Prosecution of Journalists Under the Espionage Act? Not So Fast.

Kurt Wimmer and Stephen Kiehl

No journalist has ever been prosecuted under the Espionage Act. There long has been debate over whether the statute could apply to journalists, however, and there is newfound concern that the Trump Administration—led by a president who has openly declared "war with the media"[1]—will pioneer such a prosecution. The recent prosecution of NSA contractor Reality Winner for leaking sensitive information to the *Intercept* indicates that the Trump Administration will not hesitate to use the Espionage Act to pursue leakers,[2] a practice that was employed by the Obama Administration.[3]

Although administrations have generally interpreted the Espionage Act so as not to apply to journalists,[4] either through the "mercy of *noblesse oblige*"[5] or prosecutorial self-restraint, Attorney General Jeff Sessions refused to commit to upholding this tradition when asked about it at his confirmation hearings.[6] And, as a senator and the Republican leader on the Senate Judiciary Committee, Attorney General Sessions consistently opposed proposals to create a federal privilege to permit journalists to protect the identity of sources, decrying the laws as means of "protect[ing] those who use the media to illegally expose America's national security secrets."[7]

Some writers recently have focused on the language of the Espionage Act and, based on nothing more, asserted that journalists certainly could be prosecuted under that Act. But reading the text of a statute, of course, is only the first step in determining whether a criminal law could be used to silence or punish the press. Quite to the contrary, we see a number of defenses and bases on which prosecution of journalists under the Espionage Act would be improper and even unconstitutional.

First, a proper construction of Section 793(e) would avoid the overwhelming constitutional issues and find that the statute does not, and was not meant to, apply to journalists engaged in the act of publishing and reporting. *Second*, if Section 793(e) is held to apply to journalists on its face, then the statute, as applied to journalists publishing information in the course of their profession, violates the First Amendment and any prosecution under it would be invalid. The statute constitutes a content-based restriction, subject to strict scrutiny, and the government cannot overcome its burden of proving that the prosecution of journalists is narrowly tailored to protect national security. *Third,* there are several additional ways in which the prosecution of a reporter would be unconstitutional: the statute is unconstitutionally vague; this rare application of the statute constitutes selective prosecution; and the statute amounts to a prior restraint.

The Text of the Espionage Act

The Espionage Act was first passed by Congress in 1917, after America entered World War I, and amended through the Internal Security Act of 1950. Now codified at 18 U.S.C. §§ 793-798, the part that poses the greatest and broadest risk to journalists is Section 793(e).

Section 793(e) provides for the fine or imprisonment of:

> Whoever having unauthorized possession of, access to, or control over any document, writing[,] 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 … 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.[8]

At the outset, it is worth emphasizing that Section 793(e) is limited to documents and information "relating to the national defense." This is a term of art that would not encompass every leak coming out of the government, or all classified information. Rather, to qualify as information "relating to the national defense," the information must be (1) "potentially damaging to the United States or might be useful to an enemy of the United States," and (2) "closely held" by the government.[9]

With that caveat in mind, the statute's text would seem to apply to a journalist who has obtained leaked information that is related to the national defense. She possesses information that she is presumably unauthorized to possess, and the information pertains to the "national defense."[10] If the information was considered to be a "document," "writing," or "note," she would violate the statute by willfully continuing to possess the document without turning it in (not to mention willfully "communicat[ing]" or "transmit[ing]" it).[11]

If the journalist possessed only "information"—i.e. not a physical piece of U.S. property—she would need to have "reason to believe" the information could be used to "injur[e]" the United States or help "any foreign nation."[12] Though "reason to believe" is a higher *mens rea* requirement than "willfulness," it does not provide much comfort as many notable leaks—such as the news that President Trump shared national security intelligence with the Russian foreign minister—would give the author "reason to believe" that the information could adversely affect the United States and aid foreign nations. In other words, as Harold Edgar and Benno C. Schmidt said in their pivotal

Kurt Wimmer and Stephen Kiehl *Covington & Burling LLP, Washington, D.C.* *The authors are grateful for the inspired research and analysis of Samson Schatz, Stanford Law Class of 2018, without whom this article would not be possible.*

1973 piece on the Espionage Act, "If these statutes mean what they seem to say and are constitutional, public speech in this country since World War II has been rife with criminality."[13]

The Proper Interpretation of the Act, Consistent with the Constitution

1. Section 793(e) Does Not Apply to Journalists Engaged in theAct of Reporting and Publishing.

A foundational defense is that Section 793(e), when considered in its statutory context and with its legislative history, does not apply to journalists exercising their First Amendment rights. The statute can—and should—be construed to avoid a conflict with the First Amendment. The Supreme Court has allowed that courts may "strain to construe legislation so as to save it against constitutional attack" though they "must not and will not carry this to the point of perverting the purpose of a statute."[14] Because the Espionage Act is highly politicized, confusing, and old, courts have significant incentive to avoid constitutionalizing the issues and to simply read Section 793(e) so as not to apply to journalists acting in the course of their profession. This is not nearly as implausible as some have assumed.

First, Section 793(e) forbids "communicat[ion], deliver[y], or transmiss[ion]" but does not specifically include "publication."[15] Though it may seem trivial to argue that the act of publishing does not lie within the plain meaning of communication, delivery, or transmission,[16] Congress arguably understood the act of publishing as separate and unique from the other actions. In Sections 794, 797, and 798, Congress specifically forbids the act of "publishing" certain information, at certain times.[17] If the words in § 793(e)—"communicates, delivers, [or] transmits"—included "publishing," the subsequent statutes would be redundant. Justices Douglas and Black, concurring in the judgment in *New York Times Co. v. United States*,[18] understood the omission of *publishing* from Section 793(e) to mean that the statute "does not apply to the press."[19] The Supreme Court has emphasized that "where Congress includes particular language in one section of a statute but omits it another … it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion of exclusion."[20]

Second, a reading of "willful"—"willfully communicates, delivers, [or] transmits" and "willfully retains"[21]—precludes journalists acting in the course of their business. Edgar and Schmidt read Section 793(e) such that "conduct is not willful for purposes of the Section, when undertaken for any of the variety of reasons . . . that reflect interests protected by the First Amendment."[22] In other words, when acting in the course of their business—reporting, writing, and publishing news, all actions that are critical to the foundational freedom of the press—journalists *cannot* satisfy the *mens rea* elements contained in the statute.

The legislative histories of the 1917 and 1950 acts—as interpreted by Edgar and Schmidt in their exhaustive study of these statutes—convey a "clear message" that "publication of defense information for the purpose of selling newspapers or engaging in public debate is not a criminal act."[23] Edgar and Schmidt walk carefully through the record of Congressional speeches and letters to show that these acts were not understood by their authors to criminalize the work of reporters.[24] Judge Gurfein—the judge presiding over the *Pentagon Papers* case at the district court—also found the legislative history persuasive.[25] Judge Gurfein quotes Senator Ashhurst's statements during congressional debate over the 1917 Act: "'[F]reedom of the press' means nothing except that the citizen is guaranteed that he may publish whatever he sees fit and not be subjected to pains and penalties because he did not consult the censor before doing so."[26] These words informed Judge Gurfein's confidence that Congress did not intend for the Act to apply to journalists in the course of their work.

And perhaps the best illustration of congressional intent is the opening proviso to the Internal Security Act of 1950 (the act that amended Section 793(e) to its current form): "Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect."[27] These are powerful words that should give any court confidence to narrowly construe Section 793(e) so as not to apply to journalists.

2. The Espionage Act Is an Unconstitutional Content-Based Restriction of Freedom of the Press.

To the extent Section 793(e) is applied to journalists, it clearly restricts First Amendment activity in proscribing what journalists may or may not publish ostensibly in the name of national security. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[28] "The predominant purpose of the [First Amendment] . . . was to preserve an untrammeled press as a vital source of public information. . . .[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."[29] In fact, "[t]he press was protected so that it could *bare the secrets of government* and inform the people. Only a free and unrestrained press can effectively expose deception in government."[30]

With this grave concern for preserving the vital role of the press in our democratic system, courts approach restraints of the press with a high degree of skepticism. Therefore, if Section 793(e) is deemed to apply to journalists on its face, then as applied, the statute constitutes a content-based restriction. And "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[31]

A regulation is content-based if the "law applies to particular speech because of the topic discussed or the

idea or message expressed."[32] In *Reed v. Town of Gilbert*, the Supreme Court affirmed that if a law is content-based on its face, a court need not inquire as to the legislature's purposes for enacting the statute in order to apply strict scrutiny.[33] Section 793(e), on its face, constitutes a content-based restriction on speech. The statute only restrains speech pertaining to the national defense.[34]

Under strict scrutiny, the court asks whether the statute is narrowly drawn to serve the government's compelling interests. Here, there is no dispute that preserving the national defense is a compelling interest.[35] Therefore, the analysis turns to whether prosecuting journalists under Section 793(e) is necessary to protect that interest.

Prosecuting journalists under Section 793(e) is not narrowly tailored to safeguard America's national security for three reasons: (1) prosecuting journalists is an ineffective way to achieve the government's compelling interests; (2) the law is overinclusive; and (3) there are less restrictive alternatives to safeguarding national security without causing such damage to First Amendment freedoms.

First, the law does not actually protect national security—at least not in a constitutional way. The government has the burden of proving the "harms it recites are real and that its restriction will in fact alleviate them to a material degree."[36] Therefore, the law fails narrow tailoring if it does not effectively promote the government's stated interests. Here, prosecuting journalists under Section 793(e) does not make anyone safer.

In fact, the government may be caught in a logical bind: The government will argue that this law does not constitute a prior restraint on speech in that it only punishes publication after the fact. But if we accept the government's argument there as true, how does the law actually protect national security? The logical answer is that it provides deterrence—by criminally prosecuting journalists for publishing sensitive information, future journalists will think twice about doing the same. This explanation, however, brings the government right back into the highly scrutinized area of prior restraint. By arguing that deterrence is what makes the law effective, the government tacitly admits the statute functions as a prior restraint. Thus, Section 793(e) is either ineffective and thus unconstitutionally applied to journalists for lack of narrow tailoring, or it *is* effective and thus an unconstitutional prior restraint.

Second, the law is overinclusive. On its face, the law brings under threat of criminal liability a tremendous amount of newsworthy reporting that does not threaten national security (or at least where the risks to national security are far outweighed by the public interest). Several examples highlight the dangerous reach of the law:

- On January 12, 2017, the Washington Post reported that Retired Lt. Gen. Michael T. Flynn, the incoming national security advisor, had spoken on the phone with Russian Ambassador, Sergey Kislyak several times, after telling Vice President-elect Pence and others that he had not.[37] Presumably, Post columnist David Ignatius had "unauthorized possession" of this information which might be broadly interpreted as pertaining to the national defense, and had reason to believe that revealing the information could be used to embarrass or otherwise harm the United States. Ignatius would therefore be liable for criminal prosecution under Section 793(e), even though the public interest in reporting this news far outweighs any concerns about protecting the national defense.

- In May 2017, the Washington Post reported that President Trump revealed highly classified information—shared with the United States by a close ally—to the Russian foreign minister and ambassador.[38] Again, if Section 793(e) applied to journalists, its elements may be met here and the journalists could be criminally liable, even though the information is a matter of critical public interest.

These example highlight the nature of the public interest that is at stake if the Espionage Act is deemed applicable to journalists. Either these journalists must jeopardize their own liberty to report newsworthy facts, or very possibly, the facts never make their way into the public sphere. The First Amendment saves journalists from deciding between those two choices.

Lastly, Section 793(e) is not narrow tailored because there are numerous alternatives through which the government can safeguard national security without so severely burdening First Amendment rights.[39] One alternative is for the government to continue its informal negotiations with media organizations when a specific issue of concern arises. A common practice among the press, already, is to approach the government with a piece of leaked information before publishing stories about it.[40] Second, journalists can still be prosecuted or sued under generally applicable criminal and civil laws.[41] The government can use applicable criminal laws to guarantee that journalists do not steal sensitive information or otherwise coerce sources to break the law. A third alternative is to prosecute government employees who leak information, rather than journalists who publish the information, as the Obama and now Trump administrations have done. Courts have generally held that there are no First Amendment rights implicated in the prosecution of government employees who have breached the terms of their employment by leaking classified materials.[42]

3. Section 793(e) Is Unconstitutionally Vague.

The century of speculation and confusion over whether the text of the Espionage Act can be applied to journalists is a testament to its vagueness. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[43] And in the context of the First Amendment, courts are particularly vigilant about statutory vagueness given the immense concern over chilling speech.[44]

Simply put, no one understands

what the Espionage Act really means or how it should be applied, particularly with respect to journalists, and its vagueness affords the government "too much enforcement discretion."[45] For example, how should "unauthorized possession" be defined?[46] Does this imply tethering to the government's classification system, wherein only classified materials can be possessed without authority and only by persons who do not have clearances?[47] Must something be affirmatively determined "unauthorized" or, conversely, is anything that is *not* specifically unauthorized, authorized? Perhaps in the context of the 1950 Internal Security Act proviso, the First Amendment freedom of the press suffices to convey "authority"?

Furthermore, as discussed above, is publishing considered "communicating, delivering, or transmitting"? And, what constitutes "willful[] ret[ention]" of "information" when it is not one of the enumerated physical items pertaining to the national defense?[48] What must a journalist do to avoid criminal liability if she is told a sensitive piece of information over the phone? These glaring ambiguities fall far short of giving a person of average intelligence fair notice of what is and is not criminal under the statute.[49] After all, if they are "beyond [the] ken" of former FBI director and career prosecutor James Comey,[50] who can possibly be expected to be on notice?

4. Unconstitutional Selective Prosecution.

Due to the non-existence of journalist prosecutions under Section 793(e), a journalist charged under the section today would have a persuasive selective prosecution claim. Generally the government retains "broad discretion" in its decisions of who to prosecute and when.[51] The Supreme Court has recognized that this discretion, however, is subject to ordinary equal protection standards, which require "petitioner to show both that the [decision to prosecute] had a discriminatory effect and that it was motivated by a discriminatory purpose."[52] In *Wayte v. United States*, petitioners were prosecuted for failure to register for the draft.[53] The only non-registrants prosecuted, however, were those who affirmatively protested the draft and notified the government of their intention not to register. Those who remained silent were not prosecuted.[54] Petitioners argued they were prosecuted in retaliation for the exercise of their First Amendment rights.[55] The government responded that it was simply prosecuting individuals who had identified themselves as violating the law—it was purely a passive enforcement system.[56] The Court sided with the government, holding that petitioners failed to show that the government was discriminating against non-registrants on the basis of their speech.[57]

A journalist's claim of selective prosecution in retaliation for exercising her First Amendment rights is more likely to succeed than the non-registrants' claims in *Wayte*. That said, the success of her claim may rise or fall on the existence of several additional facts. For example, she would have a stronger discriminatory effects claim if she can show that most journalists are not prosecuted for publishing leaked information, but only she and others who are particularly critical of the administration suffer prosecution. In addition, she may succeed in claiming discriminatory intent if she can show, for example, that the administration or other policy makers sometimes strategically leak their own information to the press, and when they do so, the journalists publishing that information remain safe from prosecution,[58] whereas when journalists who do not receive such information from the administration publish stories containing leaks, *they* are prosecuted.

These facts are not preposterous. Former L.A. Times Editor Dean Baquet and former New York Times Editor Bill Keller describe a situation in which former Treasury Secretary John Snow invited a group of reporters to tour the department's capabilities for tracking terrorist financing for several days. Throughout the trip, the secretary's team shared many sensitive details of their efforts and capabilities, hoping they would appear in print.[59] Three years later, Secretary Snow vehemently protested the papers' decision

andled bank-monitoring program. "Government officials, understandably, want it both ways."[60] Yet, such hypocrisy, while understandable, can be potent evidence of discriminatory purpose if the government decides to start prosecuting certain journalists.

5. The Espionage Act Amounts to a Prior Restraint.

This is not a typical prior restraint. Traditionally the Supreme Court has drawn a distinction between "criminal or civil sanctions after publication" and prior restraints.[61] Both can be violative of the First Amendment—the former "chills" speech, the latter "freezes" it[62]—but prior restraints are especially disfavored.[63]

In one case, however, the Supreme Court entertained, without deciding, a party's argument that a criminal statute acts in "operation and effect" like a licensing scheme and thus constituted a prior restraint.[64] As applied to journalists, Section 793(e) may also be an atypical criminal statute that amounts to a prior restraint given its singular purpose of deterring journalists from publishing sensitive information pertaining to the national defense. As briefly noted above, it is hard to read the statute as achieving its purpose of protecting national security in any other way but to effectively restrain journalists from publishing stories. In that case, Section 793(e) acts in "operation and effect" like a prior restraint, and should bear a "heavy presumption against its constitutional validity."[65]

Conclusion

If this Administration, or any future one, chooses to test the boundaries of the Espionage Act by prosecuting a journalist for the publication of sensitive information, defenders of the press will have multiple paths to showing that such a prosecution is improper. A court may employ basic tenets of statutory interpretation to find that Section 793(e) on its face does not apply to "publishing" information, thus avoiding a constitutional confrontation. If a court reads the Espionage Act to apply to journalists, it will be forced to grapple with compelling constitutional arguments that the act is not narrowly

tailored to achieve its purpose and is unconstitutionally vague, and that its use amounts to a selective prosecution or prior restraint. For good reason, the Supreme Court has repeatedly reaffirmed that "'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'"[66]

Endnotes

1. Julian Zelizer, *President Trump's Dangerous War on the Media*, CNN (Jan. 25, 2017), http://www.cnn.com/2017/01/25/opinions/trumps-war-on-media-zelizer-opinion ("I have a running war with the media. They are among the most dishonest human beings on earth, right?").

2. Charlie Savage et al., *Reality Winner, N.S.A. Contractor Accused of Leak, Was Undone by Trail of Clues*, N.Y. Times (June 6, 2017), https://www.nytimes.com/2017/06/06/us/politics/reality-leigh-winner-leak-nsa.html.

3. *See* James Risen, *If Donald Trump Targets Journalists, Thank Obama*, N.Y. Times (Dec. 30, 2016), https://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html?_r=0.

4. *See, e.g.*, Zachary Roth, *Holder: I Won't Send Journalists to Jail for Doing Their Job*, MSNBC (Oct. 14, 2014), http://www.msnbc.com/msnbc/holder-i-wont-send-journalists-jail-doing-their-job ("no reporter is going to go to jail as long as I am attorney general").

5. United States v. Stevens, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

6. Peter Sterne, *Sessions 'Not Sure' Whether He Would Prosecute Journalists*, POLITICO (Jan. 10, 2017), http://www.politico.com/blogs/on-media/2017/01/sessions-not-sure-whether-he-would-prosecute-journalists-233431 (quoting Sessions as saying that "you could have a situation in which media's not the unbiased media we seen [sic] today, and they could be a mechanism through which unlawful intelligence is obtained").

7. *A Report on Attorney General Nominee Jeff Sessions on Issues that Affect the News Media*, Reporters Comm. for Freedom of the Press, https://www.rcfp.org/sessions-report (last visited June 22, 2017).

8. 18 U.S.C. § 793(e) (2015)

9. United States v. Morison, 844 U.S. 1057, 1071-72 (4th Cir. 1988) (citation omitted).

10. *Id.*

11. *Id.*

12. *Id.*

13. Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 1000 (1973).

14. Holder v. Humanitarian Law Project, 561 U.S. 1, 17 (2010) (quoting Scales v. United States, 367 U.S. 203, 211 (1961)).

15. 18 U.S.C. § 793(e) (2015).

16. *See* Edgar & Schmidt, *supra* note 13, at 1036.

17. 18 U.S.C. §§ 794, 797, 798 (2015).

18. 403 U.S. 713 (1971).

19. *Id.* at 721 (Douglas, J., concurring).

20. Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (citation omitted).

21. 18 U.S.C. § 793(e) (2015).

22. Edgar & Schmidt, *supra* note 13, at 1046.

23. *Id.* at 1001-02.

24. *See id.* at 1002-31

25. *See* United States v. New York Times Co., 328 F. Supp. 324, 329 (S.D.N.Y. 1971).

26. *Id.*

27. Internal Security Act of 1950, H.R. 9490, 81st Cong. § 1(b), 64 Stat. 987 (1950).

28. U.S. Const. amend. I.

29. Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).

30. New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (emphasis added).

31. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

32. *Id*. at 2227.

33. *Id.*

34. *See* 18 U.S.C. § 793(e) (2015)

35. *See, e.g.*, *Humanitarian Law Project*, 561 U.S. at 34-36; *see also id.* at 28 ("Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order.")

36. Edenfield v. Fane, 507 U.S. 761, 770–71 (1993)

37. David Ignatius, *Why did Obama Dawdle on Russia's Hacking?* Wash. Post (Jan. 12, 2017), https://www.washingtonpost.com/opinions/why-did-obama-dawdle-on-russias-hacking/2017/01/12/75f878a0-d90c-11e6-9a36-1d296534b31e_story.html?utm_term=.dc7f8d4b5214.

38. Greg Miller & Greg Jaffe, *Trump Revealed Highly Classified Information to Russian Foreign Minister and Ambassador*, Wash. Post (May 15, 2017), https://www.washingtonpost.com/world/national-security/trump-revealed-highly-classified-information-to-russian-foreign-minister-and-ambassador/2017/05/15/530c172a-3960-11e7-9e48-c4f199710b69_story.html?utm_term=.75804b29efc5.

39. *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2540 (2014) ("To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests.").

40. *See* Dean Baquet & Bill Keller, *When Do We Publish a Secret?*, N.Y. Times (July 1, 2006), http://www.nytimes.com/2006/07/01/opinion/01keller.html?-auth=login-email.

41. Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."). Note, however, that in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Supreme Court struck down a statute that prohibited the intentional disclosure of the contents of an illegally intercepted communication. When a radio host, who had not participated in the interception of a phone call but obtained the tape from a source, broadcast the intercepted tape, one of the speakers on the tape brought a suit against the host. The Court held that the government may not punish the publication of lawfully obtained information relating to matters of public interest, even if the source who provided the information obtained it unlawfully. *Id.* at 535. In

striking down 18 U.S.C. § 2511(1)(c), the Court found it was a "content-neutral law of general applicability." *Id.* at 526. Section 793(e), as a content-based restriction, would face even greater scrutiny than was applied in *Bartnicki*.

42. *See, e.g.*, United States v. Morison, 844 F.2d 1057, 1068 (4th Cir. 1988); *see also* Branzburg v. Hayes, 408 U.S. 665, 691-92 (1972) ("It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws.").

43 Humanitarian Law Project, 561 U.S. at 18 (quoting United States v. Williams, 553 U.S. 285, 304 (2008)). *See also General Elec. Co. v. E.P.A.*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995) (holding that the government may not impose civil or criminal liability where a law or regulation "is not sufficiently clear to warn a party about what is expected of it")

44. *See Humanitarian Law Project*, 561 U.S. at at 19 (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982))

45. *Id.* at 20

46. 18 U.S.C. § 793(e) (2015)

47. The Fourth Circuit assumed this to be true: "unauthorized possession" is tied to the government classification system. *See* United States v. Morison, 844 F.2d 1057, 1074-76 (4th Cir. 1988).

48. 18 U.S.C. § 793(e) (2015).

49. Prior to the 1950 amendments, the Supreme Court did hold that Sections 1 and 2 of the Espionage Act—the precursors to today's Sections 793-798—were not vague. Gorin v. United States, 312 U.S. 19, 27 (1941). Because Section 793(e) did not exist in its current form at the time *Gorin* was decided, and because the statute was *not* vague as to its application to the defendants in that case (a Russian-born government contractor and a foreign agent), that case is not binding here. *But see* United States v. Morison, 844 F.2d 1057, 1071-74 (4th Cir. 1988) (holding Section 793(d) is not vague, but as in *Gorin*, defendant should not have standing to argue vagueness as the statute is not vague as applied to him, a government employee); United States v. Hitselberger, 991 F. Supp. 2d 101, 107 (D.D.C. 2013) ("simple willfulness has never been held to be unconstitutionally vague").

50. *See* David Folkenflik, *Q: Could U.S. Prosecute Reporters for Classified Scoops? A: Maybe*, NPR (Mar. 22, 2017) (reporting that James Comey testified that "whether a reporter incurs criminal liability by publishing classified information" is a matter "probably beyond my ken"), http://www.npr.org/sections/thetwo-way/2017/03/22/521009791/q-could-u-s-prosecute-reporters-for-classified-scoops-a-maybe.

51. Wayte v. United States, 470 U.S. 598, 607 (1985) (citing United States v. Goodwin, 457 U.S. 368, 380, n. 11 (1982)).

52. *Id.* at 608. Note that though the Fifth Amendment does not have an equal protection clause, the Supreme Court has held the Fourteenth Amendment protections of equal protection to be encompassed by the Fifth Amendment Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

53. *Wayte*, 470 U.S. at 603

54. *Id.*

55. *Id.* at 604

56. *Id.* at 603.

57. *Id.* at 609

58. It is possible that journalists receiving information from the administration—i.e. with the consent of the President—are considered "authorized" for purposes of Section 793(e) even though the information may remain classified

59. Baquet & Keller, *supra* note 40.

60. *Id.*

61 Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). The classic examples of prior restraints are "court orders that actually forbid speech activities" like restraining orders or injunctions. Alexander v. United States, 509 U.S. 544, 549–50 (1993)

62. *Nebraska Press Ass'n*, 427 U.S. at 559.

63. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 733 (1971) (White, J., concurring) ("Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication.").

64. *See* Smith v. Daily Mail Pub. Co., 443 U.S. 97, 100–01 (1979).

65. Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

66. Bartnicki v. Vopper, 532 U.S. 514, 527 (2001) (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 102 (1979)).