CURBING OVERZEALOUS PROSECUTION OF THE ESPIONAGE ACT: THOMAS ANDREWS DRAKE AND THE CASE FOR JUDICIAL INTERVENTION AT SENTENCING

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INTRODUCTION

The Obama administration has elected to charge mid-level intelligence officials, including National Security Agency (NSA) official Thomas Andrews Drake,[1] who exposed government wrongdoing by leaking information to the press. These prosecutions are based on a broad 1917 law called "the Espionage Act."[2] Since its inception, the Espionage Act has been used twelve times to bring criminal cases against government officials accused of providing information to the media.[3] Nine of those cases were brought by the Obama administration.[4]

Many experts worry about charging government whistleblowers as spies.[5] "Spies" are generally defined as people who collect and reveal information about an enemy or competitor.[6] "Whistleblowers," on the other hand, are defined as employees who disclose information about their employer that they believe is evidence of illegality, gross waste, fraud, or abuse of power.[7] What distinguishes a spy and a whistleblower

1 Thomas Andrews Drake is a former NSA official who leaked to the *Baltimore Sun* in 2005. The government charged Drake with five counts under the Espionage Act, and later dropped them on the eve of trial. *See infra* Part I.E.

2 18 U.S.C. §§ 792–799 (2012).

3 *See* Elizabeth Shell & Vanessa Dennis, *11 "Leakers" Charged With Espionage*, PBS NEWSHOUR (Aug. 21, 2013), http://www.pbs.org/newshour/multimedia/espionage/; *see also* Charlie Savage, *F.B.I. Ex-Agent to Plead Guilty in Press Leak*, N.Y. TIMES, Sept. 24, 2013, at A1.

4 *See* Savage, *supra* note 3; Shell & Dennis, *supra* note 3; *see also* Jesselyn Radack & Kathleen McClellan, *The Criminalization of Whistleblowing*, 2 AM. U. LAB. & EMP. L. F. 57 (2011); Ed Pilkington, *Manning Conviction Under Espionage Act Worries Civil Liberties Campaigners*, GUARDIAN (July 31, 2013, 10:20 AM), http://www.theguardian.com/world/2013/jul/31/bradley-manning-espionage-act-civil-liberties.

5 Jane Mayer, *The Secret Sharer*, NEW YORKER, May 23, 2011, at 57. ("If Drake is convicted, it means the Espionage Act is an Official Secrets Act. . . . [It] would establish a legal precedent making it possible to prosecute journalists as spies." (internal quotation marks omitted)). One Espionage Act expert claims that the law was meant to criminalize classic espionage and not whistleblowing. *Id.* (quoting Stephen Vladeck, Espionage Act expert and law professor at American University, claiming that the law was "meant to deal with classic espionage, not publication").

6 *Definition of Spy in English*, OXFORD ENGLISH DICTIONARY, *available at* http://oxforddictionaries.com/definition/american_english/spy (last visited Oct. 26, 2013).

7 According to the Government Accountability Project, a non-profit organization whose mission is "to promote corporate and government accountability by protecting whistleblowers," *About Us*, GOV'T ACCOUNTABILITY PROJECT, http://www.whistleblower.org/

is the actor's motives: While a spy has bad intentions, a whistleblower exposes wrongdoing for the sake of the public interest. Despite the purported distinction, however, courts have applied the Espionage Act against government officials who have leaked to the press.[8]

The Obama administration's recent crackdown on mid-level intelligence officials has been acute; for advocates of freedom of speech and transparent government, the attack against leakers has been particularly startling from a democratic president committed to transparency.[9] This Note argues that to offset the effects of the executive branch's overzealous and retaliatory prosecution of leakers, the judiciary, under a theory of separation of powers, should use its sentencing power to intervene.

This Note will use the case of Thomas Andrews Drake as an example of the executive branch's pursuit of government official leakers. At Drake's sentencing hearing, District Court Judge Richard D. Bennett focused on what he found to be the government's inappropriate conduct throughout the case. He commented on the staggering amount of time between Drake's house raid in 2007 and his indictment two and a half

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about (last visited Oct. 26, 2013), a whistleblower is:

> An 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. Typically, whistleblowers speak out to parties that can influence and rectify the situation. These parties include the media, organizational managers, hotlines, or Congressional members/staff, to name a few.

What Is a Whistleblower?, GOV'T ACCOUNTABILITY PROJECT, http://www.whistleblower.org/about/what-is-a-whistleblower (last visited Oct. 26, 2013). Their definition is a composite definition taken from combined state, federal, and international cases.

8 *See infra* Part I. In *United States v. Morison*, 604 F. Supp. 655 (D. Md. 1985), the Maryland district court mooted the distinction between classic spy and leaker to the press for the purposes of § 793(e). *Id.* at 659. The court pointed out that by leaking it to the press, the defendant leaked it to "every foreign agent and government, hostile or not, in the world." *Id.* The court also reasoned that:

> If Congress had intended this situation to apply only to the classic espionage situation, where the information is leaked to an agent of a foreign and presumably hostile government, then it could have said so by using the words 'transmit . . . to an agent of a foreign government.' In 18 U.S.C. § 794, Congress did precisely that . . . .

Id. at 660.

9 *See* Radack & McClellan, *supra* note 4, at 58–59 (arguing that the prosecutions are unusual for the Obama administrative because "they are brought under a novel theory of the Espionage Act espoused by a neo-conservative, and they often involve stale cases opened during the Bush administration" (footnote omitted)). Their claim is that these prosecutions will have a chilling effect on the press.); *Ethics Agenda*, CHANGE.GOV, http://change.gov/agenda/ethics_agenda (last visited Oct. 26, 2013); *see also* Mayer, *supra* note 5, at 48. Drake argues that these Draconian prosecutions could be a result the destructive force of power. *Id.* He also believes that "the intelligence community coöpted [sic] Obama, because he's rather naïve about national security." *Id.*

years later.[10] He accused the government of overly indecisive prosecutorial discretion, that the case was "floating somewhere in terms of exactly who was going to make a decision," particularly "in light of the fact that none of the other people with whom he was alleged to have been acting were ever charged."[11] Judge Bennett argued that Drake was an all-around honest man with no criminal history,[12] who, as a result of the government's pursuit, had lost a lot, including his job, a government pension, and money in legal fees.[13] On the whole, the judge argued that the government's behavior simply did not "pass the smell test."[14] Taking a cue from Judge Bennett's rebuke of the government in Drake's case, this Note seeks to address the government's misconduct in bringing suits against government leakers under the Espionage Act. This Note argues that judicial intervention at sentencing is necessary to curb overzealous prosecution of government official leakers under § 793(e) of the Espionage Act, as evidenced by the case against Thomas Andrews Drake.

Part I of this Note considers the history of the Espionage Act and outlines the similarities between the Obama administration's prosecutions, focusing specifically on the *Drake* case. Part II argues that the willful retention provision of the Espionage Act allows for broad prosecutorial power, particularly as courts will defer to the executive branch in interpreting the law. Part III advocates for a balancing test for judges to use at sentencing in order to curb overzealous prosecution under the Espionage Act. The balancing test will weigh the harm to national security with the public interest in releasing the information for the purpose of assessing what is an appropriate sentence for government official leakers who have been found guilty of willfully retaining documents under the Espionage Act.

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10 Transcript of Sentencing at 21, United States v. Drake, 818 F. Supp. 2d 909 (D. Md. 2011) (No. 1:10-CR-181-RDB) [hereinafter Drake Sentencing Transcript], *available at* www.fas.org/sgp/jud/drake/071511-transcript.pdf ("Based on my career experience, having occupied both chairs in the courtroom, I know very few situations where a person's home is searched and two and a half years later they're indicted. . . . I find a two and a half year period after your home is searched to wait and see if you're going to be indicted is an extraordinary period of delay, Mr. Welch.").

11 *Id.* at 22.

12 *Id.* at 6–7 ("Mr. Wyda: I wish I had his driving record, Your Honor. The Court: . . . [I]t's not often I have a defendant in front of me that has a better record than I do.").

13 *Id.* at 24, 29. ("That's four years of hell that a citizen goes through.").

14 *Id.* at 30.

I. BACKGROUND

A. *Why the Public Needs Government Official Leakers*

At the heart of the issue of prosecuting government official leakers is the importance of access to information. Public access to government information is essential to the vitality of a democratic government; the only way to limit corruption is to enable an open public dialogue and hold the government accountable for its actions.[15] Public access, however, is limited when government agencies classify information—which they do far too often.[16] Experts have recognized that government agencies withhold too much information from the public by classifying documents when there is no real threat to national security therein.[17]

Oftentimes, the only way the public can gain access to inappropriately classified information is by intelligence officials leaking information to the press.[18] Leaks, therefore, have an important role in maintaining a robust democracy. In pursuing government officials under the Espionage Act, however, the Obama administration is acting against this public interest by seeking to limit one of the only ways in which the public can gain access to intelligence information.

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15 Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 399 (2009).

16 The U.S. government periodically restricts certain information on the basis of a national security risk. As defined in the Espionage Act, "classified information" means information that was "specifically designated by a United States Government Agency for limited or restricted dissemination or distribution." 18 U.S.C. § 798(b) (2012).

17 *See* Aftergood, *supra* note 15, at 399–401 (citing the Homeland Security Advisory Council, who argues that the "classification system is broken and is a barrier (and often an excuse) for not sharing pertinent information with homeland security partners") (internal quotation marks omitted); *see also Emerging Threats: Overclassification and Pseudo-classification: Hearing Before the Subcomm. on Nat'l Sec., Emergency Threats and Int'l Relations of the H. Comm. on Gov't Reform*, 109th Cong. 120 (2005) (prepared statement of Thomas Blanton, Executive Director, National Security Archive). Mr. Blanton noted that:

> The deputy undersecretary of defense for counterintelligence and security confessed that 50% of the Pentagon's information was overclassified. The head of the Information Security Oversight Office said it was even worse, "even beyond 50%." The former official who participated in the Markle Foundation study cited by the 9/11 Commission on information sharing stated that 80–90% (at least in the area of intelligence and technology) was appropriately classified at first, but over time that dwindled down to the 10–20% range.

Id. at 120 (emphasis omitted); *see also* Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25 ("It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification, and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another.").

18 Often this information is not a threat to national security, but simply embarrassing to the government. *See, e.g.*, *infra* Part II.D.

B. *Historical Underpinnings of § 793(e)*

The Espionage Act[19] was enacted in 1917 and has remained mostly unchanged, aside from § 793(e).[20] Section 793(e) was extended in 1950 as part of the Internal Security Act,[21] and it prohibited anyone from communicating information relating to the national defense to persons "not entitled to receive it."[22] Section 793(e) also criminalized the retention of defense information alone.[23] The dates of the section's passage and amendment—1917 and 1950—coincide with major historical events requiring new legislation.[24] The initial Espionage Act was enacted in 1917 when America entered World War I, prompting legislation promoting greater secrecy in government.[25] The 1950 amendment responded to the perceived threat of Communism; Senator McCarran, who proposed the amendment, described Communism as a "sizeable army dedicated to trickery, deceit, espionage, sabotage, and terrorism" in a 1951 University of Pittsburgh Law Review Article.[26] There, Senator McCarran also explains that his amendments to the Espionage Act closed certain loopholes within the Act as it existed.[27]

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19 18 U.S.C. §§ 792–799.

20 This section was central to the *Drake* case and will be the focus of this Note.

21 50 U.S.C. § 797 (2012) (otherwise known as the McCarran Internal Security Act).

22 18 U.S.C. § 793(e) ("Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . ."); s*ee also* Harold Edgar & Benno C. Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973).

23 18 U.S.C. § 793(e).

24 The United States entered World War I in 1917. The height of the Red Scare was in 1950.

25 *See* Timothy L. Ericson, *Building Our Own "Iron Curtain": the Emergence of Secrecy in American Government*, 68 AM. ARCHIVIST 18, 32 (2005) ("The seeds for hasty action had been sown a year earlier by the Black Tom Railroad Yard explosion in which a munitions dump had been destroyed by saboteurs. This terrific explosion made headlines across the country and heightened fears of terrorism by leftist labor organizations, anarchists, and enemy saboteurs as well."). Note, however, that the bill was not met without dissonance. *See* 55 CONG. REC. 3124, 3133 (1917) (statement of Rep. McKenzie, stating that "I can conceive of no good reason why at this time we should enact a general law giving the President or his agents power to throttle the press of our country").

26 Patrick A. McCarran, *The Internal Security Act of 1950*, 12 U. PITT. L. REV 481, 482 (1951).

27 For example, before the amendment, "the unauthorized possession of certain restricted items relating to national defense was not a penal offense unless a demand had been made against the possessor by the authorities entitled to receive them, and the demand had been refused." *Id.* at 496.

Thus, the legislators who enacted the law and these amendments had similar intentions to that of a whistleblower: To expose corruption.[28] Indeed, scholars argue that the legislative history of the original Act indicates an intention to exclude well-meaning publication of information.[29] Courts, however, have interpreted the Act more broadly.[30]

C. *Pre-Obama Administration Prosecutions of Government Officials Under the Espionage Act*

Before the Obama administration, there were only three other instances where prosecutors had charged government officials with violating the Espionage Act.[31] Since *United States v. Morison* was the only case tried[32] and later appealed,[33] that case has the most precedential value for current cases and will be explored more in depth.

The first prosecution concerned the famous Pentagon Papers case.[34] In 1971, two analysts at the Research and Development Corporation, Daniel Ellsberg and Anthony Russo, were indicted for leaking classified information about the Vietnam War.[35] A federal judge dismissed the case in 1973 based on government misconduct.[36]

The first government official to be successfully convicted under the Espionage Act was Samuel Loring Morison in 1985.[37] Morison was a civilian employee of the Office of Naval Intelligence Support Center.[38] He was charged with releasing copies of three photographs, classified

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28 *Id.* at 483–84.

29 Edgar & Schmidt, *supra* note 22, at 937 (arguing that the legislative history "may fairly be read as excluding criminal sanctions for well-meaning publication of information no matter what damage to the national security might ensue and regardless of whether the publisher knew its publication would be damaging").

30 *See infra* Part II.A.

31 *See* Cora Currier, *Charting Obama's Crackdown on National Security Leaks*, PROPUBLICA (July 30, 2013, 3:40 PM), http://www.propublica.org/special/sealing-loose-lips-charting-obamas-crackdown-on-national-security-leaks.

32 United States v. Morison, 604 F. Supp. 655 (D. Md. 1985). The Pentagon Papers case was tried but later dismissed.

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

34 *See* DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 4–6 (1996).

35 *Id.* at 341–42. On whether those documents contained information that harmed national security, see Griswold, *supra* note 17, at A25 ("I have never seen any trace of a threat to the national security from the publication [of the Pentagon Papers]. Indeed, I have never seen it even suggested that there was such an actual threat.").

36 *See* RUDENSTINE, *supra* note 34, at 342.

37 *Morison*, 844 F.2d 1057.

38 United States v. Morison, 604 F. Supp. 655, 657 (D. Md. 1985).

"secret," to British magazine *Jane's Defense Weekly* (*Jane's*).[39] The photographs featured the construction of a nuclear-powered Soviet aircraft carrier.[40] Morison was also involved in a separate incident wherein he photocopied a report of an explosion of a Soviet naval base for one of his contacts at *Jane's*.[41] For each incident, Morison was charged with two counts under the Espionage Act: One under § 793(d), for willfully causing the photographs to be transmitted to a person not entitled to receive them, and the other under § 793(e), for willfully retaining classified documents and failing to deliver them to the officer or employee of the United States entitled to receive them.[42] He was sentenced to two years in prison,[43] and his conviction was affirmed on appeal.[44] He served less than one year and was subsequently pardoned by President Clinton.[45]

In August 2005, Lawrence Franklin, a State Department analyst, was charged with leaking classified information about Iran to two American Israel Public Affairs Committee lobbyists.[46] He was charged under §§ 793(d) and (e).[47] He pled guilty in January 2006 and was sentenced to twelve years in prison,[48] which was later reduced to ten months house arrest.[49]

D. The Obama Administration's Charges

The Justice Department under the Obama administration has chosen to prosecute eight government officials under the Espionage Act aside from Thomas Andrews Drake: Shamai Leibowitz, Bradley Manning, Stephen Jin-Woo Kim, Jeffrey Sterling, John Kiriakou, James Hitselberger, Edward Snowden, and Donald Sachtleben.[50] These men have a number of important similarities: They were all mid-level intelligence officials who leaked information to the media and did so,

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39 *Id.* Morison was previously paid as an American editor at *Jane's*.

40 Shell & Dennis, *supra* note 3.

41 *Morison*, 604 F. Supp. at 657.

42 *Id.* at 658.

43 *See* Shell & Dennis, *supra* note 3.

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

45 *See* Anthony Lewis, *Abroad at Home; The Pardons in Perspective*, N.Y. TIMES, Mar. 3, 2001, at A13. Note that generally, each count of the Espionage Act is given a ten-year sentence.

46 *See* Currier, *supra* note 31.

47 Criminal no. 1:05cr225 Lawrence Franklin indictment (2005) (on file with the author).

48 *See* David Johnston, *Former Military Analyst Gets Prison Term for Passing Information*, N.Y. TIMES, Jan. 21, 2006, at A14.

49 *See* Shell & Dennis, *supra* note 3.

50 *Id.*; *see also* Savage, *supra* note 3.

for the most part, because they believed the public had a right to know the information that they leaked.

First, in targeting mid-level officials,[51] prosecutors are selecting those who will suffer the most financially. For mid-level officials, legal costs are onerous; as opposed to the higher-ranking officials, who can more easily rebound with consulting or university jobs after a trial or jail-time, these officials will have a more difficult time recovering.[52] It appears that prosecutors are going after mid-level officials as a deterrent: Any potential leaker will have to weigh the cost of potential financial ruin, let alone jail time. For some, the personal cost may sufficiently outweigh the public gain in leaking.

Second, most of the officials leaked information to the media.[53] There is some variance, however, over both the amount of information leaked—ranging from a single offhanded comment to a reporter[54] to thousands of diplomatic cables to a website[55]—and the type of information leaked—be it primary documents or secondary testimony. For example, former Army Intelligence analyst Bradley Manning was

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51 *E.g.*, Leibowitz was a translator, Manning and Snowden were analysts, and Sterling and Kiriakou were agents. *See* Scott Shane, *U.S. Pressing Its Crackdown Against Leaks*, N.Y. TIMES, June 18, 2011, at A1. Kim, an arms expert, might be one exception, though it is notable that he was working as an analyst under contract with the State Department. *See* Scott Shane, *U.S. Analyst Is Indicted in Leak Case*, N.Y. TIMES, Aug. 28, 2010, at A1.

52 *See* Drake Sentencing Transcript, *supra* note 10, at 24–25. Judge Bennett distinguishes Sandy Berger who bounced back quickly after his prosecution and became an advisor to the President of the United States because he "travels in those circles." In noting the unfairness of who the Obama administration chooses to charge under the Espionage Act, John Kiriakou laments that though CIA Director Leon Panetta revealed the identity of the Seal Team member who killed Osama Bin Laden, "[t]here was no espionage charge for Panetta. But there was a $3m book deal." *See* John Kiriakou, *Obama's Abuse of the Espionage Act Is Modern-day McCarthyism*, THE GUARDIAN (Aug. 6, 2013, 8:15 AM), http://www.theguardian.com/commentisfree/2013/aug/06/obama-abuse-espionage-act-mccarthyism. A few of the government officials who have been charged have (or had) setup websites where people can donate to their legal costs. *See, e.g.*, PLEASE HELP DEFEND JOHN KIRIAKOU, http://www.defendjohnk.com (last visited Oct. 26, 2013); STEPHEN KIM LEGAL DEF. TR., http://stephenkim.org/legal-defense-trust (last visited Oct. 26, 2013). In an interview with the Washington Post, Edward Snowden acknowledged that he will likely always be on the run. Interview by Glenn Greenwald with Edward Snowden, NSA Whistleblower, in H.K. (June 6, 2013) [hereinafter Snowden Interview], *available at* http://www.washingtonpost.com/posttv/world/national-security/edward-snowden-reveals-himself-as-nsa-leaker/2013/06/10/f5791c4a-d1fb-11e2-8cbe-1bcbee06f8f8_video.html.

53 *E.g.*, Leibowitz leaked to blogger Richard Silverstein; Manning leaked to Julian Assange's website, *WikiLeaks*; Kim leaked to Fox News; Sterling leaked to James Risen for his book *State of War*; Kiriakou leaked to ABC News; Drake leaked to the *Baltimore Sun*; and Sachtleben leaked to the *Associated Press*. *See* Currier, *supra* note 31; Savage, *supra* note 3; Shell & Dennis, *supra* note 3.

54 *E.g.*, Kim. *See* Shell & Dennis, *supra* note 3.

55 *E.g.*, Snowden and Manning. *See* Currier, *supra* note 31.

found guilty of six counts of violating the Espionage Act[56] for leaking over 250,000 military and diplomatic documents to Julian Assange's website, *WikiLeaks*, including Iraq and Afghan war logs, detainee files from Guantanamo Bay, and documents relating to a U.S. air strike that killed civilians in Afghanistan.[57] Unlike Manning, who leaked primary documents, State Department analyst Kim leaked information to Fox News, which resulted in a report that Pyongyang would likely respond to a U.N. resolution condemning its nuclear and missile tests (something that, arguably, any educated layperson could have stated with confidence).[58] Kim and Manning are by no means facing the same fate: Kim is charged only under the Espionage Act and for making a false statement to the FBI,[59] whereas Manning was found guilty of fourteen other counts and received a sentence that some call "excessive."[60] No matter how much their acts differ in amount or in kind, both men fall under the broad reach of the Espionage Act.[61]

Furthermore, there is some discrepancy among the leakers regarding whether they were named in the media as the source. Kiriakou, for example, gave an interview on ABC News detailing the Bush administration's use of waterboarding in interrogating terrorist suspects and quickly became a source for other journalists and arguably a target for prosecutors.[62] Though one of the Espionage Act charges was for speaking out publicly, he was also charged with another count under the Espionage Act for disclosing the name of a CIA analyst involved in torture to a freelance reporter who did not publish it.[63] Similarly, former CIA agent Jeffrey Sterling was accused of surreptitiously leaking information about an effort to sabotage Iranian nuclear research to New York Times reporter and author James Risen for a chapter in Risen's 2006 book *State of War*, for which Sterling has pled not guilty.[64]

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56 A military judge found him guilty on July 30, 2013. *See* Charlie Savage, *Manning is Acquitted of Aiding the Enemy*, N.Y. TIMES, July 30, 2013, at A1. Manning was sentenced to thirty-five years in prison. 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.

57 Pilkington, *supra* note 4.

58 Shane, *supra* note 51. It could be argued, however, that when an intelligence official gives the statement, it is more credible.

59 *Id.*

60 *See* Savage, *supra* note 56; *see also* Editorial Board, *What Happened to Clemency?: Bradley Manning's Sentence Is Excessive*, N.Y. TIMES, Aug. 21, 2013, at A26.

61 *See infra* Part II.

62 *See* Scott Shane, *From Spy to Source to Convict*, N.Y. TIMES, Jan. 6, 2013, at A1 (noting that Kiriakou is both the first CIA official to go to jail for a leak to the press and the only CIA official to go to jail for torture).

63 Currier, *supra* note 31. He was charged with three counts of violating the Espionage Act, all of which were eventually dropped. Kiriakou, *supra* note 52.

64 *See* Greg Miller, *Former CIA Officer Accused of Leaking Information About Iran*, WASH. POST, Jan. 7, 2011, at A03. The Fourth Circuit recently reversed the district court's holding that

Third, like Drake,[65] the defendants often consider themselves whistleblowers.[66] One example is Leibowitz, who passed on secret transcripts of conversations caught on FBI wiretaps of the Israeli Embassy in Washington.[67] According to blogger Richard Silverstein, Leibowitz passed on this information because of concerns about Israel's influence over Congress and public opinion and fears that Israel might strike Iranian nuclear facilities.[68] Another example is Kiriakou, who spoke to ABC News and other reporters in 2007 about the use of torture during the Bush administration after 9/11.[69] While one can argue that the information from both of these leaks is damaging to U.S. national security, the leaks are perhaps best described as damaging to the reputation of the United States. Leibowitz's leak was particularly embarrassing, as it revealed that U.S. intelligence was spying on its ally, Israel.[70] In Kiriakou's case, the United States' use of torture post-9/11 was, arguably, a national embarrassment and thus something that the intelligence community would have preferred remained secret.[71] For both Leibowitz and Kiriakou, no matter how embarrassing the information was to the U.S. government, the public needed to be informed about the covert goings-on in their democratic government.[72]

Indeed, based on the similarities among government officials charged with violating the Espionage Act, one can infer that the

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Risen had a qualified First Amendment reporter's privilege in response to a subpoena seeking information about confidential sources. United States v. Sterling, No. 11–5028, 2013 WL 3770692, at *3 (4th Cir. July 19, 2013).

65 *See infra* Part I.E.

66 *See* Introduction, *supra*. Edward Snowden is the most recent example. In response to why he became a whistleblower, Snowden claimed that as an NSA official, he was in a position of privileged access and was exposed to information on a broad scale. According to Snowden, when you see things that are disturbing you and continue to see these wrongdoings occur, at some point you feel compelled to speak publicly about it. Snowden Interview, *supra* note 52.

67 *See* Scott Shane, *Leak Offers Look at Efforts by U.S. to Spy on Israel*, N.Y. TIMES, Sept. 5, 2011, at A1; *see also* Richard Silverstein, *Why I Published U.S. Intelligence Secrets About Israel's Anti-*Iran *Campaign*, TRUTH OUT (Oct. 14, 2011, 11:25 AM), http://truth-out.org/news/item/3499:why-i-published-us-intelligence-secrets-about-israels-antiiran-campaign (claiming that Leibowitz was worried that Israel's anti-Iran campaign might end with either Israel or the United States attacking Iran, and this would be a disaster for both countries. Silverstein recalls that, though Lebowitz knew he might be putting himself in jeopardy if he did nothing, Lebowitz risked looking back on a disaster that he could have helped avert. Silverstein also argues that Leibowitz "acted purely out of principle, received no compensation and did nothing to harm US military interests nor did he help a US enemy.").

68 *See* Shane, *supra* note 67.

69 *See* Shane, *supra* note 62. Ironically, Kiriakou is the only CIA official who will go to jail over the torture used in the Bush administration.

70 *See id.*

71 *See* Kiriakou, *supra* note 52 ("At the CIA, employees are trained to believe that nearly every moral issue is a shade of grey. But this is simply not true. Some issues are black-and-white—and torture is one of them.").

72 *See supra* Part I.A.

executive branch is using its prosecutorial discretion as a tool against those who have embarrassed the U.S. government. Though the federal government seeks to intimidate leakers and deter future leakers, the effect is that the public is denied important information about fraud, waste, and abuse of power on the part of the U.S. government.

E. *Thomas Andrews Drake*

The case against Thomas Andrews Drake perhaps best exhibits intimidation against a government official. Drake was a linguist and computer expert with a background in crypto-electronics.[73] On September 11, 2001, he began working at the NSA for Maureen Baginski, Chief of the Signals Intelligence Directorate and the NSA's third-highest ranking official,[74] and his title was "Senior Change Leader/Chief, Change Leadership & Communication Office, Signal Intelligence Directorate."[75]

Given the terrorist attacks[76] that took place immediately upon Drake's start at the NSA, and the perceived need for a greater intelligence effort on the part of the agency, Drake advocated for a project called ThinTread.[77] ThinTread was a program that could process huge amounts of digital data while immediately rejecting the useless pieces for the purposes of intelligence gathering.[78] ThinTread would correlate data from financial transactions, travel records, web searches, G.P.S. equipment, and anything else an analyst might find useful in pinpointing terrorists.[79] Though the program worked well, the problem was that it captured mostly American data when it was intended to intercept foreign communications, and federal law forbids the monitoring of domestic communications without a warrant.[80] To comply with the law, the creators implemented privacy controls that would encrypt all American communication until a warrant issued.[81]

Before 9/11, the NSA rejected ThinTread, deeming it too invasive of Americans' privacy.[82] It opted instead for a rival project called Trailblazer; built by private defense contractors, Trailblazer was a larger

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73 Mayer, *supra* note 5, at 49.

74 *Id.* Twelve years previously, he worked for the NSA as an outside contractor.

75 *Id.*

76 September 11, 2001 is the date of the terrorist attacks on the World Trade Center.

77 Mayer, *supra* note 5, at 49.

78 *Id.*

79 *Id.*

80 *Id.* at 50. The law is known as the 1978 Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801–1885(c) (2012).

81 Mayer, *supra* note 5, at 50.

82 *Id.*

system which had been criticized as both more expensive and less effective than ThinTread.[83] Trailblazer was still in the design stage after 9/11, however, and in the weeks following the terrorist attacks, the NSA, with explicit approval from the Bush White House, began using a bastardized version of ThinTread, stripped of its privacy control.[84] In so doing, the NSA monitored domestic communications without a legally-required warrant.[85]

Drake had two major concerns. First, he knew supporting Trailblazer was a major waste of government funds; second, he worried about the government's illegal domestic monitoring, particularly when the original ThinTread was equipped with privacy features for that very purpose.[86] Drake reported his concerns to numerous people, including his superior, Baginski,[87] the NSA's lawyers, and the Inspector General.[88] Drake also became an anonymous source for the Congressional committees investigating intelligence failures related to 9/11 and provided Congress with top-secret documents chronicling the NSA's shortcomings.[89] In September 2002, Drake, along with Diane Roark, a staff member on the House Permanent Select Committee on Intelligence, Ed Loomis, an NSA computer scientist, and J. Kirke Wiebe, an NSA intelligence analyst, filed what he thought was a confidential complaint with the Department of Defense.[90] For the complaint, Drake obtained documents from an NSA computer with the aim of proving waste, fraud, and abuse.[91] The report, classified as "secret" and thus only available to a limited number of officials, was completed in 2005.[92]

After filing the report in 2005, Drake was still faced with a crisis of conscience, and did not want to remain silent about the Bush administration's abuses of power.[93] Drake began leaking to *Baltimore Sun* reporter Siobhan Gorman,[94] who used the information for an

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83 *Id.* ("As the system stalled at the level of schematic drawings, top executives kept shuttling between jobs at the agency and jobs with the high-paying contractors. . . . In 2006, Trailblazer was abandoned as a $1.2-billion flop.").

84 *Id.*

85 *Id.*

86 Radack & McClellan, *supra* note 4, at 63.

87 Mayer, *supra* note 5, at 51. Baginski left for the FBI, "in part because of her [own] discomfort with the surveillance program." *Id.*

88 Radack & McClellan, *supra* note 4, at 63.

89 Mayer, *supra* note 5, at 52.

90 *Id.* at 54.

91 *Id.* ("What do I do—remain silent, and complicit, or go to the press?" (internal quotation marks omitted)).

92 *Id.*

93 *Id.* at 54–55.

94 Drake wanted to speak with Gorman, who covered the NSA for the *Sun* because he admired her previous work. Congresswoman Roark put Drake in touch, but warned Drake to be careful. *Id.*

exposé on the NSA practices around 9/11.[95] About the same time, in December 2005, the *New York Times* published a major piece about the NSA's domestic surveillance program, which included leaked information from the agency.[96] The government's pursuit of the *Times* leaker was what led them to search Drake's home in November 2007.[97] Drake cooperated with the search, and admitted that he had given unclassified information to Gorman.[98]

A few months later, in April 2008, U.S. prosecutors informed Drake that they found three documents in his basement and two more in his e-mail archive that were sufficient for Espionage Act charges.[99] Though the government raided a number of homes, Drake alone was indicted in April 2010.[100] The indictment lists five counts of violating the Espionage Act: Under § 793(e) for "Willful Retention of National Defense Information," as well as one count of obstruction of justice, and four counts of making a false statement.[101]

It is important to note that the Espionage Act charges against Drake do not directly relate to Drake's leaking to the press.[102] The government suspected Drake of leaking to the *Times* and, in searching his house, found some documents that were enough to bring Espionage Act charges. These were documents he inadvertently retained and not

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95 *Id.* (reporting that Drake had three ground rules with Gorman: not to reveal his identity (which Drake later did); not to be the sole source for any story; and not to supply her with classified information. The series of articles began on January 26, 2006.); *see also* United States v. Drake, No. 1:10-cr-00181-RDB, 2010 WL 1513342, ¶ 6 (D. Md. Apr. 14, 2010).

96 Mayer, *supra* note 5, at 54.

97 *Id.* at 56 ("The agents bagged documents, computers, and books, and removed eight or ten boxes of office files from his basement."). They also searched the houses of Wiebe and Roark. *Id.* at 55.

98 *Id.* at 56.

99 *Id.* Drake claimed that if the boxes did in fact contain classified information, it was inadvertent. Two documents in his e-mail both pertained to a Trailblazer successor, Turbulence; one was a schedule of meetings marked "unclassified/for official use only"; the other document was officially declassified in July 2010, three months after Drake was indicted. At this point, Drake had left the NSA and was working for an Apple store. *Id.*

100 Indictment, United States v. Drake, 10-cr-0181, 2010 WL 1513342, ¶ 14 (D. Md. Apr. 10, 2010) [hereinafter Drake Indictment]. There is some indication that the initial indictment, prepared in 2009, included the others as unindicted co-conspirators. *See* Shane Harris, *Indictment Continues Obama Administration's War on Leaks*, WASHINGTONIAN (Jan. 25, 2011), http://www.washingtonian.com/blogs/capitalcomment/scene/indictment-continues-obama-administrations-war-on-leaks.php ("*Washingtonian* obtained a copy of the draft indictment, which also lists three former NSA officials and an ex-congressional committee staffer as unindicted co-conspirators.").

101 Drake Indictment, *supra* note 100, ¶¶ 1–33.

102 Harris, *supra* note 100. A draft indictment was accidentally sent to the opposing counsel, and there is some indication that originally, the government sought to prosecute Drake for disclosing classified information to a newspaper reporter and for conspiracy. This draft was prepared in 2009, and it seems that when the case was picked up by a new attorney in 2010, many of the charges were dropped. *Id.*

the ones leaked to Gorman—the indictment mentions Gorman as "Reporter A" and claims that Drake destroyed the evidence.[103] Drake's prosecution, therefore, is a departure from the previous prosecutions of government officials under the Espionage Act. Here, the charges did not directly relate to the leak to the press but were used as a pretext to retaliate against Drake for leaking. The information that Drake leaked arguably did not damage national security but instead demonstrated the mismanagement of the NSA.[104] This case is thus an example of the government attacking those who have embarrassed them in the press under the guise of protecting national security.

Drake moved to dismiss the Espionage Act counts as unconstitutionally vague and overbroad; the court denied the motion, citing *Morison*.[105] As the trial approached, the government sought a plea agreement from Drake. After a number of proposals, the parties reached a last minute deal on Thursday, June 9, 2011, just a few days before trial was set to begin.[106] Drake agreed to plead guilty to a criminal misdemeanor charge of exceeding his authorized use of a computer[107] and in return, the government agreed to drop the other counts, including the Espionage Act charges, and forego jail time.[108] The government's lawyer intimated at sentencing that they sought an agreement because they did not have enough evidence to pursue Espionage Act charges against Drake.[109] At sentencing, U.S. District Judge Bennett reprimanded the government for dismissing the indictment on the eve of trial, after subjecting Drake to a four-year ordeal.[110] Drake was sentenced to 240 hours of community service, one year of probation, and no fine.[111]

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103 *See* Drake Indictment, *supra* note 100, ¶¶ 10–14. The only charge that relates to the leak is making a false statement under 18 U.S.C. § 1001(a)(2) (2012).

104 *See* Mayer, *supra* note 5, at 55 (citing secrecy expert Steven Aftergood).

105 United States v. Drake, 818 F. Supp. 2d 909 (D. Md. 2011).

106 Brent Kendall, *Plea Deal Ends Leak Case Against Former Official*, WALL ST. J., June 10, 2011, at A7.

107 *Id.*

108 *Id.*; *see also* Drake Sentencing Transcript, *supra* note 10, at 12.

109 Drake Sentencing Transcript, *supra* note 10, at 16. The government lawyer, William Welch, stated that "at the end of the day, at least it was in the judgment of individuals who reviewed the case, including myself, that the evidence was deficient as it related to that agreement, those other individual's knowledge that he was retaining official NSA information within his home." *Id.* Section 793(e), however, does not require other individuals' knowledge that he was retaining information, at least not on a reading of its plain language. *See infra* Part II.

110 Drake Sentencing Transcript, *supra* note 10, at 18, 26–29.

111 *Id.* at 44. The government argued for a $50,000 fine, or, at minimum, at $10,000 fine, based on Drake's receiving the $10,000 Ridenhour Prize for Truth-Telling. *Id.* at 20, 23. At sentencing, the judge emphasized both that Drake was just five years away from federal pension eligibility and the hardship Drake suffered while the government dragged the case on for years. *Id.* at 24.

II. ANALYSIS: § 793(E) APPLIES TO WELL-INTENTIONED GOVERNMENT OFFICIALS SEEKING TO UNCOVER GOVERNMENT ABUSE FOR THE SAKE OF THE PUBLIC INTEREST

After government officials combed through Drake's home and computer files, they found five documents that they claimed were sufficient to bring a case against him for violating the Espionage Act under the "willful retention" provision.[112] Part II will explore what constitutes a prima facie case under the willful retention[113] provision of the Espionage Act. Careful analysis demonstrates that the Espionage Act is broad enough to be used by the government as a retaliatory tool against those who have leaked information to the press.

A. *Prima Facie: Mens Rea Requirement Under the Willful Retention Provision of § 793(e)*

To prove the requisite mens rea for the act of "willfully retain[ing]" documents that relate to the national defense, the government does not have to prove that a defendant acted in bad faith: only that the defendant acted with the specific intent to act against the law.[114] On appeal, the defendant in *Morison* argued that the requirement that the act be done "willfully" requires the act be done with an evil purpose.[115] The Court of Appeals for the Fourth Circuit rejected this argument, holding that the word "willfully" should be interpreted as "*deliberately*

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112 *See supra* note 99 and accompanying text. There is some indication that the prosecution recanted that position on the eve of trial. *See supra* note 109.

113 Section 793 of 18 U.S.C. states:

> Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation . . . *willfully retains* the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 793(e)–(f) (2012) (emphasis added). This Note's analysis will not focus on the attendant circumstance requirement, "entitled to receive it."

114 In instructing the jury on the Espionage Act charges, the Maryland district court in *Morison* claimed, "[a]n act is done *willfully* if it is done voluntarily and *intentionally* and with the *specific intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law*." United States v. Morison, 844 F.2d 1057, 1071 (D. Md. 1988).

115 *Id.* at 1072 ("[P]roof of the most laudable motives, or any motive at all, is irrelevant under the statute." (internal quotation marks omitted)).

and with a specific purpose to do the acts proscribed by Congress."[116] Accordingly, the Fourth Circuit affirmed the district court's ruling in *Morison* that the government need not prove evil purpose but simply a specific intent to break the law.[117] A district court has recently upheld this position, finding that this specific intent requirement only holds the defendant responsible for conduct that he knows to be proscribed.[118] Thus, for the intent requirement, it does not matter what motivates breaking the law—be it acting in the public interest or not—so long as the defendant knows he is breaking the law by retaining the documents.

The mens rea requirement also differs based on whether a defendant is willfully retaining something tangible, like documents, or something intangible, like information.[119] The statute imposes a scienter requirement for retaining information—a showing of bad faith against the United States[120]—that does not apply to defendants who retain documents.[121] For example, since Drake was charged with retention of documents and not information, the prosecution does not have to prove the likelihood of defendant's bad faith purpose to harm the United States or to aid a foreign government.[122] The court has justified this rationale by claiming that in cases involving documents, the defendant need only act willfully, since a defendant can recognize documents relating to the national defense more readily than intangible information.[123] Therefore, the mens rea requirement for retaining documents depends upon the requirement that the document relate to the national defense; "willful" encompasses the knowledge that what you are doing is illegal, which depends on the nature of the document.

116 *Id.* at 1073 (citing United States v. Hartzel, 322 U.S. 680, 686 (1944)).

117 *Id.*; *see also* United States v. Morison, 604 F. Supp. 655, 663 (4th Cir. 1985).

118 United States v. Rosen, 445 F. Supp. 2d 602, 625 (E.D. Va. 2006). Responding to a motion to dismiss the Espionage Act charges, the district court in *Drake* affirmed these readings of "willfully" in § 793(e). *See* United States v. Drake, 818 F. Supp. 2d 909, 917 (D. Md. 2011).

119 18 U.S.C. § 793(e) (2012).

120 *Id.* (requiring that the defendant "has reason to believe [the information] could be used to the injury of the United States or to the advantage of any foreign nation").

121 *Drake*, 818 F. Supp. 2d at 917.

122 *Id.*

123 *Id.* ("In cases like this one, involving documents, the defendant need only have acted willfully, as a defendant will more readily recognize a document relating to the national defense based on its content, markings or design than it would intangible or oral 'information' that may not share such attributes.").

B. *Prima Facie: "Relating to the National Defense" and Judicial Limiting Construction*

What makes retaining documents an illegal act is the attendant circumstance that the documents "relat[e] to the national defense."[124] The phrase "relating to the national defense" is a broad category.[125] The Supreme Court has defined "national defense" as a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."[126] The Fourth Circuit recently held that U.S. diplomatic cables regarding peace negotiations with the North Vietnamese were related to the national defense, explaining that Congress intended for national defense to encompass a broad range of information.[127] The term, therefore, includes matters relating generally to U.S. foreign policy and intelligence capabilities, not just to matters associated with a time of war.[128]

Since the statutory language is so broad, courts have often adopted a limiting construction.[129] As previously discussed,[130] courts have emphasized that the mens rea requirement, "willful," works in tandem with the requirement that the documents "relat[e] to the national defense" in order to limit the reach of the statute.[131] To illustrate, in cases against government officials, courts have highlighted the fact that officials were previously instructed on what information was sensitive[132] and that revealing it was against the law.[133] What underlies courts' reasoning here is that, as applied to government officials, there should

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124 United States v. Rosen, 445 F. Supp. 2d 602, 618 (E.D. Va. 2006).

125 *Id.* ("In this respect, it has long been recognized that the phrase 'information relating to the national defense' is quite broad and potentially too broad since, especially in time of war, any information could conceivably relate to the national defense."). Many defendants have challenged the statute as unconstitutionally vague and overbroad under the First Amendment; s*ee, e.g.*, United States. v. Morison, 844 F.2d 1057 (4th Cir. 1988); United States v. Kiriakou, No. 1:12cr127, 2012 WL 3263854 (D. Md. 2012); *Drake*, 818 F. Supp. 2d 909. Courts have thus far rejected these challenges. A First Amendment discussion is beyond the scope of this Note.

126 Gorin v. United States, 312 U.S. 19, 28 (1941) (internal quotation marks omitted).

127 United States v. Truong Dinh Hung, 629 F.2d 908, 918 (4th Cir. 1980).

128 *Rosen*, 445 F. Supp. 2d at 620.

129 *Id.* at 618 (noting that courts have "fac[ed] the obvious need to find some limiting construction" of the phrase). Note that courts have not chosen to limit it by subject matter. *Id.*

130 *See supra* Part II.A.

131 *See* United States v. Morison, 844 F.2d 1057, 1071 (4th Cir. 1988).

132 *See id.* at 1073 (noting that Morison "was an experienced intelligence officer. He had been instructed on all the regulations concerning the security of secret national defense materials.").

133 *See id.* at 1060 (describing Morison's Non-Disclosure agreement, which acknowledged that he had been advised that any unauthorized disclosure of sensitive information may constitute violations of United States criminal laws, including the provisions of 18 U.S.C. § 793).

be no ambiguity about what documents relate to the national defense—an admonishment from the court that *they should know better*.

In some cases, courts have further limited the phrase "relating to the national defense" by requiring that the prosecution prove (i) that documents are closely held by the government; and (ii) that the information is such that, if disclosed, could potentially harm the United States.[134]

Though the first requirement—that the documents are "closely held" by the government—serves to limit "relating to the national defense," it is itself a broad category. Documents are closely held if they are not available to the general public,[135] and the reality is that intelligence agencies do not release much information to the public.[136] Furthermore, since this requirement does not directly relate to government agency classifications such as Secret, Top Secret, and so on,[137] it would encompass all levels of intelligence agencies' classified documentation, which is, as previously mentioned, overbroad.[138] This requirement, therefore, does little to limit the statutory language.

For the second requirement—that, if disclosed, the documents would be potentially damaging to the United States or might be useful to an enemy of the United States—courts generally defer to the executive and base their determination on the classification system.[139]

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134 *See Rosen*, 445 F. Supp. 2d at 618; *see also Morison*, 844 F.2d at 1071–72. In reviewing the lower court, the Fourth Circuit found no error in the jury instruction that:

> First, it must prove that the disclosure of the photographs would be potentially damaging to the United States or might be useful to an enemy of the United States. Secondly, the government must prove that the documents or the photographs are closely held in that [they] . . . have not been made public and are not available to the general public.

Id. (alteration in original). In a recent case, however, the court declined to follow the *Morison* court's limiting construction. United States v. Kim, No. 10-255-CKK, at 9 (D.D.C. May 30, 2013), *available at* http://www.fas.org/sgp/jud/kim/072413-opinion3.pdf. In refusing to require that the information be potentially damaging to the United States, the court in *Kim* noted that:

> [I]t is not clear that districts courts within the Fourth Circuit apply *Morison* . . . by requiring the Government to show that the specific information at issue would be potentially damaging to the United States. At least [unclear] courts have interpreted *Morison* to require the Government to [unclear] that the information is the type of information that, if disclosed, could harm the United States.

Id. at 9–10 (citing *Rosen*, 445 F. Supp. 2d at 618).

135 *Morison*, 844 F.2d at 1071–72.

136 As the concurring opinion in *Morison* laments, "[i]n an ideal world, governments would not need to keep secrets from their own people, but in this world much hinges on events that take place outside of public view." *Morison*, 844 F.2d at 1081 (Wilkinson, J., concurring).

137 *See Rosen*, 445 F. Supp. 2d at 620.

138 *See supra* notes 15–17 and accompanying text.

139 *Morison*, 844 F.2d at 1071. Recently, however, the court in *Kim* rejected the "potentially damaging" limiting instruction as it "invites (if not requires) the jury to second guess the

Courts have noted that this requirement is "implicit" in the purpose of the statute; the requirement assures that the government will use the statute to defend national security and not as an occasion for abuse.[140] There is some indication in *Morison* that courts should only consider classified documents as potentially damaging.[141] It is now widely recognized, however, that the government classifies many documents for which there is no occasion for secrecy,[142] thus rendering the "potentially damaging" category very broad. Therefore, the problem with this requirement is that it defers to the executive branch's classification system, which is known to be overly cautious.[143]

Thus, while some courts seek to narrow the phrase "relating to the national defense," they do so in deference to the executive branch's judgment.[144] Even with a limiting construction (which a recent court has refused to apply),[145] the law remains broad and therefore susceptible to prosecutorial abuse. Although courts have applied the Espionage Act to protect the government's national security interest,[146] their limiting construction does not sufficiently check the executive's power. Specifically, it remains possible to charge someone under the Espionage Act for willfully retaining documents that may be classified but are unnecessarily so[147]—in other words, for willfully retaining documents that do no actual harm to national security.

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classification of information." *Kim*, No. 10-255, at 9. The court in Kim found allowing the jury to decide what is potentially damaging to the United States an "absurdity." *Id.*

140 *Rosen*, 445 F. Supp. 2d at 621 ("[T]he statute only applies to information for which there is an 'occasion for secrecy,' and there is no 'occasion for secrecy' unless disclosure of the information the government seeks to protect implicates an important government interest such as the national security."); *see also Morison*, 844 F.2d at 1086 (Phillips, J., concurring) ("Without such a limitation on the statute's apparent reach, leaks of information which, though undoubtedly 'related to defense' in some marginal way, threaten only embarrassment to the official guardians of government 'defense' secrets, could lead to criminal convictions.").

141 *See Morison*, 844 F.2d at 1084 (Wilkinson, J., concurring) ("The district court's limiting instructions properly confine prosecution under the statute to disclosures of *classified information* potentially damaging to the military security of the United States." (emphasis added)). Note, however, that one of the documents for which Drake was indicted under the Espionage Act was marked "Unclassified/For Official Use Only." *See* Mayer, *supra* note 5, at 56; *infra* Part II.C.

142 *See* Aftergood, *supra* note 15.

143 *Id.*

144 *See supra* note 16 and accompanying text.

145 *See supra* notes 134, 139.

146 *See supra* notes 16–17 and accompanying text.

147 It is also possible to charge someone for retaining documents that become declassified shortly after indictment, as in the case of Drake. *See* Mayer, *supra* note 5, at 56 (noting that one of the documents for which Drake was indicted—touting the success of Turbulence—was declassified in July 2010, three months after Drake was indicted).

C. *Application to Drake: Exploring Whether the Government Had a Prima Facie Case*

Having explored what constitutes a prima facie case under the "willful retention" provision, the next question is whether the government had a prima facie case to successfully prosecute Drake. The court in *Drake* did not reach the merits of the Espionage Act charges and therefore did not have the opportunity to rule on whether he violated the statute.[148] So, though the case is closed, it would be pertinent to explore whether the government had a prima facie case against Drake using a document that was found on his computer: A schedule of meetings marked "unclassified/for official use only" and available on the NSA's internal website.[149]

In terms of the mens rea requirement, a court could find that Drake had the specific intent to violate the law in retaining the schedule on his computer.[150] Drake argues that anything found on his computer was routine trash and does not reveal anything about national security;[151] that argument is supported by the fact that the schedule was marked "unclassified."[152] Throughout his employment at the NSA, however, Drake signed agreements in which he acknowledged that he would safeguard "protected documents," defined expressly as classified documents *or* documents in the process of a classification determination.[153] These agreements also included acknowledgement of the Espionage Act's provisions.[154] In considering the schedule, the government has argued that it should have been classified and that Drake should have known as much.[155] In view of the knowledge attributed to Drake in his capacity as NSA official, a court could find that Drake retained the schedule with the intent to violate the law and thus did so willfully.

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148 The district court in *Drake* ruled on a motion to dismiss challenging the constitutionality of the law, and not on the merits. United States v. Drake, 818 F. Supp. 2d 909, 918, 920 (D. Md. 2011). Citing *Gorin*, the court held that based on its plain meaning, the phrase "relating to the national defense" does give the defendant fair notice. *Id.* at 918. On the overbroad claim, the court ruled that *Morison* controls. *Id.* at 920. The court also ruled that the fact that Drake was an "alleged" whistleblower does not change the court's analysis of whether § 793(e) is overbroad. *Id.* at 921.

149 *See supra* notes 15–17, 97 and accompanying text. Note that the indictment calls all documents retrieved from Drake's e-mail "classified." *See* Drake Indictment, *supra* note 100, ¶¶ 18–23.

150 *See* United States v. Morison, 844 F.2d 1057, 1073 (4th Cir. 1986).

151 *See* Mayer, *supra* note 5, at 56.

152 *See supra* notes 15–17, 97 and accompanying text.

153 *See* Drake Indictment, *supra* note 100, ¶ 7.

154 *See id.*

155 *See* Mayer, *supra* note 5, at 56.

In terms of whether this schedule "relat[ed] to the national defense," a court could find that the schedule was closely held and potentially damaging. The schedule was not available for public consideration.[156] A lay-person could not, for example, login to the NSA website and find the schedule of meetings. Thus, it may meet the first judicial requirement of closely held by the government. The second prong—whether the documents would be potentially damaging to the United States—is less clear, as it might depend on what could be reasonably inferred from the document.[157] To make this determination, however, a court would likely defer to the government's argument that this document should have been classified,[158] since that was sufficient to render a document potentially damaging in *Morison*.[159] Nonetheless, there remains an argument that *Drake* is distinguishable from *Morison* because the schedule was labeled "unclassified."[160] Since courts are not apt to intrude on the executive branch's power to determine national security matters,[161] however, the government's argument would likely prevail in this hypothetical.

Based on this reading of the prima facie case, the government can use § 793(e) as a pretext against any government official who has inadvertently brought home a schedule or other documents from work, particularly since the willful retention provision of § 793(e) has a broad reach.[162] Absent some intervention, it can (and will) be used successfully against government leakers.

D. *Intervention Possibilities*

The question, therefore, is how to limit the impact of an Espionage Act § 793(e) charge against government official leakers in cases where it is used as a pretext by the government.

As recognized by the fact that judges have narrowed the reach of the statute,[163] judicial intervention seems like an appropriate way to

156 United States v. Morison, 844 F.2d 1057, 1071–72 (4th Cir. 1986).

157 *Id.* at 1071. What might seem unjust about prosecution for revealing a schedule is that it generally reveals nothing of substance other than names of programs or people.

158 *See* Mayer, *supra* note 5, at 56.

159 *See supra* Part II.B.

160 *See* Mayer, *supra* note 5, at 56.

161 *Morison*, 844 F.2d at 1083 (Wilkinson, J., concurring) ("[T]he judicial role must be a deferential one because the alternative would be grave. To reverse Morison's conviction on the general ground that it chills press access would be tantamount to a judicial declaration that the government may never use criminal penalties to secure the confidentiality of intelligence information.").

162 *See supra* Part II.B.

163 *See id.*

limit § 793(e)'s impact. Indeed, the other options seem either unfeasible or impossible. First, there is the possibility of amending the statute. As displayed,[164] the breadth of the statute lies in the phrase "relating to national defense."[165] That phrase can be amended to add a narrower requirement that the documents actually do or reasonably may harm national security. However, a statutory amendment on this issue is politically unrealistic, particularly as the President would have to sign it into law—and since his administration appears to have revived the statute's power against leakers, he is unlikely to agree to amend it.[166] Second, Drake and other whistleblowers do not have a private right of action against federal prosecutors,[167] as prosecutors are immune.[168]

A further avenue to consider is for Congress to enact a law to protect whistleblowers.[169] Before 2012, none of Congress's enacted whistleblower protection laws would have helped Drake combat prosecutorial abuse.[170] The Whistleblower Protection Enhancement Act[171] has recently been signed into law, and promises more robust protection for federal government employees.[172] That has yet to be seen.

Another possible enforcement mechanism against overzealous prosecutors is a contempt citation by a judge—the first of two proposals

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164 *See id.*

165 *See id.*

166 *See supra* notes 3–4 and accompanying text.

167 Drake would have a prima facie case under *Bivens*. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (holding that federal common law creates a private right of action against federal actors). Note, however, that *Bivens* has been limited by subsequent cases. *See, e.g.*, Wilkie v. Robbins, 551 U.S. 537 (2007). Furthermore, the intelligence agency context may be one of the exceptions under *Bivens*, namely a "special factor[] counseling hesitation." *Id.* at 396.

168 Prosecutors have absolute immunity from civil suit, and any suit against a federal prosecutor would result in dismissal on pretrial motions. *See* Imbler v. Pachtman, 424 U.S. 409, 427, 430 (1976) (holding that absolute immunity precludes suit absolutely, even if the offending official knew that her conduct was unlawful, malicious, or otherwise without justification, so long as it is "intimately associated with the judicial phase of the criminal process").

169 Some consider this the only option. *See* Kiriakou, *supra* note 52 ("The only hope of ending this travesty of justice is to scrap the Espionage Act and to enact new legislation that would protect whistleblowers while allowing the government to prosecute traitors and spies.").

170 There is a Whistleblower Protection Act, but national security officers and intelligence officials are exempt, including those from the NSA and CIA. *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16; *see also* Radack & McClennan, *supra* note 4, at 74 (calling the current Act a "sham"). There is the Intelligence Community Whistleblower Protection Act, Pub. L. 105-272, tit. VIII, 112 Stat. 2413 (1998), but it fails to offer any meaningful protection for retaliatory prosecutions. Indeed, Drake followed the procedures outlined in the Intelligence Community Whistleblower Protection Act in filing his complaint to the Department of Defense and to Congress. *See id.* at 75.

171 Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat.1465. It took thirteen years to pass.

172 *See* Dylan Blaylock, *President Signs Whistleblower Protection Enhancement Act*, GOV'T ACCOUNTABILITY PROJECT (Nov. 27, 2012), http://www.whistleblower.org/blog/42-2012/2380-president-signs-whistleblower-protection-enhancement-act-wpea.

for judicial intervention. A judge may hold a prosecutor in contempt when the prosecutor's behavior is willfully disobedient or exhibits contemptuous or contumacious conduct in court that threatens the administration of justice.[173] The Supreme Court has held, however, that a trial court may not use its supervisory power as a means of remedying prosecutorial misconduct before a grand jury unless the prosecutor's actions prejudiced the defendant.[174] A judge cannot use a contempt citation, therefore, if the prosecutor is merely bringing cases within valid federal law and not otherwise disobeying the court.[175] What remains, therefore, is the ability for the judicial branch to check the power of the executive at sentencing.

III. PROPOSAL: THE USE OF JUDICIAL SENTENCING AUTHORITY AS A TOOL TO CURB ABUSE OF PROSECUTORIAL DISCRETION

The *Drake* case reflects the government's desire to make an example out of Drake.[176] But when the evidence proved insufficient (or when the government decided not to risk bringing Espionage Act changes for such a flimsy case), the government was forced to enter a plea bargain for a misdemeanor charge. Not only is this a waste of judicial resources, it is an abuse of prosecutorial power.[177] If the executive branch is going to continue on its vindictive prosecution of leakers under this broad law,[178] then, under a separation of powers theory, it is the proper role of the judiciary to curb the prosecutors' zealousness.[179] Though prosecutorial power is properly vested with the

173 *See* United States v. Giovanelli, 897 F.2d 1227, 1230 (2d Cir. 1990).

174 Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988).

175 *Giovanelli*, 897 F.2d at 1230. There is the question of whether the delay between the federal agents' search of Drake's house in 2007 and the indictment brought against him in 2010 could constitute grounds for contempt. A problem with this remedy, as highlighted by Judge Bennett at sentencing, is that a prosecutor on a given case may change. Drake Sentencing Transcript, *supra* note 10, at 29 ("I'm not criticizing you personally because I have a strong sense that you didn't make all of decisions in this case either at the beginning or the end, and you've conducted yourself very properly as an officer of the court here and I commend you for that . . . ."). Oftentimes, the prosecutor presenting the case before the judge is not the one who made the decision to prosecute in the first place. *See id.* Since the judge can only hold the prosecutor before him in contempt of court, that solution would not work in Drake's case, as it was not Welch's decision to prosecute Drake in the first place. *Id.*

176 Drake Sentencing Transcript, *supra* note 10, at 18.

177 *See supra* Introduction.

178 *See supra* Part II.

179 This idea is inspired by Judge Bennett, who noted at sentencing that "if the executive branch of government doesn't provide an explanation, at least it's up to the judicial branch to note the impropriety of it." Drake Sentencing Transcript, *supra* note 10, at 30.

executive,[180] it is the constitutional responsibility of the judiciary to check the executive's power should it be abused.[181]

Therefore, this Note proposes that, at the sentencing stage, judges should balance the threat to national security with the public interest in releasing information about government agencies.[182] This balancing test is modeled after the one read into the freedom of expression provision of the European Convention of Human Rights,[183] as well as the one read into the freedom of thought and expression provision of the American Convention on Human Rights.[184]

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180 *See* State v. Thrift, 440 S.E.2d 341 (S.C. 1994).

181 *See* Greenwood Cnty. v. Duke Power Co., 81 F.2d 986 (4th Cir. 1936), *rev'd on other grounds*, 299 U.S. 259 (1936) (holding that courts will not interfere with the discretionary powers of a subordinate government agency except in cases of fraud, clear abuse of power, or where unreasonable or capricious acts have occurred).

182 Other scholars have advocated for weighing the harm to national security against the benefit of the leak. *See, e.g.*, James A. Goldston, Jennifer M. Granholm & Robert J. Robinson, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409, 457–58 (1986) (advocating an assessment of a leak's contribution to public discourse); Alan M. Katz, *Government Information Leaks and the First Amendment*, 64 CALIF. L. REV. 108, 130–32 (1976) (suggesting a balancing test that weighs the interest of the government in confidentiality against the public interest in gaining access to information, and advocating a standard that punishes leaks that are made in reckless disregard of the government's interest in secrecy). The novelty of this proposal lies in its use at sentencing so as not to interfere with the lawmaking power of Congress and the prosecutorial power of the executive.

183 The jurisprudence of the European Court of Human Rights and the European Commission of Human Rights interprets the European Convention. Article 10 of the European Convention for Human Rights, states:

> Article 10—Freedom of [E]xpression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4. 1950, 213 U.N.T.S. 221 [hereinafter European Convention], *available at* http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights.

184 The jurisprudence of the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights interprets the American Convention. Article 13(1)–(2) of the American Convention on Human Rights states:

> Article 13—Freedom of Thought and Expression
>
> 1. Everyone has the right to freedom of thought and expression. This right includes

A. *European Court of Human Rights*

According to Article 10 of the European Convention of Human Rights,[185] freedom of expression may be limited in the interest of national security.[186] But these restrictions must be "prescribed by law" and "necessary in a democratic society."[187] The European Court of Human Rights (ECHR) interprets "necessary in a democratic society" as implying a "pressing social need" and "proportionate to the legitimate aim pursued."[188] While the Contracting States[189] have some "margin of appreciation"[190] in determining whether there exists a social need to restrict speech in favor of national security, it is the role of the ECHR to determine whether the punishment is proportionate to the legitimate aim pursued—namely, protecting national security.[191] In so doing, the

> freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
>
> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.

Organization of American States, American Convention on Human Rights art. 13(1)–(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention], *available at* http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm. Though the balancing test is modeled after Freedom of Expression provisions, it is important to note that these officials have little to no First Amendment rights in their positions, and therefore it will serve mainly as a framework.

185 *See* European Convention, *supra* note 183, art. 10.

186 *Id.*

187 *Id.* art. 10(2).

188 *See* Observer and Guardian v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at 24–30 (1991).

189 The signatories to the European Convention on Human Rights include all forty-seven members of the Council of Europe (not to be confused with the European Union). All new members are expected to ratify the convention as soon as possible. *See Member States*, COUNCIL OF EUR., http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en (last visited Nov. 2, 2013).

190 *See The Margin of Appreciation*, COUNCIL OF EUR., http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp (last visited Nov. 2, 2013) ("The term 'margin of appreciation' refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights . . . .").

191 Indeed, under the jurisprudence of the ECHR, Drake's prosecution would not have been upheld at all; criticism of the government must be tolerated, even if it is regarded as provocative or insulting or makes allegations against the security forces. *See* Özgür Gündem v. Turkey, 31 Eur. Ct. H.R. 1082, 20–21 (2000). Generally, the most "acerbic" critique of the government, without an actual call to arms, is insufficient to justify restricting freedom of expression. *See* Ceylan v. Turkey, 30 Eur. Ct. H.R. 73, 11 (1999). However, it is unclear how the ECHR would factor in Drake's role as an intelligence official.

ECHR has sometimes looked to whether the action has led to an actual breach of national security or incitement to violence.[192] So, while it is recognized that Contracting States are allowed to enact legislation to protect national security, the ECHR's proportionality requirement is meant to prevent abuse of discretion in prosecuting under these laws. Since freedom of expression is of such high social value—and since oftentimes, the information released is within the public interest—the burden is on the governments to show that their measures actually protect national security.

B. *Inter-American Court on Human Rights*

The Inter-American system has interpreted Article 13(2) of the American Convention[193] as a three-part test for any limitation on freedom of expression. The limitation must: (1) be defined in a precise and clear manner by a formal law; (2) serve a legitimate aim authorized by the Convention; and (3) be necessary in a democratic society to serve that legitimate aim, strictly proportional to the objective pursued, and appropriate to serve said objective.[194] One "legitimate aim" is the protection of national security.[195] After 9/11, the Inter-American Commission released a report on anti-terrorism legislation[196] that ruled that states must apply a balancing test to determine the proportionality of the sanction in comparison with the harm sought to be prevented.[197] Factors to be weighed include the severity of the sanction in relation to the type of harm caused or likely to be caused, the usefulness of the information to the public, and the type of media used.[198] The report also maintained that statements that implicate the government in

192 *See* Karataş v. Turkey, 4 Eur. Ct. H.R. 81, 23 (1999).

193 *See supra* note 184 and accompanying text.

194 Annual Report, Inter-Am. Comm'n H.R., OEA/Ser. L/V/II, doc. 51 (2009).

195 *See* American Convention, *supra* note 184, art. 13(2).

196 Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 (2002), *available at* http://www1.umn.edu/humanrts/iachr/terrorism-ch3censorship.html. The report states:

> [T]he states must apply a balancing test to determine the proportionality of the sanction in comparison with the harm sought to be prevented. . . . Factors that must be considered include: the dangers presented by the speech within the context of the situation (war, fighting terrorism, etc); the position of the individual making the speech (military, intelligence, official, private citizen, etc.) and the level of influence he or she may have on members of society; the severity of the sanction in relation to the type of harm caused or likely to be caused; the usefulness of the information to the public; and the type of media used.

Id. ¶ 325.

197 *Id.*

198 *Id.*

wrongdoing deserve a high level of protection, as public scrutiny of the government is an important democratic value.[199] The focus here is on balancing: If the harm done is greater than the public interest in releasing this information, then punishment for the damaging speech is more likely to be appropriate.

C. *Proposal*

Applying these concepts to cases in U.S. federal courts, judges should employ a similar type of balancing test at sentencing for government official leakers. On one side, there is the public interest in gaining access to this information. In evaluating the public interest, the judge should pay particular attention to the current climate of overclassification and whether this is the type of information that should be accessible to the public in a democracy.[200] On the other side, there is the government's national security interest or the actual harm to national security. There are three loci on which to analyze the harm: (1) the magnitude of the harm (what it is, how great it is); (2) the likelihood that harm will come from disclosure; and (3) how immediately the harm will come from disclosure.[201] Using these factors, a judge should evaluate the harm to national security as a type of equation. If, for example, (1) the harm is great and (2) it will almost inevitably happen (3) immediately, the judge should give a greater sentence than if (1) the harm is small and (2) only possible (3) at some point in the distant future.

Applying this test to the schedule of meetings in *Drake*,[202] for example, (1) the harm is small since the document likely did not reveal much about the substance of the meetings,[203] and harm is (2) only possible (3) at some unknown point, if at all. On the Espionage Act charge that relates to the schedule, therefore, Drake would get a lower sentence. Like in the international courts,[204] the burden is on the government, in its sentencing brief, to demonstrate the harm to national security that it sought to prevent; correspondingly, the burden of demonstrating the public interest in having this information is on the defendant. The motive of the defendant, therefore, would matter as a

199 *Id.*
200 *See supra* notes 15–18 and accompanying text.
201 I am grateful to Professor David Rudenstine for placing me along this analytic path.
202 *See supra* Part II.C.
203 *Id.*
204 *See supra* Part III.B–C.

measure of whether the defendant thought it was within the public interest to release these documents.[205]

What the above balancing test presupposes is that some information was released to the public, or at least was attempted to be transmitted to the public, rather than merely willfully retained.[206] As demonstrated by the *Drake* case, sometimes the documents at issue are used as a pretext in order to punish a defendant for leaking to the media.[207] In some sense, application of the balancing test at sentencing will question the prosecutor's discretion in going after mere willful retention under § 793(e). Since there can arguably be no harm to the national security if the document is never released to the public at all, the government would have to argue that the document would harm national security *if released*. That means that factors (2) (likelihood of actual harm) and (3) (immediacy) would not be as strong in the above balancing equation.

Furthermore, the balancing test would perhaps deter the type of suit in which the documents found do not directly relate to a media leak, since it would be more difficult to prove the harm to national security. In essence, it would encourage prosecutors to bring Espionage Act charges against defendants over the leaked documents directly. This balancing test would require the government to show that there was harm to national security in leaking and allow defendants to address their reasons for leaking at the sentencing stage. In other words, it would curb the retaliatory Espionage Act prosecutions and encourage use of the law against those who have actual intent to harm national security (or against those who *have* harmed national security) rather than against whistleblowers who have merely embarrassed the government.

D. *Feasibility, Enforceability, and Drawbacks*

The proposed balancing test is consistent with federal sentencing practice insofar as it allows judges to use their discretion.[208] Under the federal statutes governing sentencing, judges are encouraged to consider "the nature and circumstances of the offense and the history and characteristics of the defendant."[209] Judges may pay attention to factors

205 *See supra* Part II.B.

206 *See supra* note 23 and accompanying text; *see also supra* Part II.A.

207 Recall that they initially searched Drake's home because he was a suspect in the *Times* leak and that he admitted leaking to the *Sun*; what the agents found did not relate to either leak at all. *See supra* Part I.E.

208 *See* 18 U.S.C. § 3553 (2012).

209 *Id.* § 3553(a)(1).

such as the amount of harm done,[210] and judges may exercise wide discretion in what evidence they consider at sentencing.[211] The test would not clash with the merits of the Espionage Act but would instead employ a legitimate judicial power to soften the law's Draconian impact.

While the test is feasible, the federal sentencing guidelines are merely suggestions, and, generally speaking, judges are not *required* to consider anything specific at sentencing.[212] Since judges do not have to adhere to any specific test at sentencing, the test is unenforceable.[213] The balancing test can therefore remain an uncodified practice, something judges are not forced to do formally but might prefer to do in this particular set of cases.[214] As this balancing test is similar to what judges already consider at sentencing for other cases, it would not be a burden for judges to apply.

There are, however, other drawbacks to this proposal. The first is evidentiary. Under the Classified Information Protection Act (CIPA),[215] there are procedures that protect the use of classified documents in court.[216] In some cases, if a judge determines that a classified document might harm national security at a pre-trial CIPA hearing, the document will not be allowed into evidence or only parts of it will be allowed.[217] Balancing the contents of that document, therefore, would prove difficult at sentencing since it might be sealed or under protective order.[218] One way around this problem is to use a pre-trial CIPA finding in the balancing test as evidence that the document, if released, would pose a threat to national security, particularly since for each piece of classified information, the court must set forth in writing the basis for its determination.[219]

Second, as was true in both the *Drake* and *Kiriakou* cases, the Espionage Act charges may be dropped before the parties reach the sentencing stage. Kiriakou claims that this is part of the Obama administration's plan in the war against whistleblowers:[220] In these

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210 *See* S. REP. NO. 98-225, at 75 (1983), *reprinted in* 1983 U.S.C.C.A.N. 3182, 3258.

211 *See* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

212 *See* 18 U.S.C. § 3553.

213 *Id.*

214 One counter-argument to this is that it may lead to inconsistent sentencing practices.

215 18 U.S.C. app. §§ 1–16.

216 *See, e.g.*, 18 U.S.C. app. § 3 (2012) ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.").

217 18 U.S.C. app. §§ 1–16.

218 *Id.*

219 18 U.S.C. app. § 6(a).

220 *See* Kiriakou, *supra* note 52.

cases, the whistleblowers' lives are still ruined without a guilty verdict; arguably, the prospect of years in court and financial devastation is a sufficient deterrent against leaking.[221] Though the proposed balancing test will not apply in these cases, its existence may have a deterrent effect on the prosecutors' decisions to bring charges against leakers.

Third, and perhaps most importantly, there is the question of whether the judiciary should be the branch to determine if there was "actual harm" to national security. The executive branch might argue that it has a more complete understanding of whether a document poses a national security risk based on other intelligence information in its possession.[222] It might argue that assessing national security risks is a job best left to the executive branch, as it is better situated and equipped to make those kinds of determinations. In fact, courts have previously argued that in cases where national security interests are at stake, they should not perform their usual judicial balancing.[223]

By employing the balancing test at sentencing, however, the judicial branch would not be intruding upon Congress's lawmaking power, nor would it be intruding upon the executive's power to bring the case; if the executive is able to make a prima facie case under the Espionage Act,[224] a defendant will still be found guilty. Instead, courts would be using their legitimate power to sentence to curb the *effects* of the prosecution. Although it is true that courts are not equipped with the same background knowledge as the executive when it comes to national security matters, judges make decisions on matters for which they do not have expertise all the time. It would be the government's burden to prove how a document fits into its intelligence findings so that the judge can make that determination. The government need not worry about using other classified documents to meet that burden, since all classified documents would be safeguarded by CIPA.[225]

The point is that it is simply not sufficient for the executive branch to claim that it alone has power over national security and that the judicial branch should stay out. That notion cuts against the American

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221 *See supra* Part I.D.

222 *See* United States v. Morison, 844 F.2d 1057, 1083 (4th Cir. 1986) (Wilkinson, J., concurring) ("Even with sufficient information, courts obviously lack the expertise needed for its evaluation.").

223 *Id.* at 1082. ("Although aggressive balancing may have characterized the judicial role in other contexts, I am not persuaded that it should do so here. In the national security field, the judiciary has performed its traditional balancing role with deference to the decisions of the political branches of government. Presented with . . . constitutional claims, the Court has held that government restrictions that would otherwise be impermissible may be sustained where national security and foreign policy are implicated." (citing Snepp v. United States, 444 U.S. 507 (1980))).

224 *See supra* Part II.B–C.

225 *See supra* notes 215–19 and accompanying text.

system of inter-branch checks and balances, and leads to executive abuse of power—which is arguably what government official leakers are currently experiencing. Applying this proposal, judges can effectively protect against government abuse of the broad reaches of the Espionage Act.

CONCLUSION

Speaking before Congress about the decision not to prosecute Justice Department lawyer and *New York Times* leaker Thomas Tamm,[226] Attorney General Eric Holder said: "[T]here is a *balancing* that has to be done . . . between what our national-security interests are and what might be gained by prosecuting a particular individual."[227] According to Holder's formulation, the *Drake* case was not a good example of this type of balancing: Much was lost by way of judicial resources, and not much was gained by charging Drake with a simple misdemeanor.[228] By contrast, prosecutor William Welch raised a contrary position to the Attorney General's at Drake's sentencing hearing. When asked what message the *Drake* case is meant to send to others, Welch replied that the government is going to bring the cases and try hard, but if at the end of the day they are evidentially deficient, then the government will do what they have to do and potentially drop the charges.[229] In other words, according to Welsh, there is everything to gain by trying these cases, even if the defendants' actions insufficiently threaten national security and/or do not result in a successful prosecution.[230]

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226 *See supra* Part I.

227 Mayer, *supra* note 5, at 57 (second alteration in original) (emphasis added) (internal quotation marks omitted).

228 For an account of an interaction between Drake and Holder at the Washington Apple Store where Drake is currently employed, see Evan Perez, *Eric Holder's Apple Store Encounter*, WALL ST. J. WASH. WIRE BLOG (June 1, 2011, 5:14 PM), http://blogs.wsj.com/washwire/2011/06/01/eric-holders-apple-store-encounter.

229 Drake Sentencing Transcript, *supra* note 10, at 18–19. The official story of the dropping of the indictment is recounted by Judge Bennett as follows:

> When we had hearings under the Classified Information Procedures Act, . . . certain rulings were made, some in favor of the government, some not, some in favor of the defendant and some not, the government made its determination that the disclosure of remaining classified information would harm national security and ergo the dismissal of the indictment.

Id. at 25–26.

230 For an anecdote demonstrating that President Obama holds a similar position, see Mayer, *supra* note 5, at 48.

The executive branch remains committed to prosecuting government official leakers, no matter how successful. The Espionage Act is its weapon of choice, broad enough to allow a suit against someone who inadvertently retained something marked "unclassified." Under the Obama administration, the prosecutions are likely to persist. According to a separation of powers theory, when the executive branch's behavior "doesn't pass the smell test,"[231] it is the proper role of the judiciary to intervene. To do so at sentencing would not intrude upon the power of the executive; in other words, if a judge finds that the executive has successfully made a case against a government official, the official would still be found guilty. Judicial intervention would offset some of the devastating effects of the prosecution of mid-level intelligence officials. Without some intervention from a co-equal branch of government—like the proposed balancing test—the public will lose the valuable information provided by whistleblowers like Drake, Kiriakou, Snowden, and the like.

231 *See supra* notes 10–14 and accompanying text.