law schools.

²⁷⁸ Bejesky, *supra* note 168, at 413–14. Bejesky also argues that this danger of false information substantially outweighs the benefit of a reporter’s privilege. *Id.* at 438. Instead, he argues that the absence of a reporter’s privilege “may even foster more conscientious news production practices.” *Id.* at 446–47.

²⁷⁹ See Fenster, *supra* note 16, at 772.

²⁸⁰ *Id.* at 772; Lewis, *supra* note 112, at 420.

²⁸¹ Lewis, *supra* note 112, at 421.

²⁸² *Id.*; *About: What is Wikileaks?*, *supra* note 238 (For example, before the release of the video provided by Bradley Manning, WikiLeaks “sent a team of journalists to Iraq to interview the victims and observers of the helicopter attack. The team obtained copies of hospital records, death certificates, eye witness statements and other corroborating evidence supporting the truth of the story.”).

²⁸³ Papandrea, *supra* note 16, at 109–10.

²⁸⁴ See *id.*

result in the publication of harmful or grossly inaccurate material, the journalist should be held responsible.

B. Government Accountability

Despite the necessity of some secrecy, total control of secrecy by the Executive would be contrary to a proper functioning democracy. The United States Constitution names the President the Commander-in-Chief, thus giving him broad authority over foreign affairs and military operations.²⁸⁵ Accordingly, the President has complete and exclusive possession of all information related to foreign affairs, including national security policies, programs, and activities.²⁸⁶

However, too much control over the disclosure of these materials inevitably allows the Executive to “overprotect government secrecy at the expense of informed public debate” and without accountability.²⁸⁷ In addition, the broad and exclusive control of the executive branch provides ample opportunity for executive officials to engage in misdeeds or illegal activities.²⁸⁸ The risk of inappropriate conduct further increases given the fact that the President’s ability to prevent disclosure is unchecked, thus providing no consequence for any such behavior.²⁸⁹ Accordingly, public disclosure of certain documents and information should serve as a necessary check on the executive branch.²⁹⁰

WikiLeaks, for example, claims its purpose is to create this check on governments world-wide.²⁹¹ The WikiLeaks website states: “We believe that it is not only the people of one country that keep their own government honest, but also the people of other countries who are watching that government through the media.”²⁹² In attempting to prevent government misconduct, Julian Assange has identified two functions that the WikiLeaks website performs. First, the site’s disclosures are intended to “lead to a more knowledgeable

²⁸⁵ U.S. CONST. art. II, § 2; *see also* N.Y. Times Co. v. United States, 403 U.S. 713, 761 (1971) (Blackmun, J., dissenting).

²⁸⁶ Stone, *supra* note 29, at 83.

²⁸⁷ *Id.* at 90 (“This [“potentially damaging”] standard gives inordinate weight to secrecy at the expense of public accountability.”).

²⁸⁸ *See id.* at 90.

²⁸⁹ Bejesky, *supra* note 168, at 431 (Bejesky explains that, “[i]f anything, there is little precedent to suggest that current government officials taking unsupported, illegitimate, contemptible, or illegal actions should expect that their actions would result in accountability being assessed or have lasting negative ramifications.”).

²⁹⁰ *See* Stone, *supra* note 29, at 90.

²⁹¹ *See About: What is Wikileaks?*, *supra* note 238.

²⁹² *Id.*

public and ultimately to a more accountable, responsive, and effective state.”²⁹³ Second, the site’s disclosures can also prevent “bad governance” by, what Assange calls, authoritarian or illegitimate governments.²⁹⁴ These functions act together to force the government to respond to and remedy unwanted activities and to prevent internal conspiracies among the elite.²⁹⁵

The Executive withholds national security information primarily for one of two reasons. First, the Executive may want to mask information that reveals corrupt or illegal activity within the executive branch.²⁹⁶ Some examples include covering up information about the Watergate scandal,²⁹⁷ about controversial actions by the Central Intelligence Agency (C.I.A.) and the Department of Defense,²⁹⁸ and about the Iran-Contra investigation.²⁹⁹ A more recent example of this kind of disclosure is the release of a video showing an open fire attack on a group of civilians in New Baghdad by a U.S. Apache helicopter.³⁰⁰ The video showed the killing of eleven civilians, who did not fire back, as well as the injuring of two civilian children.³⁰¹ In addition, the audio of the clip provided commentary by the U.S. soldiers, who were lightheartedly encouraging each other to open fire into the crowd.³⁰² In these situations, where corrupt or illegal activity exists, the Executive has no legitimate interest in maintaining secrecy.³⁰³ On the contrary, the public has a compelling interest in forcing disclosure of such information because “[t]he government is, after all, accountable to the public,” and “citizens need to know when their representatives violate the law.”³⁰⁴ Due to the release of the video showing the attacks in New Baghdad, the U.S. soldiers involved were subsequently held responsible and required to make a public apology.³⁰⁵ Yet, while these soldiers

²⁹³ Fenster, *supra* note 16, at 769–70.

²⁹⁴ *Id.*; see also *About: What is Wikileaks?*, *supra* note 238.

²⁹⁵ See Fenster, *supra* note 16, at 774–75.

²⁹⁶ Bejesky, *supra* note 168, at 426–28 (“National security secrecy and executive privileges have permitted many administrations to veil highly controversial actions and misdeeds . . .”).

²⁹⁷ For more information, see generally Bejesky, *supra* note 168, at 427–28.

²⁹⁸ See *id.* at 428–30 (detailing instances where the United States was involved in supporting coups in various countries, inhumane biological and radiation experiments on American citizens, and participation in abusive military training).

²⁹⁹ *Id.* at 430–31.

³⁰⁰ *Collateral Murder Video*, BRADLEYMANNING.ORG, <http://www.bradleymanning.org/learn-more/collateral-murder-video> (last visited Oct. 16, 2013).

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ Stone, *supra* note 29, at 91.

³⁰⁴ *Id.*

³⁰⁵ Bejesky, *supra* note 168, at 455 (explaining that at least one soldier linked to the video was criminally charged, but only after the leak of the video was made); Lewis, *supra* note 112, at 440

are making apologies, Bradley Manning, the source who leaked the video, faced 22 charges for the disclosure³⁰⁶ and, after facing a potential life sentence,³⁰⁷ has been sentenced to 35 years in prison.³⁰⁸

Second, the Executive may also want to conceal information that does not necessarily show corrupt or illegal activity but that reveals “unflattering” information.³⁰⁹ Such information may include the number of civilian deaths during a particular military mission, torture by militias amicable with the United States, and military reliance on private contractors.³¹⁰ WikiLeaks, for example, disclosed the transcript of U.S. diplomatic cables revealing opinions of certain diplomats on political and economic conditions of foreign nations as well as their opinions on particular foreign leaders.³¹¹

To disguise such unflattering information the Executive will either completely prevent any talk of the information to the public or will share the information with the public but distort it as an attempt to gain public approval or reduce public criticism.³¹² Both instances serve as an improper control on meaningful public debate and are contrary to traditional notions of democracy. In the former situation, there still remains vast opportunity for misdeeds by the executive branch. In the latter situation, the Executive intentionally misleads the public and thus, cuts at the core of meaningful debate. When this happens, whistleblowers should not be condemned and, in fact, should be encouraged to disclose the appropriate information needed for public knowledge and verification of what the Executive asserts. Only after this kind of disclosure is the public able to properly support or critique the government. Otherwise, there remains a strong possibility that the President will create a monopoly over the flow of information related to national security.³¹³ Such an act is clearly contrary to the purposes of a democratic society.

Therefore, disclosure of national security information may be necessary not only to uncover wrongdoings by the government, but also to verify allegations made to the public. Such disclosure would not only make the Executive accountable to the public, but it would also make the Executive accountable to other branches of the government and to smaller agencies within

(explaining that the soldiers had to deliver a letter of “Reconciliation and Responsibility to the Iraqi People”).

³⁰⁶ Bejesky, *supra* note 168, at 455.

³⁰⁷ Liebelson, *supra* note 71.

³⁰⁸ Savage & Huetteman, *supra* note 76.

³⁰⁹ See Fenster, *supra* note 16, at 764.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² See Bejesky, *supra* note 168, at 410–13.

³¹³ See *id.* at 413–14.

the executive branch.³¹⁴ Given the fact that information related to national security lies exclusively with the President, there are times where Congress is unaware of important confidential information.³¹⁵ For example, it has been argued that the security measures limiting information sharing between agencies contributed to the failed prevention of terrorist attacks on September 11, 2001.³¹⁶ Others argue that the sharing of information between federal agencies will encourage too much whistleblowing due to the increased number of individuals that the information will be passed through.³¹⁷ However, as we have seen, whistleblowing is imperative to the public good: it promotes public discourse and government accountability, and in this particular case, can even lead to greater counterterrorism efforts.

V. RECOMMENDATION: AMENDING THE ESPIONAGE ACT

The debate between secrecy and government accountability for the benefit of the public good is similar to the theory of “transparency.” Mark Fenster explains that the theory of transparency balances two mutually exclusive interests:

On the one hand, theories of transparency emphasize the normative democratic ideal of a deliberative, engaged public and the consequentialist ideal of a responsible, accountable government that will result from a visible state; on the other hand, transparency theories in the American context also recognize the normative constitutional ideal of a tripartite system in which a semiautonomous President can perform his delegated duties without the interference of Congress and the judiciary (who are themselves free from executive branch interference), as well as the consequentialist ideal of an effective, efficient state that can protect the nation and public from external and internal threats by controlling access to its own deliberations and to sensitive information.³¹⁸

Therefore, each nation must determine how to best address disclosures of national security information in a way that advances both an engaged public as well as an accountable government.³¹⁹ Currently, the typical reaction of the United States to instances of disclosure is to arrest the source—i.e. the

³¹⁴ See LOUIS FISHER, CONG. RESEARCH SERV., RL33215, NATIONAL SECURITY WHISTLEBLOWERS (2005), available at <http://www.fas.org/sgp/crs/natsec/RL33215.pdf>.

³¹⁵ See Stone, *supra* note 29, at 83.

³¹⁶ Fenster, *supra* note 16, at 769.

³¹⁷ See *id.* at 796–97.

³¹⁸ *Id.* at 782.

³¹⁹ See Ritchie, *supra* note 15, at 479.

whistleblower—and attempt to discourage public support by emphasizing the potential harm that such information may cause.³²⁰

Recently, the disclosures of WikiLeaks have provoked increased efforts in the United States to tighten control of classified national security information.³²¹ However, tightened control of this kind of information is unlikely to serve the interest of the public good. Geoffrey Stone³²² argues that a more effective means of preventing harmful disclosure, while also promoting government accountability, is to increase the government's authority to prohibit leaks *as well as* to expand rights in favor of disclosure.³²³ Mark Fenster argues that “[t]he only remedies that will genuinely curb leaks are ones that force the government to disgorge most of the information it holds rather than hold more information more tightly.”³²⁴

These concerns have also prompted statutory reform in areas outside of the United States. For example, Iceland has recently passed the Icelandic Modern Media Initiative (“IMMI”), which promotes full transparency by offering broad protection of the sources, journalists, and publications that disclose confidential information about government or corporate activities.³²⁵ Under this law, whistleblowers will be free to communicate openly with journalists without fear of identification or criminal prosecution.³²⁶ The theory behind the IMMI is to keep every citizen informed about government actions and policies.³²⁷ Additionally, the European Court of Human Rights has enacted the equivalent of a reporter's privilege, which protects journalists from being forced to reveal the identity of their sources.³²⁸

While these newly enacted protections move in the right direction, there is little protection offered to the government to safeguard important and pressing national security information.³²⁹ Clearly, it is a difficult task to balance the importance of secrecy and government accountability in favor of the public good. Thus, there is never any guarantee that disclosure will always have a greater effect on government accountability or promoting the public debate

³²⁰ Fenster, *supra* note 16, at 748.

³²¹ *Id.* at 770 (describing efforts to stall a Whistleblower Protections Act and initiatives to extend criminal liability under the Espionage Act to new media sites like WikiLeaks).

³²² Geoffrey R. Stone is a Professor of Law at the University of Chicago Law School. Stone teaches Constitutional Law and is the author of several articles relating to free speech and government transparency. See *Geoffrey R. Stone*, UNIV. CHI. L. SCH., <http://www.law.uchicago.edu/faculty/stone-g/> (last visited Sept. 13, 2013).

³²³ Stone, *supra* note 29, at 92.

³²⁴ Fenster, *supra* note 16, at 771–72.

³²⁵ Ritchie, *supra* note 15, at 461.

³²⁶ *Id.* at 465–66.

³²⁷ *Id.* at 476.

³²⁸ *Id.* at 468.

³²⁹ See *id.* at 476.

than on national security protection.³³⁰ However, as long as the executive branch understands that any information may be disclosed to the public at any time, it is likely that it will engage in national security decision-making more carefully. By doing so, the government will be forced to balance what is best for the public good.

Additionally, a great deal of responsibility must be placed in both the hands of whistleblowers as well as journalists. First, the whistleblowers must weigh these concerns when deciding whether to disclose information relating to national security. In other words, a whistleblower should make efforts to only disclose information that he believes, in good-faith, will promote the democratic notions of public debate and government accountability. Similarly, journalists should also weigh the concerns of secrecy and government accountability by making good-faith and reasonable efforts to verify the truth and benefits of the information received before making that information available for the whole world to see.³³¹

To accommodate these efforts, Congress should consider amending the Espionage Act to reflect a balance of secrecy and government accountability. In doing so, protections for whistleblowers should be substantially increased by raising the standard that the government must meet for a successful prosecution. Specifically, a successful case against a whistleblower should require the government to first produce some evidence that the disclosure made would create imminent harm or threat thereof.³³² If the government cannot meet this burden, the whistleblower should not be convicted under the Espionage Act. If the government does meet this burden, which it likely will,³³³ the whistleblower should be able to assert a good-faith defense. Here, the whistleblower should be able to present evidence that he did not intend to use the information to the detriment of the United States nor had reason to believe that the information would cause such harm.³³⁴ Specifically, if the whistleblower can show that his intention was solely to create public awareness

³³⁰ See Fenster, *supra* note 16, at 757.

³³¹ One would hope that this is already the case; unfortunately the value of entertainment and the potential for an increased number of viewers may create great incentives for other, less than noble intentions. See Bejesky, *supra* note 168, at 413–14.

³³² *N.Y. Times Co. v. United States*, 403 U.S. 713, 732 (1971) (White, J., concurring). There, the Court held that the government could not enjoin the press from publishing national security information unless it was shown that that information would cause “grave and irreparable injury” to the nation. *Id.*; see also *id.* at 726–27 (Brennan, J., concurring).

³³³ While this standard ideally places a harsher burden on the government (seeing as the government currently does not have to make this showing), it is likely that it will still somewhat easily find *some evidence* to show a possible threat. On the other hand, the “grave and irreparable injury” standard may actually create too high of a standard.

³³⁴ This standard is not entirely unlike the standard already found in sections of the Espionage Act not pertaining to whistleblowers. See *supra* text accompanying notes 216–17.

of an act that he perceived to be illegal or unjust, he should not be punished for attempting to hold the government accountable through such disclosures.

In addition to the increased protections for whistleblowers, the Espionage Act should be expanded to create a higher standard of accountability for journalists by prosecuting journalists who recklessly publish harmful information. Accordingly, for a successful prosecution, the government should once again be required to show that the information published could produce imminent harm or threat thereof. The government should *also* have to present evidence that the journalist had knowledge or reason to believe that the information was harmful.³³⁵ If the government is successful, a journalist should then be given the opportunity to rebut this finding with a showing of any good-faith reasonable efforts made to verify the accuracy of the information and to investigate the potential harm of disclosure before publishing it. When evaluating these good-faith efforts, the Court should look to factors similar, but not limited to, the methods that WikiLeaks implements in its verification process.³³⁶ If the journalist can successfully show that he has made adequate reasonable efforts, he should not be convicted under the Espionage Act for publishing the information.

If amended in this way, the Espionage Act would more effectively protect national security while also furthering public debate and government accountability.

VI. CONCLUSION

As highlighted by the increased prosecutions of whistleblowers during the last several years, the traditional purpose for the usage of the Espionage Act has become blurred. Traditionally, this Act was used to prosecute those who commit espionage or treason—crimes committed against the state for the purpose of aiding foreign powers.³³⁷ Now, it is being used to prosecute individuals who disclose information that they believe to be in some way valuable to the citizens of the United States—not to the leaders of foreign countries.

As it is currently written, the Espionage Act allows for the prosecution of any person who discloses national security information regardless of the effects or purpose of the disclosure.³³⁸ Yet, the Act does not criminalize the publication of national security secrets. This seems to cut against the very core

³³⁵ This extra safeguard is consistent with the traditional concepts that freedom of the press should be—and is—held at a much higher degree of protection than whistleblowing.

³³⁶ See *supra* text accompanying notes 279–282.

³³⁷ See “Espionage,” *supra* note 3; “Treason,” *supra* note 4.

³³⁸ See *Espionage Act, ESPIONAGE ACT & LIMITATIONS FIRST AMEND.*, <http://ows.edb.utexas.edu/site/espionage-act-and-limitations-first-ammendment/espionage-act> (last visited Feb. 24, 2013).

of national security protection. Protection of national security requires some level of secrecy in order to effectively guard our borders. However, there are currently no restrictions on the ability of journalists or the press to disclose such national security information, even through wide-spread publication. This is arguably the most dangerous part of disclosure because without wide-spread publication of the information, the disclosure would be virtually unknown to the public and hence, would create little to no threat to the national security. In contrast, by allowing journalists and the press to freely publish any national security information that they can get their hands on, the purpose of protecting the national security is fully defeated—and so is the benefit to the public good.

On the other hand, because some disclosure is necessary for an effective democracy, journalists and whistleblowers should not be entirely prohibited from disseminating national security information to the public. While journalists are already free to disseminate such information, whistleblowers are currently prohibited from all such disclosure. This current scheme restricts disclosure of information necessary to promote the public good. The public good encourages disclosure—by both journalists and whistleblowers—of any national security information that is more likely to incite public debate or create government accountability than to cause harm. When disclosing such information, however, both journalists and whistleblowers should remain mindful of the potential damage that may result.

Therefore, if the Espionage Act was amended to provide the standards discussed above, allowing for greater protection of whistleblowers and stricter restrictions on journalists, it would better serve its purpose to prevent harmful disclosure of information, thus, protecting national security. Additionally, it would more accurately promote what is necessary for the public good by promoting the traditional notions of democracy, including the free flow of information and government accountability. Finally, because these suggested changes to the Espionage Act would adequately protect sources as well as journalists, there would be no need to enact a federal reporter's privilege. Thus, Congress would be relieved from having to solve the evolving complexities arising from defining such a privilege. As stated previously, no test is fool-proof and there is no guarantee that the test will benefit the public good in all situations. However, this method, while not perfect, may be a significant step in the right direction.

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