Note

A Snake in the Grass?: Section 798 of the Espionage Act and Its Constitutionality as Applied to the Press

Andrew Croner*

"The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches."[1]

—Justice Potter Stewart, Associate Justice of the Supreme Court of the United States, 1958–1981.

"This bill is an attempt to provide . . . legislation for only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree."[2]

—House Report No. 81-1895 on the bill codified at 18 U.S.C. § 798 (2000).

Introduction

The media has consistently sought to fill the role trenchantly defined by Justice Stewart for the press in our constitutional structure by aggressively pursuing its duty to keep the public informed of question-

* J.D., expected May 2009, The George Washington University Law School. Special thanks to Professors Jerome A. Barron, C. Thomas Dienes, and Peter Raven-Hansen for your comments and assistance. To my family, I am forever grateful for all of your love and support over the years. Dad, I cannot thank you enough for helping me write the piece that you always wanted to write.

1 Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 634 (1975).

2 H.R. REP. NO. 81-1895, at 2 (1950), *as reprinted in* 1950 U.S.C.C.A.N. 2297, 2299.

able governmental action.[3] Recently, the *New York Times* provided a prominent example of this constitutional calling by disclosing the Bush Administration's authorization of a domestic warrantless wiretapping program conducted by the National Security Agency ("NSA").[4]

The Foreign Intelligence Surveillance Act ("FISA")[5] establishes the statutory framework for foreign intelligence operations involving electronic surveillance. It requires that NSA secure warrants based on probable cause prior to conducting electronic surveillance that targets the communications of any United States citizen located in the United States.[6] In an effort to track terrorists following the 9/11 attacks, however, President Bush signed an order authorizing NSA to intercept the international telephone calls and emails of hundreds of United States citizens located within the United States without a warrant.[7] The Bush Administration argued that the program was necessary to allow NSA to move quickly to monitor communications that could uncover impending terrorist threats, contending that the program had in fact helped to preemptively uncover plots by Al-Qaeda to harm the United States.[8]

Notwithstanding the justifications advanced by the Bush Administration, the disclosure of the program resulted in significant public outcry from civil libertarian groups and political adversaries of the Bush Administration.[9] Perhaps anticipating such backlash, the Bush Administration had previously pleaded with the *New York Times* to refrain from publishing the article, arguing that doing so could "jeop-

---

3 *See* Nicholas D. Kristof, Op-Ed., *Don't Turn Us into Poodles*, N.Y. TIMES, July 4, 2006, at A15 (noting that the press has a "watchdog role" when it comes to government affairs).

4 James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

5 Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1863 (2000).

6 The terms "electronic surveillance" and "United States person" are defined by FISA. *See* 50 U.S.C. § 1801(f), (i).

7 *See* Risen & Lichtblau, *supra* note 4. It may be worth noting that NSA was still required to obtain warrants to monitor entirely domestic communications, as the authorization by President Bush only applied to domestic communications that had a foreign component. *Id.*

8 *See id.* (explaining that several officials claimed the program had helped to uncover a plot by Iyman Faris, an Ohio truck driver and naturalized citizen, to support Al-Qaeda by bringing down the Brooklyn Bridge with blowtorches).

9 Gabriel Schoenfeld, *Has the "New York Times" Violated the Espionage Act?*, COMMENT. MAG., Mar. 2006, at 23, 23, *available at* http://www.commentarymagazine.com/viewpdf.cfm?article_id=10036 (noting that "[n]ot since Richard Nixon's misuse of the CIA and the IRS in Watergate . . . have civil libertarians so hugely cried alarm" and that "[l]eading Democratic politicians . . . have spoken darkly of a constitutional crisis").

ardize continuing investigations and alert would-be terrorists that they might be under scrutiny."[10]

Though it would seem that any governmental interest in maintaining the secrecy of the wiretapping program was compromised once the *Times* chose to publish the article, some commentators have supported prosecuting the *Times* under § 798[11] of the Espionage Act[12] in the wake of the disclosure.[13] Section 798 is a seldom-used penal statute that authorizes the imposition of criminal sanctions on those that publish classified information related to the "communication intelligence activities" of the United States.[14]

---

10 Risen & Lichtblau, *supra* note 4.

11 18 U.S.C. § 798 (2006).

12 Espionage Act, ch. 30, 40 Stat. 217 (1917) (codified as amended in scattered sections of 18 U.S.C.).

13 *See* John C. Eastman, *Listening to the Enemy: The President's Power to Conduct Surveillance of Enemy Communications During Time of War*, 13 ILSA J. Int'l & Comp. L. 49, 58–66 (2006); Schoenfeld, *supra* note 9, at 28–31.

14 Section 798 states:

> (a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—
>
> (1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or
>
> (2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or
>
> (3) concerning the communication intelligence activities of the United States or any foreign government; or
>
> (4) obtained by the process of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—
>
> Shall be fined under this title or imprisoned not more than ten years, or both.
>
> (b) As used in subsection (a) of this section—
>
> The term "classified information" means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;
>
> The terms "code," "cipher," and "cryptographic system" include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;
>
> The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a

The purpose of this Note is to evaluate the plausibility of the course advocated by these commentators in light of the constitutional scrutiny placed on regulations limiting the freedom of the press. This Note argues that prosecution of the press under § 798 would be facially unconstitutional because the statute is substantially overbroad in impairing protected speech in violation of the First Amendment. In addition, it discusses other aspects of § 798 that, although not fatal to its application to the press, are at least constitutionally problematic. Finally, while conceding that a saving construction of § 798 could probably be fashioned to avoid judicial invalidation, this Note concludes by arguing that invalidation of the statute is a more appropriate action given the marked changes in U.S. intelligence operations since § 798's enactment and the novelty of prosecuting the press under a criminal statute.

Part I of this Note briefly introduces § 798 and explains why the text of the statute makes it ripe for use in a prosecution against the press. Following this introduction, Part II focuses on recounting the history of § 798, beginning with the events influencing its enactment and then proceeding to other occasions where the idea of utilizing § 798 against the press has surfaced. Part III begins a constitutional analysis of § 798 by examining Supreme Court doctrine in the areas of First Amendment press rights and national security to predict whether the Court would generally find a prosecution of the press under § 798 permissible. Part IV continues this constitutional analysis by focusing more specifically on the text of § 798 through use of the vagueness and overbreadth doctrines. Finally, Part V concludes with a discussion of how the Supreme Court should address the constitutional infirmities of § 798 in the event that a government prosecution of the press under its terms reaches the Court for review.

> foreign country, whether or not such government is recognized by the United States;
>
> The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;
>
> The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

18 U.S.C. § 798(a)–(b).

I. A Brief Introduction to § 798

This Note focuses on the potential liability of the press under § 798 whenever someone "knowingly and willfully . . . publishes . . . any classified information . . . concerning the communication intelligence activities of the United States or any foreign government."[15] The statute defines "communication intelligence" as "all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients."[16]

Two features of the statutory text of § 798, when combined, facilitate prosecution of the press in ways not feasible under other sections of the Espionage Act. The first is the inclusion of the word "publish[ ]" within the statutory text.[17] The use of the term "publish" is significant given the Supreme Court's hesitation to apply the Espionage Act to the press in the absence of such express language.[18] The second notable aspect of § 798 is its failure to predicate liability upon the finding of a specific intent to harm the United States or benefit a foreign government.[19] This omission is important because it would be difficult in most circumstances for the government to prove that the press had such specific intent in publishing an article.

Section 798 is unique amongst the various sections of the Espionage Act in possessing *both* of these characteristics, making a prosecution of the press under its terms inherently more plausible.[20] Despite these unique characteristics, commentators have generally eschewed discussion of § 798 under the belief that it narrowly encompasses the "knowing and willful disclosure of classified information relating to cryptography."[21] Although § 798 admittedly proscribes the disclosure

---

15 *Id.* § 798(a).

16 *Id.* § 798(b).

17 18 U.S.C. § 798(a); *see* Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1065 (1973) ("[T]he use of the term 'publishes' makes clear that the prohibition is intended to bar public speech.").

18 N.Y. Times Co. v. United States (*Pentagon Papers Case*), 403 U.S. 713, 720–23 (1971) (Douglas, J., concurring) (finding that § 793 of the Espionage Act was inapplicable to the press because it did not contain the word "publish" in its statutory text).

19 *See* 18 U.S.C. § 798(a); Edgar & Schmidt, *supra* note 17, at 1065 ("[T]he statute and its history make evident that violation occurs on knowing engagement in the proscribed conduct, without any additional requirement that the violator be animated by anti-American or pro-foreign motives.").

20 *See generally* 18 U.S.C. §§ 793–798.

21 Eric E. Ballou & Kyle E. McSlarrow, Note, *Plugging the Leak: The Case for a Legislative Resolution of the Conflict Between the Demands of Secrecy and the Need for an Open Government*, 71 VA. L. REV. 801, 812 (1985); *see also* Joe Bant, Comment, United States v. Rosen*:*

of classified cryptography information,[22] the statute's broad definition of "communication intelligence" encompasses information concerning all United States government undertakings related to the interception of communications between two parties. Given this expansive embrace and the government's emphasis on foreign intelligence in fighting the war on terror,[23] an analysis of § 798 is particularly appropriate.

II. The History of § 798

The history of § 798 demonstrates the perception held by the government and others of its role in the framework of criminal statutes utilized to prevent the dissemination of information vital to national security. This Part examines that history in three installments: (1) the history, both legislative and chronological, that influenced the enactment of § 798; (2) litigation that has specifically addressed § 798; and (3) past events where the notion of applying § 798 to the press has received consideration within the executive branch of the U.S. government.

A. Legislative History of § 798

The legislative antecedent of § 798 originally appeared on May 13, 1950, as Public Law 81-513,[24] and was later codified as 18 U.S.C. § 798 on October 31, 1951.[25] Passed contemporaneously with § 793(d) and (e) of the Espionage Act,[26] there was little debate in either the House or Senate focused specifically on § 798.[27] Accordingly, the best indicators of that legislative intent with respect to the statute are the House and Senate committee reports[28] prepared before its enactment.

Almost identical in form and language, the House and Senate reports trace the impetus for the enactment of § 798 to events surround-

---

Pushing the Free Press onto a Slippery Slope?, 55 U. KAN. L. REV. 1027, 1030–31 (2007); 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, 423 n.76 (1986); Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219, 225 (2007).

22 18 U.S.C. § 798(a)(1)–(2).

23 *See, e.g.*, Eric Lichtblau, *Senate Votes for Expansion of Spy Powers*, N.Y. TIMES, Feb. 13, 2008, at A1 (detailing a recent Senate vote in favor of broadening the NSA's surveillance powers).

24 Act of May 13, 1950, ch. 185, Pub. L. No. 81-513, 64 Stat. 159.

25 Act of Oct. 31, 1951, ch. 655, Pub. L. No. 82-248, 65 Stat. 719.

26 Edgar & Schmidt, *supra* note 17, at 1064 & n.371.

27 *Id.* at 1069.

28 *See generally* H.R. REP. NO. 81-1895 (1950); S. REP. NO. 81-111 (1949).

ing Japan's successful attack on Pearl Harbor in 1941.[29] In 1931, a book was published providing a detailed account of United States successes in breaking Japanese diplomatic codes.[30] Although Congress was able to stop the publication of a second book providing further details, the earlier disclosure was viewed as responsible for prompting the Japanese government's change to more complex diplomatic codes.[31] This, in turn, hampered U.S. cryptographic efforts and, many believe, deprived the United States of vital cryptanalytic intelligence that might have provided a warning of Japanese intentions prior to the Pearl Harbor attack.[32]

The legislative reports note that, at the time of the disclosures regarding these code-breaking efforts, two other acts ostensibly protected this type of cryptographic information.[33] Their usefulness, however, was limited by the fact that one required a specific intent to harm the United States and the other proscribed only the disclosure of actual "diplomatic codes and messages," not the fact that they had been broken.[34] Section 798 was enacted to provide more encompassing protection against the disclosure of this type of information by criminalizing "knowing and willful publication or any other revelation of all important information affecting United States communication intelligence operations and all direct information about all United States codes and ciphers."[35]

The reports are also instructive regarding other considerations relevant to interpreting and enforcing the statute. Significant, for purposes of this Note, is the omission of any discussion of the statute's implications vis-à-vis the press;[36] though the reports do indicate that, in considering the legislation, Congress was cognizant of "avoiding the infringement of civil liberties."[37] Additionally, the reports acknowledge that the scope of the proposed legislation was limited, and that it was contemplated that § 798 would apply to "only a small category of

---

29 H.R. REP. NO. 81-1895, at 2–3; S. REP. NO. 81-111, at 3–4.

30 H.R. REP. NO. 81-1895, at 3; S. REP. NO. 81-111, at 3.

31 H.R. REP. NO. 81-1895, at 3; S. REP. NO. 81-111, at 3.

32 *See* H.R. REP. NO. 81-1895, at 3; S. REP. NO. 81-111, at 4.

33 *See* H.R. REP. NO. 81-1895, at 2; S. REP. NO. 81-111, at 2.

34 H.R. REP. NO. 81-1895, at 2; S. REP. NO. 81-111, at 2.

35 H.R. REP. NO. 81-1895, at 2; S. REP. NO. 81-111, at 2.

36 *See generally* H.R. REP. NO. 81-1895 (neglecting to mention the statute's effect on the press); S. REP. NO. 81-111 (same).

37 H.R. REP. NO. 81-1895, at 2; S. REP. NO. 81-111, at 3.

classified matter, a category which is both vital and vulnerable to an almost unique degree."[38]

Finally, in discussing the classified nature of the information falling within § 798, the reports noted that "classification must be in fact in the interests of national security."[39] Some scholars have interpreted this phrasing as implying that misclassification of the information at issue may be an available defense in any § 798 prosecution.[40] This latter consideration leads logically to a discussion of litigation involving § 798, where the courts specifically addressed the issue of misclassification as a defense.

B. Litigation Involving § 798

One of the more intriguing aspects of § 798 is the relative dearth of case law addressing the statute. The only case to discuss § 798 with any significance is *United States v. Boyce*,[41] which involved facts conforming more to traditional notions of what constitutes espionage and spying. Christopher John Boyce was employed in the classified communications division of TRW, Inc., a government contractor actively involved in classified programs for the Central Intelligence Agency ("CIA").[42] Upon receiving his security clearance, Boyce was assigned to operate an encrypted teletype system for communication with the CIA, which allowed Boyce to come across a classified study of a U.S. communication satellite system.[43] Boyce attempted to sell the study to the Soviet Union, but his accomplice, Andrew Daulton Lee, was apprehended in front of the Soviet Embassy in Mexico City.[44] Lee implicated Boyce, who was arrested and charged with a variety of espionage-related crimes, including violating § 798.[45]

On appeal to the Ninth Circuit, Boyce argued that his conviction under § 798 was erroneous because the documents at issue were improperly classified.[46] Without significant analysis or discussion, the Ninth Circuit dismissed Boyce's argument with the observation: "Under section 798, the propriety of the classification is irrelevant. The fact of classification of a document or documents is enough to

38 H.R. REP. NO. 81-1895, at 2; S. REP. NO. 81-111, at 2.

39 H.R. REP. NO. 81-1895, at 3; S. REP. NO. 81-111, at 3.

40 *See* Edgar & Schmidt, *supra* note 17, at 1065–66.

41 United States v. Boyce, 594 F.2d 1246 (9th Cir. 1979).

42 *Id.* at 1248.

43 *Id.*

44 *Id.*

45 *Id.* at 1248–49.

46 *Id.* at 1251.

satisfy the classification element of the offense."[47] It is notable that the *Boyce* court's holding seems to directly contradict Congress's intent to have a viable misclassification defense under § 798.[48] The court's holding thus evidences a judicial preference for executive interests over legislative intent that some commentators have found to be quite common in the realm of national security.[49]

Although the *Boyce* court did rule on an important aspect of § 798 that is the subject of later discussion, its terse dismissal of the misclassification issue is of limited use in assessing how the government has traditionally viewed § 798, particularly with respect to the press. Consequently, it is beneficial to look at other past events, outside of the courtroom, where the idea of enforcing § 798 has surfaced.

C. Section 798 in Eras of Presidential Secrecy

The Bush Administration's widely acknowledged penchant for secrecy[50] is not unprecedented. As recently as the 1980s, a similar approach to national security matters characterized the Administration of President Ronald Reagan.[51] And just as the Bush Administration has considered reviving the Espionage Act to maintain secrecy,[52] the Reagan Administration also considered using § 798 to pursue the same objective.[53]

---

47 *Id.*

48 Harold Edgar & Benno C. Schmidt, Jr., Curtiss-Wright *Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 391–92 (1986) ("The *Boyce* court ignored the fact that the Conference Report, the clearest statement in the legislative history of § 798, states that 'the classification must be *in fact* in the interests of national security.'"); *see also supra* notes 39–40 and accompanying text (discussing possible legislative intent to allow a misclassification defense).

49 *See, e.g.*, Edgar & Schmidt, *supra* note 48, at 351 ("[T]he years since the *Pentagon Papers* have seen a considerable enhancement of executive power in areas of national security secrecy, an aggrandizement significantly assisted by the Supreme Court, with Congress noticeably absent from the discourse.").

50 *See, e.g.*, Nat Hentoff, *Bush Revives Espionage Act*, VILLAGE VOICE, Nov. 15–21, 2006, at 16, *available at* http://www.villagevoice.com/news/0646,hentoff,75002,6.html (noting that the Bush Administration "devoutly believes in [a] sovereign right to keep secret everything it can").

51 Dom Bonafede, *Muzzling the Media*, 18 NAT'L J. 1716, 1716 (1986) (quoting Allan Adler, counsel for the ACLU, as claiming that the Reagan Administration "has far surpassed any previous Administration in demonstrating its disdain for the public's right to know what it is doing").

52 *See* Hentoff, *supra* note 50, at 16.

53 *See* Bonafede, *supra* note 51, at 1717–18; Gilbert Cranburg, Comment, *The Casey Offensive*, 25 COLUM. JOURNALISM REV. 18, 18–19 (1986); Stephen Engelberg, *C.I.A. Director Requests Inquiry on NBC Report*, N.Y. TIMES, May 20, 1986, at A17; Stephen Engelberg, *Justice Agency Said to Resist C.I.A. Call to Prosecute News Groups*, N.Y. TIMES, May 8, 1986, at B18

In May of 1986, CIA Director William Casey, with the blessing of the White House, threatened several news organizations claiming that they had violated § 798 and could be prosecuted for their actions.[54] A report by NBC on the espionage trial of Soviet spy Robert Pelton was the first to anger Casey after it disclosed that Pelton had given the Soviet Union information about a program called "Ivy Bells," a top secret NSA eavesdropping operation conducted by U.S. submarines in Soviet territorial waters.[55]

Soon thereafter, in an article about the Pelton trial, the *Washington Post* published a report discussing its encounters with Casey and Reagan Administration officials.[56] Editors at the *Post* had spoken with Casey in a conference meeting and the *Post* chairman even received a telephone call from the President himself, assuring the newspaper that he would support such a prosecution.[57] In apparent response, the *Post* delayed publication of the Pelton article and redacted portions of the article discussing the technical details of the NSA program.[58]

Although Casey believed he had viable cases against NBC, the *New York Times*, the *Washington Post*, *Time*, and *Newsweek*, he met resistance from a Justice Department skeptical of the idea of prosecuting the press, and the idea was eventually abandoned.[59] Casey's actions, however, may have partially succeeded in their intended effect; the *Washington Post* later acknowledged that it had redacted portions of stories (and in one instance killed a story) containing sensitive information about the government at least partially in response to Casey's admonishments.[60]

The Casey affair confirms that members of the executive branch have periodically entertained the notion of using § 798 against the press, while at the same time providing some empirical idea of the effect the mere threat of prosecution can have on the press. Armed

---

[hereinafter Engelberg, *Justice Agency Said to Resist C.I.A. Call*]; Stephen Engelberg, *U.S. Aides Said to Have Discussed Prosecuting News Organizations*, N.Y. TIMES, May 21, 1986, at A18 [hereinafter Engelberg, *U.S. Aides*]; Stephen Engelberg, *White House Backing C.I.A. on Prosecuting Publications*, N.Y. TIMES, May 9, 1986, at A14 [hereinafter Engelberg, *White House Backing C.I.A.*]; Richard Zoglin, *Questions of National Security*, TIME, June 2, 1986, at 67.

54 *See, e.g.*, Engelberg, *White House Backing C.I.A.*, *supra* note 53.

55 Zoglin, *supra* note 53, at 67.

56 *Id.*

57 *See id.*

58 *See* Engelberg, *U.S. Aides*, *supra* note 53.

59 *See* Engelberg, *Justice Agency Said to Resist C.I.A. Call*, *supra* note 53.

60 *See* Bonafede, *supra* note 51, at 1718–19; Zoglin, *supra* note 53, at 67.

with this valuable background knowledge, attention can now be turned to a thorough constitutional analysis of § 798.

III. The Constitutional Permissibility of a Criminal Prosecution of the Press

Any attempt by the government to initiate a prosecution of the press under § 798 would unquestionably elicit three constitutional challenges: (1) the statute violates the First Amendment's guarantee of freedom of the press; (2) the statute is unconstitutionally vague; and (3) the statute is unconstitutionally overbroad. This Section assesses the first of these challenges, examining Supreme Court doctrine to determine where the Court would likely strike its balance in a competition between First Amendment rights of the press and the use of § 798 to protect national security interests. At the outset, it is important to emphasize that the other constitutional challenges to this statute, involving the vagueness and overbreadth doctrines, are, in a sense, dependent on the resolution of this issue. For it is only if the Court generally finds a prosecution of the press under these circumstances constitutional that a more specific analysis of § 798 utilizing the vagueness and overbreadth doctrines becomes necessary.

A. Supreme Court Doctrine on First Amendment Rights of the Press

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press."[61] The Supreme Court, however, has found that this guarantee of a free press is "not an absolute right," and as such, the government "may punish its abuse."[62] Because the Court has been clear that the First Amendment does not protect the press in all circumstances,[63] it becomes imperative to look at the factors the Court has considered in cases where it has been compelled to decide whether such protection was constitutionally required.

The Court has acknowledged that one of the most important functions of a free press is ensuring the public remains informed about governmental affairs,[64] and thus has considered heavily whether the

---

61 U.S. CONST. amend. I.

62 Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 708 (1931).

63 *See id.*

64 Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1974) ("Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.").

published material at issue in any case is of "public concern." In the *Daily Mail* line of cases, for example, the Court repeatedly struck down efforts to limit the right of the press to publish information learned in court proceedings because of the public concern inherent in those proceedings.[65] Although information published under § 798 would normally be completely unrelated to judicial proceedings, the Court's recent recognition of the "public concern" in a different factual context suggests that this concept could be extended to circumstances outside of the courtroom.

In *Bartnicki v. Vopper*,[66] the Court upheld a radio station's broadcast of illegally intercepted phone conversations out of deference to the "public concern."[67] Though the Court accepted the fact that the broadcast violated federal wiretapping laws, it ultimately found the application of those laws to the defendants to be unconstitutional under the First Amendment,[68] noting that "[i]n these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance."[69] Though the Court emphasized that its holding was narrow in *Bartnicki*,[70] it has been suggested that such a broad recognition of the "public concern" by the Court could have ramifications in a prosecution of the press under § 798:

---

65 *See, e.g.*, Fla. Star v. B.J.F., 491 U.S. 524, 536–37 (1989) (finding the investigation of a criminal offense to be "a matter of public significance" in upholding publication of victim's name); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) (holding that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order"); Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 839 (1977) (finding that the "operations of the courts and the judicial conduct of judges are matters of utmost public concern" in striking down a statute that punished the publication of details related to inquiries into judicial misconduct); Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 311–12 (1977) (holding that once information was "publicly revealed" in a courtroom, a court could not enjoin the press from publishing it); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 596 (1976) (Brennan, J., concurring) (noting that what transpires in a courtroom is public property in striking down a press "gag order" issued by a trial court); *Cox*, 420 U.S. at 492 (overturning contempt sanctions for publishing a rape victim's name because rape prosecutions "are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report"); Bridges v. California, 314 U.S. 252, 268–69 (1941) (taking into consideration the amount of public interest in materials that were the subject of contempt sanctions against a journalist in overturning those sanctions).

66 Bartnicki v. Vopper, 532 U.S. 514 (2001).

67 *Id.* at 525, 534.

68 *Id.* at 535.

69 *Id.* at 534.

70 *See id.* at 524 ("The constitutional question before us concerns the validity of the statutes as applied to the specific facts of these cases."); *see also id.* at 535–36 (Breyer, J., concurring) (agreeing with the "narrow holding limited to the special circumstances present here").

> In light of the public concern exception articulated in *Bartnicki* . . . the Court would likely elect not to punish the press for its unlawful disclosure of [intelligence] information, upon balancing the desire to inform the public during such a critical period [in the fight against terrorism] against the need to preserve the secrecy of the information.[71]

In addition to its relation to the "public concern," the Court has also considered the source and confidential nature of the information published to determine whether actions of the press were protected by the First Amendment. In *Florida Star v. B.J.F.*, a case involving the publication of a rape victim's name culled from a police report, the Court stated that "[t]o the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release."[72] Similarly, in *Landmark Communications, Inc. v. Virginia*, the Court invalidated postpublication sanctions against a newspaper for publishing confidential information concerning an inquiry into judicial misconduct, finding that "much of the risk [of publication] can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings."[73] These cases suggest that the press is given greater First Amendment protection when the information published is either confidential in nature or originated from the government itself.

B. Supreme Court Doctrine on the Government's Interest in National Security

Although the Court's consideration of the factors above suggests that a media defendant would enjoy strong First Amendment rights in a § 798 prosecution, it is important to note that none of those cases involved national security interests. In matters of national security, the Court's experience is marked by unprecedented deference to the government, which is so widely recognized that extensive elaboration on it is unnecessary. There are, however, two cases where the Court's deference is expressed in specific discussions relating to the dissemination of classified materials, making these decisions particularly useful to this analysis.

---

71 Laura E. Zirkle, Note, Bartnicki v. Vopper*: A Public Concern Exception for the Press and Its Disclosure of Unlawfully Obtained Information*, 11 GEO. MASON L. REV. 441, 459 (2002).

72 Fla. Star v. B.J.F., 491 U.S. 524, 534 (1989).

73 Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 845 (1978).

In *CIA v. Sims*,[74] the issue was the extent of the CIA Director's power to decide what confidential sources could be withheld under exemptions to the Freedom of Information Act.[75] In sustaining the actions of the Director, the Court noted that the government has a compelling interest in protecting the secrecy of information important to national security[76] and said that the Director's decisions were "worthy of great deference given the magnitude of the national security interests and potential risks at stake."[77]

Similarly, in *Department of the Navy v. Egan*,[78] the Court upheld an executive decision to deny a Navy employee's security clearance[79] and, in doing so, confirmed that the President's "authority to classify and control access to information bearing on national security . . . flows primarily from [the] constitutional investment of power in the President [as Commander in Chief of the Army and Navy] and exists quite apart from any explicit congressional grant."[80] This explicit recognition of a President's inherent power to control access to national security information signifies that the Court is likely to continue to extend substantial deference to the executive branch on issues that are clearly within the realm of national security.

C. The Intersection of Press Rights and National Security: The Pentagon Papers Case

In the seminal *Pentagon Papers Case*,[81] the Court held that the government could not enjoin the publication of classified information derived from a leaked report on the Vietnam War.[82] Throughout the case the government argued that publication of information from the report would endanger national security,[83] but the Court found this argument unavailing given the "heavy presumption" in our country against the constitutionality of prior restraints.[84]

Though the result of the case represented a victory for press rights in the context of prior restraints, dicta in the opinion suggested

---

74 CIA v. Sims, 471 U.S. 159 (1985).

75 5 U.S.C. § 552 (2006); *Sims*, 471 U.S. at 164.

76 *Sims*, 471 U.S. at 175.

77 *Id.* at 179.

78 Dep't of the Navy v. Egan, 484 U.S. 518 (1988).

79 *Id.* at 520, 534.

80 *Id.* at 527.

81 N.Y. Times Co. v. United States (*Pentagon Papers Case*), 403 U.S. 713 (1971).

82 *Id.* at 714.

83 *Id.* at 718 (Black, J., concurring).

84 *Id.* at 714 (quotation omitted).

that the Court would have been open to imposing postpublication criminal sanctions. In his concurring opinion, Justice White specifically mentioned § 798, along with other sections of the Espionage Act, and said, "I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint."[85] Justice White's concurrence was joined by Justice Stewart,[86] with Chief Justice Burger and Justice Blackmun approving of Justice White's discussion of postpublication sanctions in their dissenting opinions.[87] If one couples this with the inference that Justice Harlan would have approved of postpublication sanctions, given that he approved of a prior restraint in the first place,[88] it seems clear that, at the very least, a majority of five Justices would have approved of postpublication sanctions in the case.[89]

D. Application to § 798

The views expressed in dicta by the five aforementioned Justices in the *Pentagon Papers Case* strongly suggest that, *generally*, a prosecution of the press under § 798 would not be constitutionally problematic. No Justice that decided the *Pentagon Papers Case* remains on the Court, but it seems doubtful that today's Court would choose to depart substantially from those views. The views of those Justices were not an anomaly, but rather evidenced a longstanding trend of judicial deference to the Executive in matters of national security.[90] And as the *Egan* and *Sims* cases show, the Court has previously recognized this deference within the context of the executive branch controlling access to classified information.[91]

This is not to say, though, that a Court would not consider some of the factors it normally looks to in assessing First Amendment cases involving the press. Although considerations of the confidential nature or source of the information at issue would assuredly yield to national security interests, the *Bartnicki* case at least suggests more

---

85 *Id.* at 737 (White, J., concurring).

86 *Id.* at 730.

87 *Id.* at 752, 759.

88 *Id.* at 758–59.

89 Some have speculated that Justice Marshall's concurring opinion suggests that he would have similarly approved. *See, e.g.*, Scott Johnson, *Did the New York Times Break the Law with Its Wire-Tapping Story?*, WKLY. STANDARD, Mar. 13, 2006, *available at* http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=6631&R=EB9524AED.

90 *See supra* Part III.B.

91 *See* Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988); CIA v. Sims, 471 U.S. 159, 175, 179 (1985).

difficulty in disposing of considerations related to the "public concern" of the information.[92] It is not irrational to think that the Court would possibly uphold an as-applied challenge to § 798 if the intelligence information in question was of extreme "public concern."

Taking all of this into consideration, a conservative estimate suggests that the Court would *generally* not find prosecutions of the press under § 798 unconstitutional, but may find an individual prosecution constitutionally problematic if it involves information of extreme "public concern." The reason for use of the term "generally" here is this conclusion takes no account of the actual language of § 798, but merely rests on the more general idea that prosecuting the press for publishing sensitive intelligence information is not unconstitutional. Assuming the Court would resolve this general issue in favor of the government, it then becomes necessary to evaluate constitutional attacks on § 798 that are more specific to its statutory text using the vagueness and overbreadth doctrines.

IV. The Constitutionality of § 798 Under the Vagueness and Overbreadth Doctrines

Having resolved the aforementioned threshold inquiry in favor of the government, the Court would then face two additional constitutional challenges to § 798 that would attack the specific text of the statute. This Section assesses both of these challenges, beginning with an as-applied challenge to § 798 under the vagueness doctrine. After concluding that § 798 is not clearly unconstitutional with respect to vagueness, this Section then analyzes the merits of a facial challenge to the statute under the overbreadth doctrine. Finding that the classification element of § 798 does little to cabin its reach, this latter analysis concludes that the scope of the statute is impermissibly broad, rendering § 798 unconstitutional on its face.

A. The Vagueness Doctrine As Applied to § 798

1. General Overview of the Vagueness Doctrine

The Court has stated that "[i]t is a basic principle of due process that [a statute] is void for vagueness if its prohibitions are not clearly defined."[93] In doing so, it has provided three rationales supporting the vagueness doctrine: (1) to ensure that "laws give the person of ordinary intelligence a reasonable opportunity to know what is pro-

92 Bartnicki v. Vopper, 532 U.S. 514, 534 (2001).

93 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

hibited, so that he may act accordingly"; (2) to prevent "arbitrary and discriminatory enforcement" of laws by providing "explicit standards for those who apply them"; and (3) to prevent a statute abutting First Amendment freedoms from "operat[ing] to inhibit the exercise of those freedoms" by forcing citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."[94]

Although the dearth of case law addressing § 798 has been noted and no precedent specifically examines the vagueness doctrine as applied to its terms, the Fourth Circuit has produced two decisions that apply the vagueness doctrine to § 793(d) and (e) of the Espionage Act.[95] Admittedly, § 793 is a different statute from § 798; each deals with different types of information and contains different language in their statutory text.[96] For purposes of a vagueness analysis, however, the two statutes present relatively similar problems, making the analyses in the following two cases an appropriate backdrop for this discussion.

---

94 *Id.* at 108–09 (citations omitted).

95 Sections 793(d) and (e) state:

> (d) Whoever, lawfully having possession of, access to, control over, or being entrusted with 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 on demand to the officer or employee of the United States entitled to receive it; or
>
> (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 . . .
>
> Shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 793(d)–(e) (2006).

96 *Compare id.* ("relating to the national defense"), *with id.* § 798 (concerning United States "communication intelligence activities").

2. United States v. Morison

United States v. Morison[97] marked the first time a court upheld a conviction under the Espionage Act where the conduct fell outside of classic spying and espionage activity.[98] Morison was a government employee who had been convicted of violating § 793 (d) and (e) of the Espionage Act for stealing classified photographs from his office at the Naval Intelligence Support Center and selling them to *Jane's Defence Weekly*, an English publication providing information on naval operations around the world.[99]

As a point of reference, it is helpful to elaborate on the basics of § 793(d) and (e). Section 793(d) and (e) imposes criminal sanctions on anyone who "willfully communicates, delivers, [or] transmits" tangible sources of information "relating to the national defense" to "any person not entitled to receive it."[100] These tangible sources include documents, writings, photographs, and blueprints, among other things.[101] The statute similarly applies to intangible information (e.g., oral communications), but imposes the additional requirement that the perpetrator "have reason to believe [the information] could be used to the injury of the United States or to the advantage of any foreign nation."[102]

As part of his defense, Morison argued that two provisions of § 793(d) and (e) were unconstitutionally vague,[103] though one argument in particular is important to this analysis. Morison claimed that the term "entitled to receive" was unconstitutionally vague "because it d[id] not spell out exactly who may 'receive' such material."[104] The court, however, rejected this argument by finding any definitional shortcoming of the statute clarified by reference to the government's classification system.[105] The court noted that while the statute itself did not reference the classification system, courts in both the Fourth and District of Columbia Circuits had used the system to flesh out similar phrases.[106] Further, the *Morison* court found that reference to

---

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

98 *Id.* at 1063.

99 *Id.* at 1060–61.

100 18 U.S.C. § 793(d)–(e).

101 *Id.*

102 *Id.*

103 *Morison*, 844 F.2d at 1071, 1074.

104 *Id.* at 1074.

105 *Id.*

106 *Id.* (citing McGehee v. Casey, 718 F.2d 1137, 1143–44 (D.C. Cir. 1983); United States v. Truong Dinh Hung, 629 F.2d 908, 919 (4th Cir. 1980)).

the classification system was particularly apt in this case because the regulations were well known to the defendant as a government employee who had agreed to abide by them as a condition of his employment.[107]

3. United States v. Rosen

In *United States v. Rosen*,[108] the District Court for the Eastern District of Virginia was forced to take a more novel approach in assessing the same "entitled to receive" language because the information at issue was transmitted orally, making reference to the classification system problematic.[109] The defendants in *Rosen* were lobbyists for a pro-Israel organization who had allegedly cultivated relationships with U.S. government officials having access to sensitive information and, as a result of conversations with these officials, learned of classified information related to U.S. strategy in the Middle East.[110] It was further alleged that the defendants had conversations with both foreign officials and members of the media in which they communicated to these parties the classified information they had learned.[111]

As in *Morison*, the defendants in *Rosen* were charged under § 793(d) and (e) and argued in defense that the term "entitled to receive" was unconstitutionally vague.[112] They emphasized, however, that unlike in *Morison*, the classified information at issue in their case had been transmitted to them orally.[113] The court recognized the significance of this argument by noting that "a conversation about classified information . . . is not likely to apprise the listener of precisely which portions of the information transmitted in the conversation are classified."[114] Ultimately, the court concluded that reference to the classification system was not necessary to avoid vagueness, as other characteristics of § 793(d) and (e) supplied the requisite clarity to make the statute constitutional.[115]

The *Rosen* court first noted that "there exists a generally recognized proposition that an otherwise unconstitutionally vague statute

---

107 *Id.*

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

109 *Id.* at 624.

110 *Id.* at 607–08.

111 *Id.* at 608.

112 *See id.* at 610, 617.

113 *See id.* at 613–14, 623–24.

114 *Id.* at 624.

115 *Id.* at 625–26.

can survive a challenge if it contains a specific intent requirement."[116] The court then observed that *Morison* had found the term "willfully," as used in § 793(d) and (e),[117] to require the defendant to have acted with "'a bad purpose either to disobey or to disregard the law.'"[118] The court concluded that, given this interpretation of "willfully," the defendants could not be convicted if they were truly unaware of the classified nature of the information they disclosed or were ignorant of the classification system in general.[119]

In addition, the *Rosen* court found that § 793(d) and (e) imposed an additional specific intent requirement when dealing with classified "information" as opposed to classified documents.[120] Looking at the text of § 793(d) and (e), along with the statute's legislative history, the court observed that when dealing with intangible information such as oral communications, § 793(d) and (e) required the defendant to "'have reason to believe it could be used to the injury of the United States or to the advantage of any foreign nation.'"[121] Further, the court noted that this language was "essentially the same" as language the Supreme Court had relied on to save another section of the Espionage Act from vagueness in *Gorin v. United States*.[122] Relying on this, along with the *Morison* court's interpretation of "willfully," the *Rosen* court rejected the defendants' claims that § 793(d) and (e) were void for vagueness with respect to oral communications.[123]

4. Application to § 798

At the outset, the classification element of § 798 may allow the statute to avoid facial vagueness challenges.[124] Without that element the public would be left with the difficult task of determining what

---

116 *Id.* at 618.

117 *See supra* note 100 and accompanying text.

118 *Rosen*, 445 F. Supp. 2d at 625 (quoting United States v. Morison, 844 F.2d 1057, 1071 (4th Cir. 1988)).

119 *Id.*

120 *Id.* at 625–26.

121 *Id.* (quoting 18 U.S.C. § 793(d)–(e) (2006)).

122 *Id.* at 627; *see also* Gorin v. United States, 312 U.S. 19, 27–28 (1941) ("The obvious delimiting words in the statute are those requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.'" (quoting Espionage Act of June 15, 1917, ch. 30, § 2(a), 40 Stat. 217, 218 (current version at 18 U.S.C. § 794(a) (2006)))).

123 *Rosen*, 445 F. Supp. 2d at 627.

124 *See* Edgar & Schmidt, *supra* note 17, at 1065 ("[T]he inevitable vagueness in defining what [ ] information is subject to restriction [under § 798] is substantially mitigated, although perhaps at the cost of overbreadth, by making classification an element of the offense.").

exactly constitutes "communication intelligence activities."[125] But, as *Morison* showed, reference to the classification system is a preferred method of providing guidance concerning what information is properly distributable.[126] Consequently, by incorporating that classification standard directly into the statutory text of § 798, Congress likely avoided a confrontation with facial vagueness—a point that carries added significance in subsequent analysis involving the overbreadth doctrine.

The inclusion of the classification element within the text of § 798, however, does not clarify all of the statute's vagueness concerns. It stands to reason that, as in *Rosen*, the press, too, receives classified information either through oral communications or, perhaps, in documents where the classification designation has been redacted.[127] Just as in *Rosen*, then, reference to the classification system would not provide the press with adequate guidance in an appreciable number of situations where § 798 culpability is possible.

This potential flaw is exacerbated since, unlike § 793 (d) and (e), § 798 does not include any requirement of specific intent when the classified nature of information within its scope is unascertainable.[128] Consequently, the only aspect of § 798's text that could arguably allow it to withstand a vagueness challenge is its inclusion of the term "willfully."[129] Although the *Rosen* court concluded that the term "willfully" was a specific intent requirement sufficient to withstand a vagueness challenge,[130] it is unclear whether that court would have felt as confident in its conclusion without the additional requirement of specific intent found in § 793(d) and (e) but not in § 798.

There has also been some criticism of the *Morison* court's interpretation of "willfully,"[131] which, in turn, provided the basis for the

---

125 18 U.S.C. § 798(a)(3) (2006).

126 *See* United States v. Morison, 844 F.2d 1057, 1074 (4th Cir. 1988).

127 *See, e.g.*, Editorial, *Espionage Acting*, WALL ST. J., Aug. 17, 2006, at A8 (commenting that the Justice Department was prosecuting a pair of lobbyists for something journalists do every day—sharing what they have heard).

128 *Compare* 18 U.S.C. § 793(d)–(e) ("[W]hich 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 . . . ."), *with id.* § 798 (lacking similar language).

129 *See id*. § 798(a).

130 *See* United States v. Rosen, 445 F. Supp. 2d 602, 625–27 (E.D. Va. 2006).

131 *See* Ballou & McSlarrow, *supra* note 21, at 807 n.29 ("The term 'willfully' in subsections 793(d) and (e) does not solve the overbreadth problem because a conventional reading of 'willfully' would render any deliberate transfer of defense-related documents criminal without requiring an additional harmful purpose."); Goldston et al., *supra* note 21, at 429–30 n.101 (pointing out the contradiction in the *Morison* court allowing the term "'willfully'" to save

court's conclusion in *Rosen*.[132] In their authoritative work *The Espionage Statutes and Publication of Defense Information*, for example, Harold Edgar and Benno C. Schmidt, Jr., found that neither the language nor the legislative history of § 793(d) and (e) indicated that the term "willfully" was to be interpreted narrowly to imply a bad purpose.[133] The legislative history of § 798 is silent on interpreting "willfully," but it is important to recall that § 798 was passed contemporaneously with § 793(d) and (e),[134] suggesting that Congress intended to attach a similarly broad meaning to the term "willfully" as used in the text of both statutes.

This broader interpretation of the term "willfully" has significance because the failure to narrow the range of conduct encompassed in "willfully" by requiring a bad purpose abates the specific intent connotation the *Rosen* court relied upon, at least in part, to save § 793(d) and (e) from vagueness.[135] And while this examination of legislative history may not warrant the conclusion that the *Morison* and *Rosen* courts were wrong in their interpretation of "willfully,"[136] it at least leaves open the possibility that another court could adopt a contrary interpretation that would render § 798 unconstitutionally vague. Considering this, it is best at this point to characterize § 798 as constitutionally problematic with respect to vagueness, and proceed with an analysis applying the overbreadth doctrine.

B. The Overbreadth Doctrine As Applied to § 798

1. General Overview of the Overbreadth Doctrine

In *Broadrick v. Oklahoma*,[137] the Supreme Court provided a useful explanation of the overbreadth doctrine and its underlying principles. In *Broadrick*, the Court observed that the overbreadth doctrine

---

§ 793(d) and (e) from vagueness, but then declining to require that the government prove evil purpose on behalf of Morison to sustain the conviction). *But see* Jereen Trudell, Note, *The Constitutionality of Section 793 of the Espionage Act and Its Application to Press Leaks*, 33 WAYNE L. REV. 205, 216–17 (1986) (supporting the *Morison* court's interpretation of "willfully" in avoiding unconstitutional vagueness).

132 *Rosen*, 445 F. Supp. 2d at 625.

133 Edgar & Schmidt, *supra* note 17, at 1039 ("Neither the language nor the legislative intent of [§ 793(d)–(e)] indicates that 'willfully' should be given any particular narrow meaning. . . . The distinction in statutory language [between § 793(a)–(b) and § 793(d)–(e)] surely points to a different, and broader, meaning for 'willfully.'").

134 Edgar & Schmidt, *supra* note 17, at 1064 n.371.

135 *See supra* notes 116–19 and accompanying text.

136 *See* Trudell, *supra* note 131, at 215–17 (supporting the *Morison* court's interpretation of "willfully" as requiring specific intent sufficient to avoid vagueness).

137 Broadrick v. Oklahoma, 413 U.S. 601 (1973).

is unique to First Amendment challenges[138] and has been used to invalidate statutes when "it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpublished is outweighed by the possibility that protected speech of others may be muted."[139] In order to achieve its purpose, the Court noted that in applying the doctrine it alters its traditional rules of standing to permit "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."[140]

Though this departure from tradition suggests a strong concern with overbroad statutes, the Court noted in *Broadrick* that application of the doctrine was "strong medicine."[141] As such, the Court has required that in order to invalidate a statute under the doctrine, its overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[142] Further, the Court explained in *Broadrick* that "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute" so as to remove the perceived threat to constitutionally protected speech.[143]

2. United States v. Morison

Presented once again with the problem of having a dearth of authority on this issue with respect to § 798, the most applicable precedent for purposes of this analysis comes from revisiting *United States v. Morison*.[144] Among the defenses raised by Morison on appeal was that the term "relating to the national defense," used to describe the information within the scope of § 793(d) and (e), was facially overbroad—an argument the *Morison* court ultimately rejected.[145]

---

138 *See id.* at 614.

139 *Id.* at 612.

140 *Id.* (quotation omitted).

141 *Id.* at 613.

142 *Id.* at 615; *see* New York v. Ferber, 458 U.S. 747, 771 (1982) (holding that the "substantial" overbreadth requirement announced in *Broadrick* applied to overbreadth challenges in cases involving both expressive conduct *and* pure speech).

143 *Broadrick*, 413 U.S. at 613.

144 United States v. Morison, 844 F.2d 1057 (4th Cir. 1988). Because the analysis in *Rosen* is essentially the same as that in *Morison* and the conclusion reached is identical, a discussion of *Rosen* in the overbreadth context will be avoided for the sake of brevity. *See* United States v. Rosen, 445 F. Supp. 2d 602, 643 (E.D. Va. 2006).

145 *Morison*, 844 F.2d at 1075–76.

Initially, the Fourth Circuit acknowledged that *Morison* was a case where conduct was being regulated "in the shadow of the First Amendment" and that *Broadrick* dictated "less rigid" overbreadth scrutiny in such situations.[146] The court then concluded that the narrowing jury instructions used by the trial court were sufficient to remove any legitimate overbreadth objection to the term.[147] These instructions limited the scope of § 793(d) and (e) to information related to the national defense that was "potentially damaging to the United States" or useful to an enemy of the United States, and which had been "closely held" by the government such that it was "not available to the general public."[148]

Interestingly, both concurring opinions in *Morison*, by Judge Wilkinson and Judge Phillips, respectively, take issue with the majority's approach to Morison's overbreadth challenge.[149] Judge Wilkinson, cautioning that he did not believe the First Amendment interests in the case to be "insignificant" as the majority had characterized them, observed that "[c]riminal restraints on the disclosure of information threaten the ability of the press to scrutinize and report on government activity."[150] Although Judge Wilkinson noted that the "First Amendment interest in informed popular debate does not simply vanish at the invocation of the words 'national security,'"[151] he conceded that the government is to be afforded immense deference when national security interests are implicated.[152] In balancing these interests, Wilkinson ultimately concluded that the overbreadth alleged by Morison was too hypothetical and that the narrowing jury instructions properly confined the scope of § 793(d) and (e).[153]

In his concurrence, Judge Phillips agreed with Judge Wilkinson that the majority put too little emphasis on the First Amendment interests implicated in the case,[154] but voiced his differing views in language more critical of the majority opinion than that used by Judge Wilkinson. Judge Phillips found that the effectiveness of the jury instructions was a close call and that "[t]he requirement that information relating to the national defense merely have the 'potential' for

146 *Id.* at 1075; *Broadrick*, 413 U.S. at 614.

147 *Morison*, 844 F.2d at 1076.

148 *Id.*

149 *See id.* at 1080–86.

150 *Id.* at 1081 (Wilkinson, J., concurring).

151 *Id.*

152 *See id.* at 1083.

153 *See id.* at 1084.

154 *See id.* at 1086 (Phillips, J., concurring).

damage or usefulness still sweeps extremely broadly."[155] Nonetheless, feeling constrained by Fourth Circuit precedent,[156] Judge Phillips concurred in the majority's opinion, though his reluctance in doing so is well expressed in a concluding passage of his opinion:

> I observe that jury instructions on a case-by-case basis are a slender reed upon which to rely for constitutional application of these critical statutes; and that the instructions we find necessary here surely press to the limit the judiciary's right and obligation to narrow, without "reconstructing," statutes whose constitutionality is drawn in question.[157]

3. Application to § 798

Although § 798 does not include the enigmatic phrase "relating to the national defense"[158] in its statutory text, any prosecution initiated under § 798 would likely encounter a challenge, similar to that raised in *Morison*, attacking the breadth of the term "communication intelligence activities."[159] Just as "relating to the national defense" defines the scope of the information falling within the scope of § 793(d) and (e), so "communication intelligence activities" defines the proper scope of the information falling within § 798.[160] And just as the term "relating to the national defense" would seem overbroad in and of itself, so it would seem with the use of "communication intelligence activities" in § 798.[161]

Admittedly, there is a critical distinction between § 793(d) and (e) and § 798 found in the qualifying adjective included in § 798 requiring that the information within its scope not only be related to "communication intelligence activities," but also be "classified."[162] This added piece of statutory text prompts the question of whether the limiting jury instructions relied upon by the court in *Morison*[163] to avoid overbreadth are obviated by the inclusion of the term "classified" as a statutory qualifier. To reach an affirmative conclusion on

---

155 *Id.*

156 *Id.* (finding that the jury instructions used by the trial court had been approved in prior Fourth Circuit cases as sufficiently limiting).

157 *Id.*

158 *See* 18 U.S.C. § 798 (2006).

159 *Id.* § 798(a)(3).

160 *Compare id.* § 793(d)–(e), *with id.* § 798.

161 Section 798 defines "communication intelligence" as "*all* procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients." *Id.* § 798(b) (emphasis added).

162 *See id*. § 798 (noting that the statute applies to "any classified information").

163 United States v. Morison, 844 F.2d 1057, 1076 (4th Cir. 1988).

this point, a brief digression into the classification practices of the government is appropriate.

The rampant overclassification of documents and information by the executive branch has been a topic tackled by commentators and government actors alike. One commentator has argued that "[m]any leaks [of government information] are of little or no actual threat to national security because the classification system is so overused that much classified material is relatively harmless."[164] This assertion is supported by numerous congressional commissions convened to address the topic of government overclassification, which have consistently concluded that such overclassification is extant and pervasive.[165] In 1987, one such commission noted that too much information was classified that "would not reasonably cause damage to national security," citing statistics in 1985 that showed government officials classified 830,641 documents originally and 21.5 million documents derivatively.[166] Further, the recently uncovered "secret" agreement between the National Archives and Records Administration and federal agencies to reclassify thousands of documents that had become publicly accessible demonstrates that overclassification is still prevalent today.[167]

---

164 Edward L. Xanders, Note, *A Handyman's Guide to Fixing National Security Leaks: An Analytical Framework for Evaluating Proposals to Curb Unauthorized Publication of Classified Information*, 5 J.L. & POL. 759, 768 (1989); *see also* David H. Topol, Note, United States v. Morison*: A Threat to the First Amendment Right to Publish National Security Information*, 43 S.C. L. REV. 581, 600 (1992) (noting the proclivity of the executive branch to selectively classify documents to manipulate support for its policies).

165 *See* REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at 19–48 (1997) (reporting that the problems affecting the classification system are: (1) the lack of narrow definitions for the different categories of information eligible for classification; (2) the lack of accountability for classifiers; (3) the lack of a sensible standard by which to initially classify information; and (4) the lack of oversight); JOINT SEC. COMM'N, REDEFINING SECURITY, A REPORT TO THE SECRETARY OF DEFENSE AND THE DIRECTOR OF CENTRAL INTELLIGENCE 7 (1994) (finding that the system of classification was cumbersome and overclassified information for longer time than needed); HOUSE OF REPRESENTATIVES PERMANENT SELECT COMM. ON INTELLIGENCE, UNITED STATES COUNTERINTELLIGENCE AND SECURITY CONCERNS—1986, H.R. REP. NO. 100-5, at 13 (1987) (noting statistics from 1985 showing that 7014 government officials with classifying authority classified 830,641 documents "originally" and 21.5 million documents "derivatively"); SENATE SELECT COMM. ON INTELLIGENCE, MEETING THE ESPIONAGE CHALLENGE: A REVIEW OF UNITED STATES COUNTERINTELLIGENCE AND SECURITY PROGRAMS, S. REP. NO. 99-522, at 79 (1986) ("The complexity of the current information security system has led to *overclassification*, employee confusion and ignorance, inability to protect all the information earmarked for protection, and, at least at times, cynical disregard for security." (emphasis added)).

166 *See* H.R. REP. NO. 100-5, at 13 (1987).

167 *See* Luppe B. Luppen, Note, *Just when I Thought I Was Out, They Pull Me Back In:*

One commentator, Mary M. Cheh, has posited that this phenomenon is the product of the anomaly resulting from "the executive branch both establish[ing] the criteria for classification and perform[ing] the actual classification of such information."[168] Further, Cheh found that "[a]llowing the executive branch a virtual free hand to withhold information . . . invites excessive secrecy and abuse of power" and "inevitably reduces the amount of information available to the public."[169]

Proceeding, then, on the reasonable assumption that the executive branch continues to indulge its penchant for excessive classification, it becomes quite clear that the classification element of § 798 does little to circumscribe its statutory scope. Such excessive classification suggests that there exists a wealth of classified information relating to "communications intelligence activities" that, if published, would have relatively harmless results.[170] If this assumption is coupled with the doctrine established in the *Morison* and *Boyce* cases, it becomes clear that § 798 cannot survive scrutiny under the overbreadth doctrine.

First, unlike in *Morison*, there can be no plausible questioning of the substantial First Amendment interests implicated by a prosecution of the press under § 798.[171] Consequently, in applying the overbreadth doctrine in this context, the Court would not opt for the "less rigid" scrutiny dictated by *Broadrick*.[172] Second, under the holding in the *Boyce* case, a press defendant would not be able to argue a defense of misclassification in an attempt to remove relatively innocuous information from within the scope of § 798.[173] By rejecting misclassification as a defense, the likelihood that § 798 culpability could be incurred by publishing information that is harmless to national security is substantially exacerbated.

Perhaps the only argument that could save § 798 from facial overbreadth is that its harmful impact on the media is too hypothetical.[174]

Executive Power and the Novel Reclassification Authority, 64 WASH. & LEE L. REV. 1115, 1116 (2007) (discussing recent secret agreement).

168 Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 690–91 (1984) (footnote omitted).

169 *Id.* at 693.

170 *See* 18 U.S.C. § 798 (2006).

171 *See* United States v. Morison, 844 F.2d 1057, 1075 (4th Cir. 1988).

172 *See* Broadrick v. Oklahoma, 413 U.S. 601, 614 (1973).

173 *See* United States v. Boyce, 594 F.2d 1246, 1251 (9th Cir. 1979).

174 This argument would be similar to the one made by Judge Wilkinson in his concurrence in *Morison*, though it is reasonable to believe in making that argument Judge Wilkinson was

There would seem to be a minimal amount of substance to this argument, however, because it rests merely on the fact that there has never been a criminal prosecution of the press from which one could observe these effects. Logically, the direct threat of criminal liability would surely result in members of the press thinking twice about publishing anything that could be construed as relating to "communications intelligence activities." In fact, the actions of the *Washington Post* during the Casey affair, when editors redacted portions of stories involving sensitive government information at the mere *threat* of a § 798 prosecution, provide empirical evidence of the "chilling effect" a prosecution under § 798 would have on the press.[175]

Once the tangible nature of this "chilling effect" is established, it becomes clear that the statute is unconstitutionally overbroad. The inclusion of the classification element does little to restrict what falls within § 798's scope, rendering the statute similar to § 793(d) and (e) in that respect. Consequently, one cannot avoid reaching a conclusion similar to that reached by Judge Phillips with respect to § 793(d) and (e) in *Morison*: section 798, "as facially stated," is unconstitutionally overbroad.[176]

V. Section 798 and the Avoidance Doctrine

To say that § 798 is unconstitutional as facially stated is not to find the statute unequivocally invalid. Indeed, despite his reservations with the text of the statute, Judge Phillips still upheld § 793(d) and (e) in *Morison* upon concluding that the use of supplemental, limiting jury instructions "sufficiently remedied the facial vice."[177] In doing so, Judge Phillips employed the avoidance doctrine.[178] This doctrine, in part, allows a court to adopt a "saving construction" of a statute to avoid invalidating it on constitutional grounds.[179] Thus, upon concluding that § 798 is unconstitutional as facially stated, the Court would then have to decide whether use of the avoidance doctrine here would also be appropriate. This Part analyzes the merits of using the avoidance doctrine to save § 798, ultimately concluding that because its use would risk abrogating the intent of Congress, the best policy would be to invalidate the statute outright.

---

alluding to Morison's tenuous connection to the press in that case. *See Morison*, 844 F.2d at 1084 (Wilkinson, J., concurring).

175 *See supra* note 58 and accompanying text.

176 *See Morison*, 844 F.2d at 1086 (Phillips, J., concurring).

177 *Id.*

178 *Id.*

179 *See* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 72.

A. General Overview of the Avoidance Doctrine

Scholars generally agree[180] that the most significant formulation of the avoidance doctrine was provided by Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority*.[181] In *Ashwander*, Justice Brandeis set forth a collection of seven principles for the avoidance of constitutional questions, two of which dealt with statutory construction.[182] The first of these stated that:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.[183]

The second of these principles further emphasized the first:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[184]

The Court's disfavor with deciding unnecessary constitutional issues is deeply rooted[185] and the Court has consistently advanced policy rationales in favor of this longstanding tradition.[186] For present purposes, only one of these justifications is of paramount concern. That justification involves separation-of-powers principles and the countermajoritarian difficulty, which posits that the Court must be careful in invalidating the actions of the other, popularly elected branches of government.[187]

---

180 *See, e.g.*, *id.*; Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1012 (1994).

181 Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936).

182 *Id.* at 347–48 (Brandeis, J., concurring).

183 *Id.* at 347.

184 *Id.* at 348 (quotation omitted).

185 Kloppenberg, *supra* note 180, at 1004 (noting that the Court's preference for avoiding unnecessary constitutional questions was expressed as early as 1833 by Justice John Marshall).

186 *Id.* at 1035 (noting that the Court has provided six closely related justifications for the avoidance doctrine over the years).

187 *See id.* at 1047–48.

B. Application of the Avoidance Doctrine to § 798

Despite the avoidance doctrine's lengthy history and policy rationales, certain aspects of a § 798 prosecution of the press make its application to this situation unwise. The first aspect to consider is the novelty of a criminal prosecution of the press in the general sense. Too often the Court, in invoking the avoidance doctrine, has failed to address the underlying constitutional themes presented by a particular case, leaving both Congress and other courts clueless as to the reasoning behind its decisions.[188] Here, where the Court would be writing on a blank slate with regard to criminal prosecutions of the press, the Court would do a great disservice to both Congress and the lower courts by failing to provide these entities with future guidance by elaborating on its reasoning.[189]

Admittedly, the desire for a decision that pointedly addresses the constitutional issues implicated by § 798 does not necessarily warrant the Court's abdication of the avoidance principles. As the *Morison* and *Rosen* opinions demonstrate, even cases using "saving" statutory constructions can produce insightful and well-reasoned writing.[190] More problematic is the risk that a "saving" construction will produce a statute distorted in ways Congress never intended, which effectively institutes "judicial" legislation without the popular approval of the people.[191] In doing so, the Court would be usurping more power from the other branches of government than by simply invalidating § 798,[192] and this would be done in the arena of national security where the Court has consistently recognized the greater expertise of the elected branches.[193] Thus, such action would completely contradict the sepa-

---

188 *See* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 17 (1996) (observing that the use of the avoidance doctrine "instead of direct constitutional rulings contributes to confusion for Congress, courts, and other constitutional interpreters, such as state legislatures and administrative agencies, who often strive to act within boundaries illuminated by the courts").

189 *See id.* at 33 ("In situations where the precedent is unclear or not directly on point, reasoned elaboration, involving a full and direct airing of the policy concerns and precedent, is preferable to use of the [avoidance] canon.").

190 *See generally* United States v. Morison, 844 F.2d 1057 (4th Cir. 1988); United States v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006).

191 *See* Schauer, *supra* note 179, at 95.

192 *See* Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481, 487 (1990); Schauer, *supra* note 179, at 94–95.

193 *See supra* Part III.B.

ration-of-powers justification that is frequently advanced in support of the avoidance doctrine.[194]

Of paramount consideration here is the fact that the legislative history of § 798 mentions nothing about the press whatsoever, leaving open the possibility that Congress did not intend at enactment, nor at any other time, to have the statute used against the press in any way. Further, even if Congress did or does desire appropriate prosecutions of the press under § 798,[195] it would still be unclear whether Congress would want the prosecutions limited by the specific constraints used by the Court in its construction. Using the jury instructions from *Morison* as an example,[196] Congress might acquiesce in qualifying the information based on potential damage to the United States, but might oppose any requirement that the information be closely held by the government. Although the constitutionality of eliminating that second qualification would be questionable, Congress should at least be able to pursue such a strategy if it so desired.

These risks are further enhanced by two factors specific to the context of prosecuting the press under § 798. The first deals again with the novelty of such a prosecution, as it would be particularly difficult to predict Congress's views on the matter given that there has never been a criminal prosecution of the press in our history. The second is the fact that § 798 was passed almost sixty years ago, when United States government intelligence operations were arguably still in their infancy.[197] Considering the marked changes that have occurred within the intelligence community since that time, particularly the government's aggressive emphasis on intelligence operations in fighting the war on terror (perhaps at the expense of civil liberties), it would be prudent for the Court to allow Congress to reconsider § 798 before prosecutions of the press under it become more palpable.

With these arguments in mind, it is beneficial to revisit Judge Phillips's warning at the end of his concurrence in *Morison*.[198] In that opinion, Judge Phillips expressed concern that "jury instructions on a case-by-case basis are a slender reed upon which to rely for constitu-

---

194 *See* Kloppenberg, *supra* note 180, at 1047–48.

195 It can be inferred that this is a strong possibility because Congress chose to enact § 798 with the term "publish" in the statutory text. *See* 18 U.S.C. § 798(a) (2006).

196 *See supra* notes 147–48 and accompanying text.

197 *See* National Security Agency, Introduction to History, http://www.nsa.gov/history/index.cfm (last visited Jan. 30, 2009) (noting that the NSA was not even created until November of 1952, two years after § 798 was enacted).

198 United States v. Morison, 844 F.2d 1057, 1085–86 (4th Cir. 1988) (Phillips, J., concurring).

tional application of these critical statutes."[199] Judge Phillips's proposition is on point, but unlike him, the Court would not be constrained by precedent to approve jury instructions to salvage § 798. Instead, the Court should sustain an overbreadth challenge to § 798, invalidate the statute, and return the question of protecting the "communication intelligence activities" of the United States to Congress for resolution.

Conclusion

When the *New York Times* published its article detailing the Bush Administration's authorization of warrantless domestic wiretaps, interested parties aligned on both sides of the divide. Some argued that the *Times* was irresponsible in disclosing information damaging to our national security, while others praised the *Times* for having the courage to expose governmental wrongdoing in the face of strong-armed opposition. Beyond question, it was seriously debatable whether or not the *Times* had done anything deserving of condemnation.

One need not go back too far in history, though, to find an instance of press conduct that is more clearly reprehensible. In the mid-1970s the United States engaged in an ongoing deep-sea covert operation attempting to salvage a Soviet submarine sunk off the Hawaiian coast.[200] As a result of press disclosure of the operation, Soviet vessels began patrolling the area, necessitating the operation's termination.[201] The inability to continue the operation to its completion prevented the government from recovering numerous weapons and codebooks, foiling what then-CIA Director William Colby described as potentially the "biggest single intelligence coup in history."[202]

Do these actions necessarily imply a need for criminal deterrence? That is a difficult issue to address, primarily because special care must be taken to ensure such deterrence does not come at too high of a cost. As Justice Stewart made clear at the beginning of this Note, the press serves a vital role in society in informing the public of governmental actions, and it would be unwise to frustrate the press's fulfillment of this role with overly broad statutes criminalizing the publication of materials on that very issue. This is particularly true where, as here, the governmental conduct in question (i.e., communi-

---

199 *Id.* at 1086.

200 Xanders, *supra* note 164, at 784.

201 *Id.*

202 *Id.*

cations surveillance) necessarily implicates concerns regarding civil liberties.[203]

This Note did not set out to resolve the inquiry of exactly where Congress should draw the line between these two competing interests. Rather, the purpose of this Note was to determine whether the lines drawn in § 798 are constitutionally acceptable. In defining the information within the scope of § 798 so broadly, Congress has struck an unconstitutional balance between these interests, allowing criminal deterrence in the name of national security to exact an impermissible burden on the press's ability to fulfill its role as government watchdog. Further, this Note wanted to emphasize that if it were found necessary to reevaluate the government's policy with respect to the issues implicated by § 798, those decisions should be made by the legislature and not the judiciary. By invalidating § 798, the Court may compel Congress to reconsider the merits of prosecuting the press for publishing communication intelligence information, allowing Congress to clarify its views on the matter. At the very least, though, judicial invalidation would ensure that § 798 would no longer be the proverbial snake in the grass, waiting to rear its ugly head the next time a press outlet publishes a controversial story on United States intelligence operations.

---

203 *See* Risen & Lichtblau, *supra* note 4 (noting that intelligence initiatives undertaken by the Bush Administration provoked outcry from those "who argue that the measures erode protections for civil liberties and intrude on Americans' privacy").