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Hanna Kim  
Indiana University, hanrkim@indiana.edu

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# The Resilient Foundation of Democracy: The Legal Deconstruction of the Washington Post's Condemnation of Edward Snowden

HANNA KIM\*

On September 17, 2016, *The Washington Post* (“the *Post*”) made history by being the first paper to ever call for the criminal prosecution of its own source<sup>1</sup>—Edward Snowden.<sup>2</sup> Yet, two years prior to this editorial, the *Post* accepted the 2014 Pulitzer Prize in Public Service for its “revelation of widespread secret surveillance by the National Security Agency”<sup>3</sup>—an honor which would not have been bestowed had Snowden not leaked the documents through this news outlet. The other three major media outlets that received and published Snowden’s documents and findings—*The Guardian*, *The New York Times*, and *The Intercept*—all have taken the opposite approach and stood by their source, calling for Snowden’s pardon.<sup>4</sup> The unprecedented actions of the *Post* raise questions regarding the responsibilities of news outlets under the Espionage Act, the effect of self-implication when condemning one’s own source, and the extent of public policy exceptions afforded to journalists.<sup>5</sup>

Constitutional law has set a precedent for protecting journalists,<sup>6</sup> and subsequently media organizations, although decisions to this effect may at times be difficult for the Court to make. For example, the Court’s findings and concurring opinions in the *Pentagon Papers Case* state that any action that resembles prior restraint bears a “heavy presumption against its constitutional validity.”<sup>7</sup> Specifically, Justice Black

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\* 2019 Cybersecurity Risk Management M.S. Candidate, Indiana University Bloomington; J.D. 2018, Indiana University Maurer School of Law; B.A. 2012 Indiana University Bloomington. I would like to extend my gratitude to my fiancé, for his support and enthusiasm; Professor Joseph Tomain, for his guidance and contributions during the drafting of this Note; the members of the *Indiana Law Journal*, for their hard work and careful editing; and my mother, for all of her continuous support.

1. Glenn Greenwald, *WashPost Makes History: First Paper To Call for Prosecution of Its Own Source (After Accepting Pulitzer)*, INTERCEPT (Sept. 18, 2016, 11:05 AM), <https://theintercept.com/2016/09/18/washpost-makes-history-first-paper-to-call-for-prosecution-of-its-own-source-after-accepting-pulitzer> [<https://perma.cc/P9M6-YHLE>].

2. Editorial, *No Pardon for Edward Snowden*, WASH. POST (Sept. 17, 2016), [https://www.washingtonpost.com/opinions/edward-snowden-doesnt-deserve-a-pardon/2016/09/17/ec04d448-7c2e-11e6-ac8e-cf8e0dd91dc7\\_story.html](https://www.washingtonpost.com/opinions/edward-snowden-doesnt-deserve-a-pardon/2016/09/17/ec04d448-7c2e-11e6-ac8e-cf8e0dd91dc7_story.html) [<https://perma.cc/PB6J-JCE3>].

3. *The 2014 Pulitzer Prize Winner in Public Service*, PULITZER PRIZES, <http://www.pulitzer.org/winners/washington-post-1> [<https://perma.cc/FB8F-CRDS>].

4. Greenwald, *supra* note 1.

5. New York is an example of a state that incorporates a strong public policy of protecting journalists from disclosing confidential sources. *Strong Public Policy of Protecting Journalists from Having To Disclose Confidential Sources Justified Denial of Subpoena*, 31 WEST’S CRIM. L. NEWS NL, no. 2, 2014, at 39; see *Holmes v. Winter*, 3 N.E.3d 694, 707 (N.Y. 2013).

6. “In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy.” *N.Y. Times Co. v. United States (Pentagon Papers Case)*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

7. *Id.* at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

stated in his concurring opinion that “the word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”<sup>8</sup> These types of protections have allowed media organizations to both take on controversial topics and to support their source, as was evident during the *Pentagon Papers* controversy when the New York Times refused to discuss whether Daniel Ellsberg was their source.<sup>9</sup> Despite this history of protection by the Court—the *Post* decided to support the idea of criminal punishment and stated that it “might be a bargain . . . [if] Mr. Snowden accepts a measure of criminal responsibility for his excesses and the U.S. Government offers a measure of leniency.”<sup>10</sup> The *Post* claims that the only program that was justifiably exposed was the domestic metadata program—because it was “a stretch, if not an outright violation, of federal surveillance law”<sup>11</sup>—and that there was no public interest in exposing the NSA Internet-monitoring program, PRISM.<sup>12</sup> Notwithstanding PRISM’s lack of public value, the *Post* reported on the program in detail and won an accolade for this reporting.<sup>13</sup> If the *Post* truly believes that disclosing information on PRISM is unlawful because it exposes details of international intelligence operations,<sup>14</sup> then by publishing articles on this topic of “no public value” the *Post* is exposing these details, which could be used to harm, to a larger audience. Further, if the *Post* believed that the disclosure of details surrounding the PRISM program were potentially illegal, then new questions can be raised about the reasonability of the *Post* being a disseminator of this illegal information.

This Note analyzes the role of the *Post* in the Snowden leaks and how the *Post*’s surprising call for legal action against Snowden directly contradicts the *Post*’s instrumentality in the initial reporting. Major news outlets have a long-established history of standing by their sources or, at the very least, abstaining from suggesting prosecution for the very individuals who provide them with information that they voluntarily published. Without this consistency, the source faces additional inquiry and accusations, and the news outlet opens itself up to criminal scrutiny by signaling certain legal concerns with its own published materials. While there is an oft-applied public policy exception that applies in many instances involving factual

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8. *Id.* at 719.

9. Robert Reinhold, *Ellsberg Yields, Is Indicted; Says He Gave Data to Press*, N.Y. TIMES (June 29, 1971), <http://www.nytimes.com/1971/06/29/archives/ellsberg-yields-is-indicted-says-he-gave-data-to-press-ellsberg.html> [<https://perma.cc/7E3T-Z5PX>].

10. Editorial, *supra* note 2.

11. *Id.*

12. *Id.*; see also Greenwald, *supra* note 1.

13. Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), [https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497\\_story.html](https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html) [<https://perma.cc/JXB4-BHP7>].

14. Editorial, *supra* note 2.

reporting by newspapers,<sup>15</sup> this Note will examine whether this exception should stand in these unusual circumstances.

Part I of this Note provides background information on the controversy surrounding Edward Snowden by giving a timeline and describing the documents that were released to journalists and the public. Part II discusses the criminal charges that were levied against Snowden in relation to his wide-reaching leaks of confidential government data, as well as the history behind the statutes under which he is charged—including the Espionage Act of 1917. Part III seeks to elucidate the ramifications of the *Post*'s new stance that Snowden should in fact face some criminal penalties for his actions. Part III then analyzes the reach of the Espionage Act, and whether the *Post* is in fact implicating itself by claiming that the extraction and distribution of this data was criminal in nature. Finally, Part IV explores the historical basis for the policy exceptions that have generally protected newspapers and other reporting outlets in instances in which reported data was factual. This Part includes discussion about whether the *Post*'s recent pivot against Edward Snowden impacts the *Post*'s protection under this public policy exception, and how similar cases might impact the relationships between media outlets and their sources.

#### I. TIMELINE AND SYNOPSIS OF THE LEAKED DOCUMENTS

On June 6, 2013, Glenn Greenwald of *The Guardian* released the Foreign Intelligence Surveillance Court order that directed Verizon to produce “telephony metadata” for communications that were between (1) the United States and abroad or (2) “wholly within the United States” on an “ongoing daily basis” to the National Security Agency (NSA).<sup>16</sup> This information was retrieved from Edward Snowden, an intelligence contractor for Booz Allen Hamilton at the NSA,<sup>17</sup> in Hong Kong by three individuals: Glenn Greenwald—a journalist from *The Guardian* who is now

15. The courts, under the First Amendment, often protect media organizations in order to ensure that the journalist's role is protected against prior restraint, and that media organizations have access to information. *See* *N.Y. Times Co. v. United States* (Pentagon Papers Case), 403 U.S. 713, 717, 723 (1971); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (“[W]e have long eschewed any ‘narrow, literal conception’ of the Amendment’s terms for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.”) (citations omitted); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (“[The] expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”).

16. *In re Verizon Bus. Network Servs., Inc.* (FISA Ct. 2013) (unpublished, top secret decision), <https://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order> [<https://perma.cc/6CMG-XXL2>]; Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, *GUARDIAN* (June 6, 2013, 6:05 AM), <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> [<https://perma.cc/25ZF-LKML>].

17. Mirren Gidda, *Edward Snowden and the NSA Files – Timeline*, *GUARDIAN* (Aug. 21, 2013, 5:54 PM), <https://www.theguardian.com/world/2013/jun/23/edward-snowden-nsa-files-timeline> [<https://perma.cc/LF4F-A6UT>].

a founding editor of *The Intercept*<sup>18</sup>—Ewen MacAskill from *The Guardian*, and documentary maker Laura Poitras.<sup>19</sup>

The following day on June 6, *The Washington Post*, with Poitras's assistance, published a second story about the leaked documents—specifically about the NSA slides explaining the PRISM data collection program.<sup>20</sup> Many other media organizations followed suit, including *The New York Times*.<sup>21</sup> On June 7, *The Washington Post* released a follow-up article explaining the undisclosed PRISM program and its ability to allow the NSA and FBI to tap directly into the servers of Microsoft, Yahoo, Google, Facebook, PalTalk, AOL, Skype, YouTube, and Apple.<sup>22</sup> This access allowed the NSA and FBI to track foreign targets by extracting audio and video chats, photographs, emails, documents, and connection logs.<sup>23</sup> The article further explains that the United Kingdom's Government Communications Headquarters (GCHQ) was able to access communications data from the American internet companies because the GCHQ had access to the PRISM program<sup>24</sup> through their computer system, which was codenamed "Tempora."<sup>25</sup>

On June 8, 2013, *The Guardian* unveiled more information from the Snowden documents, this time about the "Boundless Informant" tool used by the NSA.<sup>26</sup> Boundless Informant is a data analysis and visualization tool that uses a heat map and allows the NSA to keep track of the location of their surveillance information.<sup>27</sup> This disclosure came on the heels of a Senate Intelligence Committee hearing in March of 2013, where the Director of National Intelligence—James Clapper—denounced collecting data on millions of Americans and having the technology to track such intelligence.<sup>28</sup> Finally, on June 9, 2013, Snowden publicly identified himself as the whistleblower behind the leak of the NSA documents.<sup>29</sup>

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18. *About the Author*, GLENN GREENWALD, <http://glenngreenwald.net/#Maboutglenn> [<https://perma.cc/6KFH-WJ4G>].

19. Gidda, *supra* note 17.

20. Gellman & Poitras, *supra* note 13.

21. See Charlie Savage, Edward Wyatt & Peter Baker, *U.S. Confirms that It Gathers Online Data Overseas*, N.Y. TIMES (June 6, 2013), <http://www.nytimes.com/2013/06/07/us/nsa-verizon-calls.html> [<https://perma.cc/CTT6-56KG>].

22. Gellman & Poitras, *supra* note 13.

23. *Id.*

24. *Id.*; Gidda, *supra* note 17.

25. CITIZENFOUR (HBO Films 2014).

26. *Boundless Informant NSA Data-Mining Tool—Four Key Slides*, GUARDIAN (June 8, 2013), <https://www.theguardian.com/world/interactive/2013/jun/08/nsa-boundless-informant-data-mining-slides> [<https://perma.cc/CL7N-WCEK>].

27. Glenn Greenwald & Ewen MacAskill, *Boundless Informant: The NSA's Secret Tool to Track Global Surveillance Data*, THE GUARDIAN (June 11, 2013), <https://www.theguardian.com/world/2013/jun/08/nsa-boundless-informant-global-datamining> [<https://perma.cc/6JYH-FHJ8>].

28. *Id.*; Glenn Kessler, *James Clapper's 'Least Untruthful' Statement to the Senate*, WASH. POST (June 12, 2013), [https://www.washingtonpost.com/blogs/fact-checker/post/james-clappers-least-untruthful-statement-to-the-senate/2013/06/11/e50677a8-d2d8-11e2-a73e-826d299ff459\\_blog.html](https://www.washingtonpost.com/blogs/fact-checker/post/james-clappers-least-untruthful-statement-to-the-senate/2013/06/11/e50677a8-d2d8-11e2-a73e-826d299ff459_blog.html) [<https://perma.cc/T7C5-8D9V>].

29. Gidda, *supra* note 17; Tom McCarthy, *Edward Snowden Identifies Himself as Source of*

On January 1, 2014, *The Guardian*'s and *The New York Times*' editorial boards gave their cases for why Snowden should be pardoned and solidified their stance of supporting their source and his decision.<sup>30</sup> Around a year later, *The Intercept*—through Greenwald—also published an impassioned plea to give Snowden a pardon.<sup>31</sup> However, unlike many of its peers who also won various accolades and recognition for their courage in journalism in exposing the NSA, *The Washington Post* took a difference stance. On September 17, 2016, the editorial board of *The Washington Post* published an opinion stating that Edward Snowden should not receive a pardon.<sup>32</sup> Moreover, *The Washington Post* went one step further to demand that its own source stand trial on espionage charges or, as a “second-best solution,” accept some criminal responsibility for his “excesses.”<sup>33</sup>

## II. UNDERSTANDING THE CRIMINAL CHARGES AGAINST EDWARD SNOWDEN

On June 14, 2013, the United States government charged Edward Snowden with “theft of government property” under 18 U.S.C. § 641,<sup>34</sup> “unauthorized communication of national defense information” under 18 U.S.C. § 793(d),<sup>35</sup> and “willful communication of classified communications intelligence information to an unauthorized person” under 18 U.S.C. § 798(a)(3).<sup>36</sup> The last two charges fall under the 1917 Espionage Act.<sup>37</sup> The maximum sentence for each of these charges is ten years, creating a maximum cumulative sentence of thirty years.<sup>38</sup>

The Espionage Act of 1917 was President Woodrow Wilson's response to the Defense Secrets Act of 1911;<sup>39</sup> he viewed the Defense Secrets Act as not “effective enough to combat the threat of espionage.”<sup>40</sup> President Wilson felt so strongly about wanting to ensure the security of the United States against foreign enemies that he implored Congress to include a provision that would give the President the power to censor the press for the publication of any information that was “in

*NSA Leaks—As It Happened*, GUARDIAN (June 9, 2013), <https://www.theguardian.com/world/2013/jun/09/nsa-secret-surveillance-lawmakers-live> [<https://perma.cc/3WFJ-2AJN>].

30. Editorial, *Snowden Affair: The Case for a Pardon*, GUARDIAN (Jan. 1, 2014, 6:16 PM), <https://www.theguardian.com/world/2014/jan/01/snowden-affair-case-for-pardon-editorial> [<https://perma.cc/YSQ4-G5SL>]; Editorial, *Edward Snowden, Whistle-Blower*, N.Y. TIMES (Jan. 1, 2014), <http://www.nytimes.com/2014/01/02/opinion/edward-snowden-whistle-blower.html> [<https://perma.cc/VK6D-XU3M>].

31. Glenn Greenwald, *Media Lessons from Snowden Reporting: LA Times Editors Advocate Prosecution of Sources*, INTERCEPT (June 7, 2015, 9:37 AM), <https://theintercept.com/2015/06/07/la-times-editors-advocate-imprisonment-sources> [<https://perma.cc/J6SJ-LVGW>].

32. Editorial, *supra* note 2.

33. *Id.*

34. Crim. Complaint, *United States v. Snowden* (E.D. Va. 2013) (Case No. 1:13 CR 265 (CMH)) (unpublished and under seal).

35. *Id.*

36. *Id.*

37. Espionage Act, 18 U.S.C. §§ 791–799 (2012).

38. 18 U.S.C. § 641 (2012); *id.* § 793(d), (f); *id.* § 798(a)(3)–(4).

39. See DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 88–89 (1998).

40. Josh Zeman, “*A Slender Reed Upon Which to Rely*”: *Amending the Espionage Act To Protect Whistleblowers*, 61 WAYNE L. REV. 149, 151–52 (2015).

violation of Presidential regulations” that dealt with national security interests.<sup>41</sup> Congress, fearing the potential abuse of presidential power, voted down the provision.<sup>42</sup> This rejection by Congress highlights the idea that the core of the Espionage Act was neither to limit the press’s ability to publish information of public interest, nor to “prosecute those who provided that information to the press.”<sup>43</sup> The Espionage Act of 1917 was amended by the passage of the Internal Security Act of 1950.<sup>44</sup> The amendment expanded the scope of the 1917 Espionage Act by prohibiting (1) the “retention of classified information by someone who does not have lawful possession” and (2) the transmission of classified information “from someone with lawful possession to someone without” lawful possession; this was codified into 18 U.S.C. § 793(d) and (e).<sup>45</sup>

Only eleven cases, including Snowden’s, deal with the criminal prosecution of the “leakers” under espionage charges.<sup>46</sup> Of these eleven cases, five were found guilty for espionage;<sup>47</sup> three were found guilty, but not for espionage;<sup>48</sup> one was

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41. *Id.* at 152; Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 940 (1973).

42. Zeman, *supra* note 40, at 152.

43. *Id.*

44. Internal Security Act of 1950, ch. 1024, 64 Stat. 987, 1003–04 (1950) (codified at 18 U.S.C. § 793(d)–(e) (2015)).

45. Robert D. Epstein, *Balancing National Security and Free-Speech Rights: Why Congress Should Revise the Espionage Act*, 15 COMM.LAW CONSP. 483, 494 (2007).

46. Larisa Epatko, Elizabeth Shell & Vanessa Dennis, *11 ‘Leakers’ Charged with Espionage*, PBS: NEWSHOUR (Aug. 21, 2013), <http://www.pbs.org/newshour/spc/multimedia/espionage> [<https://perma.cc/C5XT-YZQJ>].

47. *Id.*; see Indictment, *United States v. Sterling*, (E.D. Va. 2010) (No. 1:10CR485) (indictment of Jeffrey A. Sterling), <https://fas.org/sgp/jud/sterling/indict.pdf> [<https://perma.cc/2RQC-4CRW>]; Indictment, *United States v. Kim* (D.D.C. 2009) (No. 1:10-cr-00225-CKK) (indictment of Stephen Jin-Woo Kim), <https://fas.org/sgp/jud/kim/indict.pdf> [<https://perma.cc/PFU3-8NQP>]; Indictment, *United States v. Leibowitz* (D. Md. 2009) (No. AW09CR0632) (indictment of Shama Leibowitz), <https://fas.org/irp/news/2009/12/skleibowitz-charge.pdf> [<https://perma.cc/2PK3-CTH7>]; Superseding Indictment, *United States v. Franklin* (E.D. Va. 2005) (No. 1:05CR225) (indictment of Lawrence Franklin), <https://fas.org/irp/ops/ci/franklin0805.pdf>; Julie Tate & Ernesto Londoño, *Judge Finds Manning Not Guilty of Aiding the Enemy, Guilty of Espionage*, WASH. POST (July 30, 2013), [https://www.washingtonpost.com/world/national-security/2013/07/29/e894a75c-f897-11e2-afc1-c850c6ee5af8\\_story.html](https://www.washingtonpost.com/world/national-security/2013/07/29/e894a75c-f897-11e2-afc1-c850c6ee5af8_story.html) [<https://perma.cc/XN9P-75L8>] (Bradley Manning found guilty of espionage); see also Charlie Savage, *Chelsea Manning To Be Released Early as Obama Commutes Sentence*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html> [<https://perma.cc/A58D-47A3>]; Matt Apuzzo, *C.I.A. Officer is Found Guilty in Leak Tied to Times Reporter*, N.Y. TIMES (Jan. 26, 2015), <https://www.nytimes.com/2015/01/27/us/politics/cia-officer-in-leak-case-jeffrey-sterling-is-convicted-of-espionage.html> [<https://perma.cc/4HL7-WW9V>]; Josh Gerstein, *Contractor Please Guilty in Leak Case*, POLITICO (Feb. 7, 2014, 2:49 PM), <http://www.politico.com/story/2014/02/stephen-kim-james-risen-state-department-fox-news-103265> [<https://perma.cc/EVK9-E5SV>] (Kim pleads “guilty to a single felony count of disclosing national defense information to an unauthorized person”).

48. Epatko et al., *supra* note 46; see Crim. Complaint, *United States v. Hitzelberger*

dismissed;<sup>49</sup> one was pardoned;<sup>50</sup> and one is ongoing.<sup>51</sup> Daniel Ellsberg, leaker of the Pentagon Papers, was dismissed under the Richard Nixon administration due to governmental misconduct against him.<sup>52</sup> Samuel Morison, who leaked confidential images of Soviet nuclear-powered aircraft to a military defense magazine, was prosecuted under the Ronald Reagan administration and pardoned by President Clinton on the last day of his presidency.<sup>53</sup> Lawrence Franklin, who leaked classified policy documents about Iran to the American Israel Public Affairs Committee, was found guilty of espionage under the George W. Bush administration. The other eight leakers, statuses ranging from case ongoing to guilty of espionage, are all under the Barack Obama administration.<sup>54</sup>

No cases deal with the prosecution of an entire media organization. The Court in the *Pentagon Papers Case* mentioned that release of the Pentagon Papers could potentially be harmful to the nation<sup>55</sup> and that *The New York Times* and the *Post* could be prosecuted after publication under various espionage statutes.<sup>56</sup> Contrary to this sentiment, following the ruling of the case, *The New York Times* and the *Post* continued to publish material on the Pentagon Papers and they were never charged for any criminal prosecution under the Espionage Act.<sup>57</sup>

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(D.D.C. 2012) (No. 1:12-cr-00231-RC) (criminal complaint of James Hitselberger), <https://fas.org/sgp/jud/hitsel/complaint.pdf> [<https://perma.cc/7TVL-385G>]; Indictment, United States v. Kiriakou, (E.D. Va. 2012) (No. 1:12CR127) (indictment of John Kiriakou), <https://fas.org/sgp/jud/kiriakou/indict.pdf> [<https://perma.cc/SST4-LYAF>]; Indictment, United States v. Drake, (D. Md. 2010) (No. RDB18CR0181) (indictment of Thomas Drake), <https://fas.org/sgp/news/2010/04/drake-indict.pdf> [<https://perma.cc/5THP-QHSY>]; see also Josh Gerstein, *Ex-Navy Linguist Pleads Guilty in Secret Documents Case*, POLITICO (Apr. 25, 2014, 1:18 PM), <http://www.politico.com/blogs/under-the-radar/2014/04/ex-navy-linguist-pleads-guilty-in-secret-documents-case-187436> [<https://perma.cc/7B9D-EBQ6>] (Hitselberger accepted a plea deal that resulted in a misdemeanor conviction of taking classified documents without authority; the espionage charge was dropped).

49. Epatko, *supra* note 46; cf. Indictment, United States v. Russo & Ellsberg (C.D. Cal. 1971) (Crim. No. 9373-(WMB)-CD), <http://law2.umkc.edu/faculty/projects/ftrials/ellsberg/indictment.html> [<https://perma.cc/VWA5-KYRZ>] (dismissed because of government misconduct).

50. Epatko, *supra* note 46; cf. United States v. Morison, 604 F. Supp. 655 (D. Md. 1985) (discussing the indictment of Samuel Morison).

51. Epatko, *supra* note 46; see Crim. Complaint, United States v. Snowden, *supra* note 34.

52. Epatko, *supra* note 46.

53. *Id.*

54. *Id.*; Dinah PoKempner, *Chelsea Manning Commutation Doesn't Erase Obama's Awful Whistleblower Legacy*, TIME (Jan. 19, 2017), <http://time.com/4638617/chelsea-manning-commutation-obama-whistleblower-legacy> [<https://perma.cc/L5LU-NH8L>] (“Under Obama’s administration, more people were investigated and prosecuted for leaks than under all other U.S. presidents combined.”).

55. N.Y. Times Co. v. United States, 403 U.S. 713, 762 (1971) (Blackmun, J., dissenting).

56. Neb. Press Ass’n v. Stuart, 427 U.S. 539, 591–92 (1976).

57. Floyd Abrams, *The Pentagon Papers a Decade Later*, N.Y. TIMES: MAGAZINE (June 7, 1981), <http://www.nytimes.com/1981/06/07/magazine/the-pentagon-papers-a-decade-later.html> [<https://perma.cc/5DFC-7L4M>].

III. SELF-IMPLICATION AT THE *WASHINGTON POST**A. Culpability Under a Literal Interpretation of the Espionage Act*

While no direct precedent has been established in which a newspaper was charged with violating the Espionage Act for its role in publishing leaked information, the *Post* brushes up against many of the same tenets of the Espionage Act as Snowden in this case. The *Post* is seen not as a co-conspirator to Snowden in espionage or as a participant in the alleged “theft” of classified information. It is not unreasonable, however, to consider that the *Post*’s original publication of the Snowden leaks—the publications that won the media organization a Pulitzer Prize for providing insightful reporting to the public—may have potentially violated both the provision under 18 U.S.C. § 793(d) regarding “unauthorized communication of national defense information”<sup>58</sup> or the provision under 18 U.S.C. § 798(a)(3) prohibiting “willful communication of classified communications intelligence information to an unauthorized person.”<sup>59</sup> The *Post*, by suggesting that Snowden face criminal charges for his disclosures of classified information to unauthorized individuals, invites scrutiny onto itself by blurring the lines of potential self-implication in what the *Post* alleges is a dangerous crime under the Espionage Act of 1917.

While the *Post* did not play a primary role in leaking classified information the way that Edward Snowden did—the *Post* did not have access to classified databases in which they shared the classified information to the public—this fact does not make the *Post* inherently immune to the arm of the Espionage Act of 1917 and its punishments. When deconstructing the specific wording of 18 U.S.C. § 793(d) in relation to the actions taken by the *Post*, several instances are worth noting. First, the communication of this information is likely “unauthorized”<sup>60</sup> when taken in a literal sense, as it is unlikely that the United States government would have sanctioned the distribution of the secrets regarding PRISM and domestic surveillance. Second, the article published by the *Post* was in fact a “communicat[ion]”<sup>61</sup> aimed at reaching millions of potential readers in order to circulate certain facts that are of absolute public importance. Finally, the unauthorized communication must pertain to “national defense information.”<sup>62</sup> Again, a public policy defense might insulate the *Post* on this statutory element, as there may be some debate about which surveillance programs truly promote national defense objectives, but it is likely that the United States government would argue that programs run at the NSA further the country’s national defense goals.

In similar fashion, the language in 18 U.S.C. § 798(a)(3) from the Espionage Act of 1917 might implicate the *Post* for many of the claims that the newspaper alleges Edward Snowden is guilty of committing. Publishing this highly sensitive information to a mass market of potential readers was clearly an intentional act, and it would be difficult to argue that the *Post* was not fully aware that this would cause

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58. Crim. Complaint, *United States v. Snowden*, *supra* note 34.

59. *Id.*

60. 18 U.S.C. § 793(d) (2012).

61. *Id.*

62. *Id.*

substantial controversy. In fact, this awareness is solidified by their acceptance of the Pulitzer Prize for this very reporting. Thus, there is merit to the assertion that the initial leaks made through the *Post* were in fact a “willful[] communicat[ion].”<sup>63</sup>

The next crucial element of this statute is that the information in question must be “classified information.”<sup>64</sup> It is evident from the publicly disclosed documents that much of the information involved in this case was highly classified in nature. Documents revealed programs ranging from top secret metadata collection and analysis of internet records of United States citizens to a memorandum from President Barack Obama highlighting potential foreign targets for cyberattacks and spying.<sup>65</sup> The government went to great lengths to ensure that prior to the Snowden leaks, none of this information would be known to the general public. Furthermore, Snowden’s own access to this information was attributable to his high level of security clearance—a clearance that not everyone within the NSA had.<sup>66</sup> The information that Snowden retrieved—intended only for those that had a high level of security clearance—ultimately permeated, in part, by the *Post*’s publication of this information.

Finally, this section of the Espionage Act states that the willful communication of classified information must be given to an “unauthorized person.”<sup>67</sup> In 2013, when the *Post* published its first article with Barton Gellman—a *Washington Post* reporter—and Laura Poitras—a journalist that Snowden specifically requested—about Edward Snowden’s leaked information,<sup>68</sup> the circulation of the paper was an estimated 646,700 readers and an additional 42,313 digitally.<sup>69</sup> By any measure, this is a broader audience than what might be conceived to be an authorized receiver of classified intelligence.

While by a literalistic application of the verbiage of the Espionage Act there is a strong case against the *Post* for the aforementioned violations, some established precedent suggests that the publication of illegally obtained materials may be protected from the legal scrutiny that is applied to the individual who committed the initial illegal acquisition of the information. Treatment of the subsequent possessor in these cases has varied based on the level of participation the media organization took in the initial procurement of the illegally obtained information, escalating in culpability with the amount of instrumentality in the original offense.<sup>70</sup>

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63. *Id.* § 798(a)(3) (2012).

64. *Id.*

65. Paul Szoldra, *This Is Everything Edward Snowden Revealed in One Year of Unprecedented Top-Secret Leaks*, BUS. INSIDER (Sept. 16, 2016, 8:00 AM), <http://www.businessinsider.com/snowden-leaks-timeline-2016-9> [<https://perma.cc/H9C6-KZUA>].

66. CITIZENFOUR, *supra* note 25.

67. 18 U.S.C. § 798(a)(3).

68. Gellman & Poitras, *supra* note 13.

69. Felix Richter, *The Gradual Decline of The Washington Post*, STATISTA (Aug. 6, 2013), <https://www.statista.com/chart/1333/circulation-at-the-washington-post> [<https://perma.cc/KU4A-FNGN>].

70. Diane Dellamere, *The Legality of Publishing Hacked E-Mails*, COLUM. JOURNALISM REV. (Dec. 16, 2009), [http://www.cjr.org/the\\_observatory/the\\_legality\\_of\\_publishing\\_hac.php](http://www.cjr.org/the_observatory/the_legality_of_publishing_hac.php) [<https://perma.cc/XYF9-SCGP>].

*B. Prior Precedent Regarding Illegally Obtained Information*

The Supreme Court in *New York Times Co. v. United States (Pentagon Papers Case)* rejected the government's plea to prohibit *The New York Times* and *The Washington Post* from publishing the contents of a classified historical study on America's policy in Vietnam.<sup>71</sup> In the Court's per curiam opinion, it stated that the government had not met its "heavy burden of showing justification for the imposition of . . . [prior] restraint."<sup>72</sup> Justice Black, in his concurrence, notably stated:

The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the *New York Times*, the *Washington Post*, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly.<sup>73</sup>

Not only did the First Amendment heavily protect the newspapers according to Justice Black, but the argument that the press should be silenced in the name of "security" was short-sighted.<sup>74</sup> Justice Douglas in his concurrence agrees with this sentiment, stating that "[s]ecrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors."<sup>75</sup>

The precedent in the *Pentagon Papers Case* is clear, though the reasoning through the First Amendment is not: the press must be protected, especially when speaking against the government, because that is the exact role that the Founding Fathers envisioned when the First Amendment was created. Regardless of if the information was obtained illegally through espionage or any other illegal means, if the information has great public importance and furthers democracy through governmental transparency, then the press is simply fulfilling its duty. In accordance with this ruling, not only is the *Post* not implicated in the alleged crimes of Edward Snowden, but the *Post* was fulfilling its democratic duty to its country.

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71. 403 U.S. 713, 714 (1971).

72. *Id.*

73. *Id.* at 717.

74. *Id.* at 719 ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."). Furthermore, the more threats there are to national security, the more important the need for free speech, press, and assembly are to the country in order to "maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *Id.* at 720 (quoting *De Jong v. Oregon*, 299 U.S. 353, 365 (1937)).

75. *Id.* at 724.

Moreover, thirty years later in *Bartnicki v. Vopper*, the Court created a distinct demarcation on the level of protection a media organization would receive under the First Amendment.<sup>76</sup> *Bartnicki*, though not about the Espionage Act, deals with the publication of illegally obtained information and asks the question: “[W]hat degree of protection, if any, [does] the First Amendment provide to speech that discloses the contents of an illegally intercepted communication.”<sup>77</sup> The facts of this case pertain to an unidentified third party who illegally recorded union negotiations between a teacher’s union and the respective school board, and then subsequently leaked the recording to a local radio station, which played the tape for the broader public to hear.<sup>78</sup> Justice Stevens, in authoring the Court’s opinion, highlights the importance of the role that the radio host, Vopper, played in the process of illegally obtaining this tape.<sup>79</sup> Justice Stevens explains that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”<sup>80</sup> The Court stresses that “punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality” is unacceptable.<sup>81</sup>

In accordance with this precedent, though Snowden may have illegally obtained the information, the *Post* is still protected under the First Amendment shield because it is a matter of great public concern. Former President Obama has stated that what Snowden unveiled “raised some legitimate concerns”<sup>82</sup> and former President Jimmy Carter has stated:

[Snowden]’s obviously violated the laws of America, for which he’s responsible, but I think the invasion of human rights and the American privacy has gone too far. I think that the secrecy that has been surrounding this invasion of privacy has been excessive, so I think that the bringing of it to the public notice has probably been, in the long term, beneficial.<sup>83</sup>

This consensus that what Snowden revealed, despite whether it was espionage or not, is a matter of great public concern, and, in accordance with *Bartnicki*, is enough to shield the *Post* under the First Amendment. However, the concern comes when relating this ruling with the Espionage Act itself. The Espionage Act explicitly states that it is a felony to receive or “willfully retain[.]” national defense information that “the President has determined would be prejudicial to the national defense.”<sup>84</sup> If the Court were to balance this issue in the same way that these issues were balanced by

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76. See 532 U.S. 514, 517 (2001).

77. *Id.*

78. *Id.* at 518–19.

79. *Id.* at 535.

80. *Id.*

81. *Id.* at 529.

82. Joe Mullin, *Obama Says He Can’t Pardon Snowden*, ARS TECHNICA (Nov. 20, 2016, 6:00 PM), <https://arstechnica.com/tech-policy/2016/11/obama-says-he-cant-pardon-snowden> [<https://perma.cc/KR7U-ZVLK>].

83. Tom Watkins, *Father Proposes Deal for Snowden’s Voluntary Return*, CNN (June 30, 2013), <http://edition.cnn.com/2013/06/28/us/snowden-lawyer-offer> [<https://perma.cc/D8KU-H572>].

84. 18 U.S.C. § 793(a)–(e) (2012).

Justice Black and Justice Douglas in *New York Times Co. v. United States*,<sup>85</sup> then despite the argument for security concerns for Snowden, the *Post* was simply doing its duty as the press to create a more informed public as to the actions of its government. If weighed as the Founding Fathers would have weighed this issue, in accordance with *New York Times Co. v. United States*,<sup>86</sup> then despite the allegations against Snowden, the *Post* is shielded by the First Amendment.

#### IV. THE PUBLIC INTEREST IN A FREE PRESS

When the Court speaks about the First Amendment protections for the press, they uphold this protection because of a legitimate fear of a “chilling effect” on the press.<sup>87</sup> Even in the face of the Espionage Act, the Court has previously held that media organizations have a right to disclose information of public importance.<sup>88</sup> *The Washington Post*, recognizing that the information given to them by Snowden held great public importance, acted on their instinct as a media organization.

This role of the press and the First Amendment protections that give the press the ability to report on issues that expose the government is so important to some that there are suggestions that the Espionage Act should be revised to ensure the protection of journalists in situations similar to that of the *Post*'s.<sup>89</sup> Edgar and Schmidt, in 1973, recognized the need for clarification and revision to the Espionage Act, calling the state of the Espionage Act “totally inadequate.”<sup>90</sup> They state that the “gathering and obtaining offenses of subsection 793(a) and 793(b)” in the Espionage Act have no purpose that “could not be served by more precise definition of attempts to violate the transmission offenses of subsection 794(a).”<sup>91</sup> Edgar and Schmidt also mention the “intent or reason to believe information to be used to the injury of the United States or to the advantage of any foreign nation” element under subsections 794(a), 793(a), and 793(b), stating that Congress could not have proscribed a punishment of death through a subsection utilizing the phrasing “reason to believe.”<sup>92</sup> Culpability is another vague concept within the Espionage Act subsection 793(c)—culpability meaning “for the purpose of obtaining national defense information”—where the two preceding subsections indicate “intent and reason to believe” is all that is needed for

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85. 403 U.S. 713 (1971).

86. *Id.*

87. *See* *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 610 n.40 (1976) (Brennan, J., concurring in judgment) (noting that the chilling effect is especially noteworthy in smaller media organizations); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 655, 662, 665, 686 n.13 (D.C. Cir. 1989) (holding that the FCC's order was proper and that the Syracuse Peace Council was given adequate notice. The FCC's order: (1) found that the fairness doctrine of the Syracuse Peace Council did not serve the public interest and violated the First Amendment, (2) looked at many examples of “broadcaster chill” that needed to be accorded substantial weight, (3) analyzed the net negative effects of the fairness doctrine, and (4) looked at alternatives that were deemed unproductive.).

88. *See N.Y. Times Co.*, 403 U.S. at 717.

89. *See* Edgar & Schmidt, *supra* note 41, at 934; Epstein, *supra* note 45, at 484.

90. Edgar & Schmidt, *supra* note 41, at 1076.

91. *Id.*

92. *Id.*

culpability.<sup>93</sup> Edgar and Schmidt also address the confusing nature of the term “willfully” and the intent standard given in the Espionage Act. Ultimately, Edgar and Schmidt believe that the Espionage Act is overbroad and too vague that, if not remedied, will end in a “chill on publication.”<sup>94</sup>

Epstein states that because the men under *United States v. Morison* were the first non-governmental employees to be indicted, it holds the door open for other nongovernmental employees such as journalists.<sup>95</sup> Further to that point, Epstein argues that a door is created because the Espionage Act itself is overbroad and vague.<sup>96</sup> Ultimately, Epstein suggests that the “reason to believe could be used to the injury of the United States or to the advantage of any foreign nation” should be replaced, stating that it creates a “chilling effect on speech” and gives the executive branch the ability to “punish individuals lacking bad faith intent.”<sup>97</sup> He also suggests removing “to the advantage of any foreign nation”<sup>98</sup> because information that is disclosed to an enemy would be equally protected under the “could be used to the injury of the United States” clause.<sup>99</sup>

The “chilling effect” is an important issue when discussing the *Post*’s culpability if it were deemed that the Snowden leaks constituted crimes under the Espionage Act. Important here is the balance that must be struck between the chilling effect on the press and charging individuals or entities under the Espionage Act. While Snowden is a whistleblower that has to face Espionage Act charges and may be found in violation of these charges,<sup>100</sup> the *Post* was simply reporting on an issue that is of great importance—the very information that *New York Times Co. v. United States* mentioned.<sup>101</sup> Regardless of what Snowden might have to face, the potential of chilling the speech of the press is a risk that is too grim to allow. If the Espionage Act is seen as overbroad and vague, especially in the context of journalists, then the Espionage Act cannot be upheld toward the whistleblowing duties of the press.

Further establishing the case for journalistic exceptions in this case is the widespread public interest in the nature of the leaked documents. Regardless of the outcome in any potential case involving Edward Snowden himself, the *Post* has a strong argument to assert that its actions in publishing this information served a public purpose. One of the underlying purposes of a free press is to expose information that is kept hidden from public view when it serves a great value to the citizenry, and the

93. *Id.*

94. *Id.* at 1000, 1087.

95. Epstein, *supra* note 45, at 498.

96. *Id.* at 483–84.

97. *Id.* at 512; *see also* 18 U.S.C. § 793(d), (e) (2012).

98. Epstein, *supra* note 45, at 513; 18 U.S.C. § 793(d), (e).

99. Epstein, *supra* note 45, at 513; 18 U.S.C. § 793(d), (e). Epstein also suggests replacing the “to the advantage of any foreign nation” with “to an *enemy* of the United States” or “to the advantage of an enemy to the United States,” stating that the definition of enemy should be found under the Military Commissions Act of 2006 and that by doing this, it provides more protections to journalists. Epstein, *supra* note 45, at 513–14.

100. This is not making an assessment of whether he should or should not be found guilty of these charges. The *Post* should not be seen as a complicit actor *despite* possible punishments for Snowden.

101. *See* 403 U.S. 713, 717 (1971).

*Post* did in fact fulfill this characteristic in its reporting—despite the hypocrisy it displayed by condemning its source.

Special protections are also afforded to journalists in a majority of states via ‘shield laws,’ which—similar to attorney-client privilege—insulate journalists from having to testify against their own sources.<sup>102</sup> The logic behind these statutes suggests that in order to successfully engage in the professional exercise of sound and powerful journalism, there must be an ironclad trust between journalists and their sources.<sup>103</sup>

While these laws further extend the umbrella of protections afforded to journalists, it is significant that in the case of the Snowden leaks, there are further extenuating circumstances. Upon leaking thousands of classified documents, Edward Snowden took the bold step of publicly acknowledging his identity, and thus opening himself up to public accusations and scrutiny.<sup>104</sup> Then, the next unprecedented event happened when the *Post* reversed its course in 2016 and suggested that Snowden was guilty of violating the Espionage Act.<sup>105</sup> These extraordinary circumstances raise additional questions about the ethical standards expected of journalism, and the durability of safe-haven laws for journalists in cases where they turn their backs on their own sources.

The quality and impact of the *Post*’s reporting was rewarded with a Pulitzer Prize for “authoritative and insightful reports that helped the public understand how the disclosures fit into the larger framework of national security.”<sup>106</sup> The leaked information was clearly important to the public and the target of the reporting was a governmental body—clearly the type of information *New York Times Co. v. United States* wanted the press to enlighten the American public about.<sup>107</sup> The Espionage Act is overbroad and vague when applying it to journalistic protections, thereby risking the chilling effect on media organization’s speech. It is for these reasons that, as a matter of public policy, there is a strong case to be made for the exemption of the *Post* in any potential future case regarding violation of the Espionage Act in the Snowden leaks.

#### CONCLUSION

In 2013, the massive leak of confidential information regarding the NSA’s covert collection of data from domestic and foreign sources captivated the nation, leading to a significant shift in public consciousness and opinion regarding privacy and trust in government. By most accounts, this was the largest leak of state secrets of all

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102. Jonathan Peters, *Shield Laws and Journalist’s Privilege: The Basics Every Reporter Should Know*, COLUM. JOURNALISM REV. (Aug. 22, 2016), [http://www.cjr.org/united\\_states\\_project/journalists\\_privilege\\_shield\\_law\\_primer.php](http://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php) [<https://perma.cc/V2F6-GVEW>].

103. *Id.*

104. Amy Davidson Sorkin, *Edward Snowden, the N.S.A. Leaker, Comes Forward*, NEW YORKER (June 9, 2013), <http://www.newyorker.com/news/amy-davidson/edward-snowden-the-n-s-a-leaker-comes-forward> [<https://perma.cc/8CJC-N9NC>].

105. Editorial, *supra* note 2.

106. *The 2014 Pulitzer Prize Winner in Public Service*, *supra* note 3.

107. *See* 403 U.S. 713 (1971).

time.<sup>108</sup> Given the fact that Snowden fled the country to avoid what he believed may have been a potentially unfair trial, there was no formal resolution of this case through the judicial system.<sup>109</sup> A less oft-discussed topic throughout the whirlwind of news coverage and debate of the Snowden case was the role of the *Post* and the potential for liability under the Espionage Act of 1917. This high-profile case was further complicated by the *Post*'s 2016 unprecedented editorial that called for the criminal sentencing of their own source—Edward Snowden—and thus, by association, implicating itself to the very same crimes.<sup>110</sup>

By a literal reading of the Espionage Act, the *Post* may be at risk of bearing liability for its publication. The facts of the case seem to strongly suggest both that the reporting was an “unauthorized communication of national defense information” that was a “willful communication of classified communications intelligence information to an unauthorized person.”<sup>111</sup> However, case law softens the cement against the *Post*. Though all of the justices had differing ideas on how far the protection of the First Amendment should reach, the per curiam holding in *New York Times Co. v. United States* solidified the notion that the government must meet its “heavy burden” of justifying prior restraint.<sup>112</sup> In the *Post*'s case, the government's burden is extremely heavy because the information published was of great importance to the public—no information is greater than that of the government abusing its authority against the people of its country. *Bartnicki* creates a demarcation on the level of protection a media organization receives under the First Amendment—giving credence to the weight of public concern in Snowden's leaks, but giving further pause to the fact that the *Post* was aware of the information's illegality.

Yet, the aforementioned rulings coupled with Epstein's suggestion to revise the Espionage Act<sup>113</sup> and Edgar and Schmidt's critique of the Espionage Act's overbroad and vague nature<sup>114</sup> highlight the strong public policy argument: news organizations should be protected from the chilled effect that comes with fear of being prosecuted under the Espionage Act and should not be punished for wanting to protect their sources through the shield laws. The United States government clearly has the ability to communicate with great reach and respond to the claims laid out by the *Post*'s articles, and there is a public value in engaging in a debate over the merit of these secret surveillance programs. This healthy debate should not be quashed through a chilling effect and other potential repercussions from the Espionage Act.

The public policy argument for an exception to the right to a free press is crucial to the sustained prosperity of America. Media has historically played a significant role in the nation's democratic process through tactics, such as investigative journalism, which attempt to uncover closely guarded facts not widely known to the public.

108. Jason M. Breslow, *How Edward Snowden Leaked “Thousands” of NSA Documents*, FRONTLINE (May 13, 2014), <http://www.pbs.org/wgbh/frontline/article/how-edward-snowden-leaked-thousands-of-nsa-documents/> [<https://perma.cc/LQ89-59HP>].

109. CITIZENFOUR, *supra* note 25.

110. *See* Editorial, *supra* note 2.

111. Crim. Complaint, *United States v. Snowden*, *supra* note 34.

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

113. Epstein, *supra* note 45.

114. Edgar & Schmidt, *supra* note 41.

Regardless of the ultimate verdict, were Edward Snowden ever to face trial for violation of the Espionage Act, it would be in the country's national interest to separate any charges against *The Washington Post* on the grounds that they have a mission of informing the public of the relevant news of which they are aware.

While it may be tempting in a particular case to push back on the precedents of nearly boundless speech by the press, it is important to keep in mind the long-term implications of maintaining strong press protections. Following the tumultuous 2016 United States presidential election, there has been significant demonization of the free press, led by talk of "fake news" impacting election results and the recent statements from President Donald Trump that he would like to "open up our libel laws" to clear avenues to sue media outlets which spoke unfavorably of him.<sup>115</sup> In the Snowden case, there has been substantial debate in the public sphere as to whether he was a hero or a criminal, and whether the government is justified to infringe upon citizens' privacy for the sake of national security. These debates undoubtedly have passionate supporters on either side of the argument, but it is difficult to deny that there is a considerable public interest in the information that has been released through these events. It is undeniable that there is great societal merit in knowing the background of a presidential candidate and the powerful activities that the government wields against the American people.

In publishing a series of articles detailing the findings in Edward Snowden's infamous leaked documents, the *Post* entered into a hot debate over the role of government in the lives of the American people and our counterparts abroad. While there is clearly some damage done to the credibility and confidentiality of the United States government in relation to these specific programs, the emphasis should stand with the preservation of a thriving free and open press for generations to come. While the *Post* may have taken unprecedented action in turning on their own source and suggesting criminal punishment for a crime that—in some sense—they enabled, the true result of their involvement has been a far reaching contribution to the public discourse that carries great value to the American people.

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115. Jacob Gershman, *Can Trump 'Open Up' Libel Laws?*, WALL ST. J. L. BLOG (Nov. 14, 2016, 4:14 PM), <http://blogs.wsj.com/law/2016/11/14/can-trump-open-up-libel-laws> [<https://perma.cc/6KEC-Z6HY>].