UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Plaintiff, v. TERRY J. ALBURY, Defendant	Case No. 18-cr-00067 (WMW) **BRIEF OF AMICI CURIAE SCHOLARS OF CONSTITUTIONAL LAW, FIRST AMENDMENT LAW, AND MEDIA LAW** **(Unopposed, filed in support of Terry J. Albury)**

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INTEREST OF *AMICI CURIAE*[1]

Amici are seventeen professors whose research and teaching primarily focus on constitutional law, First Amendment law, and media law. The professors have an interest in ensuring the continued operation of a free, fair, and robust press in the United States. This brief addresses issues that are specifically within their areas of scholarly expertise. Biographical information on the *amici*, who are participating in their individual capacities and not as representatives of the institutions with which they are affiliated, appears below:

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INTRODUCTION

The sentencing of Terry Albury requires this Court to determine what criminal punishment should appropriately be imposed on a government employee who disclosed to a journalist information of significant public interest to his fellow citizens. In making that determination, this Court can and should consider the important First Amendment interests at stake. It is for this Court, at sentencing, to craft a punishment that properly weighs the constitutional protection of free speech and the public interest in the newsworthy disclosure at issue in this case against any actual harm to national security caused by Mr. Albury's act of conscience. To aid the Court in making this determination, *amici* draw the Court's attention to several factors that underscore the important interests that should weigh in the sentencing decision:

First, this Court should acknowledge that the status of information as "classified" does not, standing alone, establish the existence of harm from its publication or the gravity of the offense in its unauthorized disclosure. As the government repeatedly has acknowledged, its classification system is often used improperly to shield important information from the public without good

reason. Indeed, ubiquitous overclassification has long required journalists to rely on leaks to expose matters of powerful public concern, from the fraught history of the Vietnam War, the use of torture at Abu Ghraib, and the bulk collection of American citizens' telephone records. Classified information is also often essential to reporting about law enforcement and other everyday matters the public legitimately needs to know. It is fair to say that if all classified information were somehow hermetically sealed off from the public, ours would no longer be the vibrant, publicly-accountable republic it has been from its birth. This Court can and should consider this reality in determining an appropriate penalty.

Second, this Court should ponder the nature and intent of the law that the government is using to punish a leak to the press that was motivated by a desire to inform public debate about highly contestable and controversial law enforcement programs. Given our constitutional commitment to free speech, this nation has never enacted an Official Secrets Act that explicitly criminalizes all disclosures of classified information. The Espionage Act under which Mr. Albury is being prosecuted was enacted during the First World War to go after spies and enemies. It was never used to prosecute a leak to the media until more than 50 years later. Before 2008 there was only one successful conviction under the Act for a media leak, and that case involved the disclosure of documents to a magazine in exchange for payment, rather than a public-interested desire to inform fellow citizens about government misconduct.[2]

The Espionage Act has been transformed over the last decade. The Obama administration prosecuted eight people in eight years for allegedly leaking classified information to journalists or for retaining such information. This transformation is accelerating under the current administration: Mr. Albury was the second person prosecuted for a media leak under the Espionage

[2] *See United States v. Morison*, 844 F.2d 1057, 1060-62 (4th Cir. 1988)

Act in the first fourteen months of the Trump administration. The Attorney General has informed Congress that prosecuting media leaks is a top priority and that the Justice Department has tripled the number of such investigations since President Trump took office. It is entirely appropriate in determining a just sentence for Mr. Albury for this Court to weigh the implications for our democracy of this aggressive and arguably unintended use of the Espionage Act.

Third, this Court should also consider the fundamental First Amendment interests that are at stake in penalizing a leak of newsworthy information. In the past judges had the opportunity to weigh the First Amendment equities in a leak investigation when deciding whether a reporter should be compelled to disclose her source—*i.e.* to identify the leaker. Nowadays, ubiquitous communications technologies leave digital breadcrumbs that investigators can easily spot and follow to their source without ever consulting the reporter who receives the leak, rendering the First Amendment protection for confidential sources largely irrelevant. Leak investigations are also easier and cheaper than ever, allowing the government to conduct many more of them. Technology has, in effect, rendered obsolete the practical and legal constraints by which courts previously calibrated the constitutional interests in protecting the flow of information to the public through the confidential sources of the press. As a result, the same First Amendment considerations previously weighed in determining whether to breach a reporter's privilege should be applied in assessing the proper penalty for a leak.

Finally, this Court should squarely address the public value of Mr. Albury's leak in determining a proper penalty. Courts have long recognized that First Amendment protections are implicated whenever the government seeks to suppress the flow of information to citizens on matters of public importance. Indeed, the central purpose of the First Amendment is to protect the "the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y.*

Times v. Sullivan, 376 U.S. 254, 270 (1964). Across a variety of contexts, courts have thus taken care to cabin legal sanctions for speech—even speech of government employees or involving classified information—in light of the First Amendment interests at stake.

The disclosure here was made by a government employee who sought to inform citizens about secret and troubling law enforcement practices that many agree are unlawful or unwise. In particular, Mr. Albury appears to have disclosed FBI rules that govern activities like targeting religious or ethnic communities for surveillance and identifying journalists' confidential sources without notice to the journalist or an opportunity to assert a privilege against disclosure. The documents he disclosed are, in effect, the internal laws or rules that govern FBI agents domestically. Mr. Albury's disclosure triggered an important public debate about specific FBI practices as well as the broader question of whether the FBI should be able to keep the rules governing its domestic investigations secret and therefore largely immune from democratic scrutiny. His sentence should reflect these facts.

Public-spirited disclosures to the domestic press, like this one, should not be punished as espionage, even though the government may prosecute them under the Espionage Act. Like punishments imposed on citizens who have engaged in other forms of civil disobedience, the sentence imposed by this Court should reflect the full "nature and circumstances of the offense," the "characteristics of the defendant," and "the seriousness of the offense," including the benefits to the public from public-interested leaks, the essential role of genuine whistleblowers in democratic self-government, and the damage to the First Amendment that would result if every disclosure of documents marked "classified" could be met with severe criminal sanctions without regard for the information's actual sensitivity or public importance.

I. THIS COURT'S SENTENCE SHOULD REFLECT THAT CLASSIFICATION ALONE DOES NOT ROB SPEECH OF PUBLIC VALUE OR PREDICT ITS DANGEROUSNESS.

One relevant measure of a criminal sentence is the harm caused by the offender. To assess the gravity of harm caused by Mr. Albury's speech, the Court must look beyond the mere fact that the information he disclosed had been classified by the FBI. Overclassification is rampant. It is beyond peradventure that the government routinely classifies information that it has no legitimate basis to keep secret. Notwithstanding the classification standards spelled out in Executive Order 13,526,[3] a great deal of nonsensitive information is classified simply because disclosure would embarrass powerful officials or expose government misconduct.[4]

The vast array of improperly classified information often involves issues of intense public interest and, not infrequently, matters critical to democratic oversight of our public institutions. It necessarily follows that the classified status of the information Agent Albury disclosed, standing alone, neither establishes the existence of any actual harm his action may have caused nor negates the existence of any significant public benefit from disclosure.

Overclassification has been a problem since the classification system was created, and has only worsened as the volume of classified information has exponentially increased. Today, an estimated two to three million persons have the authority to classify information. Of these, 1,867

[3] The executive order governing classification prohibits classifying information to "conceal violations of law, inefficiency, or administrative error," or to "prevent embarrassment to a person, organization, or agency." Exec. Order No. 13526 § 1.7(a)(1)–(2), 75 Fed. Reg. 707, 710 (Dec. 29, 2009). But so long as the classifier can posit some national security implication to disclosure, a motive to hide wrongdoing can be hidden. *See, e.g.*, *ACLU v. Dep't of Def.*, 584 F. Supp. 2d 19, 24 (D.D.C. 2008), *aff'd*, 628 F.3d 612 (D.C. Cir. 2011).

[4] *See* Elizabeth Goitein and David M. Shapiro, BRENNAN CENTER FOR JUSTICE, *Reducing Overclassification Through Accountability* at 1-2 (2011) (the "BRENNAN CENTER REPORT"), *available at* https://www.brennancenter.org/publication/reducing-overclassification-through-accountability.

persons held "original classification" authority as of the end of fiscal year 2017,[5] and millions more have "derivative" classification authority,[6] or the right to classify information under guidelines issued by an original classification authority.[7] Last year, these individuals collectively made more than 49.5 million decisions to classify information, a ten-percent increase from 2016.[8]

Unsurprisingly, every government study of the issue over the last six decades has found widespread classification of information that the government had no basis to conceal.[9] Precise numbers are hard to come by, but current and former government officials have provided disturbing estimates. In 1991, Rodney B. McDaniel, the former Executive Secretary of the

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[5] Information Security Oversight Office, 2017 REPORT TO THE PRESIDENT 1-8 (2018) (the "ISOO 2017 REPORT"), *available at* https://www.archives.gov/files/isoo/reports/2017-annual-report.pdf.

[6] Precise numbers of derivative classifiers are not recorded given fluid designations, but in 1997, the Commission on Protecting and Reducing Government Secrecy estimated that "three million government and industry employees . . . have the ability to mark information as classified." SENATE REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, 103RD CONG., S. Doc. No. 105-2, at 31 (1997).

[7] Info. Sec. Oversight Office, 2010 REPORT TO THE PRESIDENT 8 (2011), *available at* https://www.archives.gov/files/isoo/reports/2010-annual-report.pdf; *see generally* Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SECURITY L. & POL'Y 409 (2013) (discussing derivative discretion to make classification decisions).

[8] ISOO 2017 REPORT at 41, 43.

[9] *See* Def. Dep't Comm. on Classified Info., REPORT TO THE SECRETARY OF DEFENSE 6 (1956); Comm'n on Gov't Sec., 84th Cong., REPORT OF THE COMMISSION ON GOVERNMENT SECURITY 174–75 (1957); Special Subcomm. on Gov't Info., REPORT OF THE SPECIAL SUBCOMMITTEE ON GOVERNMENT INFORMATION, H.R. REP. NO. 85-1884, at 4 (1958); Def. Sci. Bd. Task Force on Secrecy, REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON SECRECY 2 (1970); Comm'n to Review DOD Sec. Policies and Practices, KEEPING THE NATION'S SECRETS: A REPORT TO THE SECRETARY OF DEFENSE app. E 31 (1985); Joint Sec. Comm'n, REDEFINING SECURITY: A REPORT TO THE SECRETARY OF DEFENSE AND THE DIRECTOR OF CENTRAL INTELLIGENCE 6 (1994); Comm'n on Protecting and Reducing Gov't Secrecy, SENATE REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, 103RD CONG., S. Doc. No. 105-2 xxi (1997); Nat'l Comm'n on Terrorist Attacks Upon the U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 417 (2004).

National Security Council during the Reagan administration, estimated that "only 10% of classification was for 'legitimate protection of secrets.'"[10] At a 2004 congressional hearing, J. William Leonard, then director of the Information Security Oversight Office, and Carol A. Haave, then Defense Department's Undersecretary for Intelligence, both put the odds of defensible government classification as a coin toss: "*half* of all classified information is overclassified."[11] A decade later, the odds had worsened: former New Jersey governor and 9/11 Commission Chairman Thomas Kean said that "three-quarters of the classified material [I] reviewed for the [9/11] Commission should not have been classified in the first place."[12]

Recent government statistics support these assessments. A process called "mandatory declassification review" entitles citizens to ask agencies to declassify particular records. Data from 2017 show that more than 90 percent of declassification requests led to a determination that at least some of the information did not need to remain classified; in 51 percent of cases, the documents were declassified in full.[13]

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[10] 108 CONG. REC. S9714 (2004) at 84 (statement of Thomas S. Blanton, National Security Archive, George Washington University) (citing statement of Rodney McDaniel).

[11] *Espionage Act and the Legal and Constitutional Issues Raised by Wikileaks*, HEARING BEFORE THE H. COMM. ON THE JUDICIARY, 111TH CONG. 27 (2010) (statement of Abbe D. Lowell, Partner, McDermott Will & Emery LLP) (emphasis in original) (citing *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing*, HEARING BEFORE THE SUBCOMM. ON NAT'L SECURITY, EMERGING THREATS AND INT'L RELATIONS, COMM. ON GOV'T REFORM, 108TH CONG. 82-83 (2004)).

[12] 108 CONG. REC. S9714 (2004) (statement of Sen. Wyden). *See also* Pub. L. 111-258, § 2, 124 Stat. 2648 (Oct. 7, 2010) codified at 6 U.S.C. § 124m & 50 U.S.C. § 135d (the Reducing Overclassification Act) (congressional finding that "the overclassification of information . . . needlessly limits stakeholder and public access to information."); SENATE REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, 103RD CONG., S. Doc. 105-2, at xxi (1997) ("The classification system . . . is used too often to deny the public an understanding of the policymaking process, rather than for the necessary protection of intelligence activities and other highly sensitive matters."), *available at* http://www.access.gpo.gov/congress/commissions/secrecy/index.html.

[13] ISOO 2017 REPORT at 16; *see also* BRENNAN CENTER REPORT at 1-2.

As documented in the 2011 Brennan Center Report, rampant over-classification results from imbalanced incentives. Many incentives to classify information have nothing to do with national security, while few countervailing incentives exist. As one retired intelligence official recounted:

> [C]lassification was used not to highlight the underlying sensitivity of a document, but to ensure that it did not get lost in the blizzard of paperwork that routinely competes for the eyes of government officials. If a document was not marked "classified," it would be moved to the bottom of the stack. . . . He observed that a security classification, by extension, also conferred importance upon the author of the document.[14]

Such incentives are magnified by a prevailing culture of secrecy in institutions like the FBI, the instinct to conceal information that might harm an agency, a fear of reprisals if adverse information is disclosed, the ease of classifying information, the lack of accountability for misclassifying information, and the absence of any professional rewards for declining to wield the classification stamp or for affirmatively challenging improper classifications.[15]

This system inherently produces massive over-classification. A former director of the Information Security Oversight Office reported that information "published in third-grade textbooks" was classified.[16] A great deal of nonsensitive information whose disclosure would be entirely harmless routinely ends up "classified" in government files,[17] including information

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[14] Ted Gup, NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE 44 (RANDOM HOUSE 2007).

[15] *See* Brennan Center Report at 21-32.

[16] Scott Shane, *Increase in the Number of Documents Classified by the Government* (N.Y. TIMES, July 3, 2005), *available at* https://www.nytimes.com/2005/07/03/politics/increase-in-the-number-of-documents-classified-by-the-government.html.

[17] *See* BRENNAN CENTER REPORT at 1; *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139-40 (1951); *ACLU v. Office of Dir. Nat'l Intelligence*, 2011 WL 5563520, at *5-6, *12 (S.D.N.Y. Nov. 15, 2011).

crucial to informed public debate, which ends up classified and hidden from public view for no proper purpose. The full scope of the problem may never be known, but the 2011 Brennan Center Report describes a number of such instances unveiled only with the passage of time. For example:

- In 1947, a memorandum issued by an Atomic Energy Commission official instructed that no document should be released that "refers to experiments with humans and might have [an] adverse effect on public opinion or result in legal suits. Documents covering such work …should be classified 'secret.'"[18]

- In the 1950s, the government received funds from Congress for heavy-duty military cargo planes, then classified pictures showing the aircraft "converted to plush passenger planes."[19]

More recently, in 2014 the Senate Select Committee on Intelligence revealed that even while the existence of the CIA's harsh interrogation program remained highly classified, CIA officials were coordinating the release of information to certain reporters to shape public opinion about the program, confirming the lack of any need for continued secrecy.[20] And in January 2015, the Inspector General of the Department of Homeland Security accused Transportation Security Administration (TSA) officials of classifying information "pos[ing] no threat to transportation security" simply to "conceal negative information" about security controls at New York's John F. Kennedy International Airport.[21]

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[18] Memorandum, O. G. Haywood Jr., Col., Corps of Engineers to Dr. [Harold] Fidler, Atomic Energy Comm'n, Medical Experiments on Humans (Apr. 17, 1947), *available at* http://www.fas.org/sgp/othergov/doe/aec1947.pdf.

[19] H.R. REP. NO. 85-1884, at 4.

[20] *Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program,* S. REP. NO. 113-288, at 401-08 (2014).

[21] Press Release, OFFICE OF INSPECTOR GENERAL, DEP'T OF HOMELAND SEC., *IG Protests TSA's Edits of Audit Report* (Jan. 23, 2015), *available at* http://www.oig.dhs.gov/assets/pr/2015/oigpr_012315.pdf.

These examples reflect a systemic problem. As former solicitor general Erwin Griswold wrote: "It quickly becomes apparent to any person who has considerable experience with classified material" that "the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."[22] And given this "well-documented practice" of overclassification, the Court of Appeals for the District of Columbia cautioned that it would be improper for courts to "conclude automatically that revelation of all 'top secret' documents will endanger national security."[23]

Overclassification is not just unnecessary and indefensible, but affirmatively harmful, as members of Congress concluded when they cited the "proclivity for overclassification" as the reason for requiring *de novo* judicial review in FOIA cases to guard "against the potential for mischief and criminal activity under the cloak of secrecy."[24] Just as instances of classification made to conceal unlawful behavior or prevent embarrassment are well documented, important public debates about civil rights and liberties have been sparked only by whistleblower revelations of classified information.[25]

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[22] Erwin N. Griswold, Op-Ed., *Secrets Not Worth Keeping: The Courts and Classified Information* WASH. POST, Feb 15, 1989), *available at* https://www.washingtonpost.com/archive/opinions/1989/02/15/secrets-not-worth-keeping/a115a154-4c6f-41fd-816a-112dd9908115/?utm_term=.358b76a54e04.

[23] *Halperin v. Kissinger*, 606 F.2d 1192, 1204 n.77 (D.C. Cir. 1979), *aff'd in part by an equally divided court*, 452 U.S. 713 (1981) (per curiam).

[24] *Ray*, 587 F.2d at 1209 (quoting *Source Book: Legislative History, Texts & Other Documents* (Comm. Print 1975) at 460-61).

[25] *See, N.Y. Times Co. v. DOJ*, 756 F.3d 100, 104-08 (2d Cir. 2014) (surveying government efforts to shield the legal justifications relied upon in carrying out targeted killing) (subsequent history omitted); E. Macaskill & G. Dance, *NSA Files Decoded* (THE GUARDIAN, Nov. 1, 2013) (mass NSA telephone and email surveillance kept secret from American public by classification), *available at* http://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded.

These realities have important consequences for courts, which must not ignore the practical consequences of executive-branch overclassification: "A blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse."[26]

In determining an appropriate sentence in this case, the Court should look beyond the mere fact that the information Mr. Albury disclosed was classified at the time of its disclosure. It should consider carefully the extent to which the disclosure caused any actual damage and the strength of the initial decision to classify it. Against a realistic view of the harms from disclosure, the Court should weigh the public importance of the information in question, its value to democratic deliberation on matters of public concern and, more specifically, its role in bringing to light troubling and seriously contestable practices at the FBI.

II. THIS COURT'S SENTENCE SHOULD REFLECT THAT The TRANSFORMATION OF THE Espionage Act INTO AN OFFICIAL SECRETS ACT THREATENS TO Chill IMPORTANT SPEECH

The bloated classification system uncomfortably abuts our constitutional commitment to "supply[ing] the public need for information and education with respect to the significant issues of the times."[27] This tension heightens considerably if prosecutors are empowered to prosecute speakers whenever they convey classified information of any sort, for any purpose, to the media.

In fact, the Espionage Act of 1917 has in recent years been transformed into exactly that kind of blunt instrument. Moreover, technological developments including the proliferation of digital communications technology have made it easier to wield this prosecutorial tool. It is likely that the recent massive upswing in leak prosecutions will only accelerate, and that this blunt

[26] *Wash. Post*, 807 F.2d at 392.

[27] *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

instrument will be used to suppress speech that the government finds challenging or inconvenient, or speakers that the government disfavors.

A. The Espionage Act Has Been Transformed Into An Official Secrets Act

Because of our constitutional commitment to the freedoms of speech and press, the United States has never explicitly enacted a law akin to the U.K.'s Official Secrets Act that broadly criminalizes disclosure of classified government information. President Clinton expressed this First Amendment commitment in vetoing a bill in 2000 that would have permitted felony prosecution of any person who leaked classified information to anyone not cleared to receive it. Clinton deemed it his "obligation to protect not only our Government's vital information from improper disclosure, but also to protect the rights of citizens to receive the information necessary for democracy to work."[28] His veto affirmed the widely held view that the United States "would never abide . . . a sweeping criminal prohibition" like the United Kingdom's Official Secrets Act, which "broadly criminalizes the dissemination and retention of numerous classes of government information."[29]

Despite this common understanding, and notwithstanding the First Amendment principles invoked by Clinton's veto, the government since then has effectively transformed a century-old law—the 1917 Espionage Act—into one that now closely resembles the Official Secrets Act.[30]

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[28] THE WHITE HOUSE, *Statement by the President on Disapproving H.R. 4392, the "Intelligence Authorization Act for Fiscal Year 2001* (Nov. 4, 2000), *available at* https://fas.org/sgp/news/2000/11/wh110400.html.

[29] David Pozen, *The Leaky Leviathon: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 516, 626 (2013).

[30] *See id.* at 627 ("[t]he daylight between" the U.K.'s Official Secrets Act and the U.S. Espionage Act "is nowhere near as great as is commonly presumed.)"

The Espionage Act was enacted during the First World War and was last amended in 1950,[31] well before the landmark Supreme Court decisions that affirmed the First Amendment principles it threatens. Even so, for the first fifty-five years it was on the books the Espionage Act was never once wielded against individuals who disclosed information to the press.[32] In 1973, the Nixon Administration attempted to use the Espionage Act in this way for the first time, targeting Daniel Ellsberg and Anthony Russo for leaking the Pentagon Papers to the New York Times and other newspapers.[33] The district court dismissed the case against Ellsberg and Russo due to government misconduct.[34] Only two more cases were brought against media leakers under the Espionage Act between the dismissal of the Pentagon Papers case and the Obama administration. The first, during the Reagan administration, targeted a Navy intelligence analyst, Samuel Morison, for disclosing a military satellite photograph to a British publication in exchange for payment.[35] The second, during the George W. Bush administration, only nominally involved a media leak. In that case, prosecutors targeted a Defense Department analyst for leaking information to two lobbyists, and the lobbyists for passing the leaked information to "members of the media, foreign

[31] *See United States v. Rosen*, 445 F. Supp. 2d 602, 611-13 (E.D. Va. 2006) (recounting history of the Act).

[32] *See* Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 454-55 & n.17 (2014).

[33] *Id.* at n.17.

[34] *Id.*

[35] *Id.; United States v. Morison*, 844 F.2d 1057, 1060-62 (4th Cir. 1988).

policy analysts, and officials of a foreign government."[36] Moreover, charges against the lobbyists were ultimately dropped.[37]

The long era of prosecutorial restraint is over. The Obama Administration brought nearly three times as many Espionage Act prosecutions as had all previous administrations combined,[38] and the Trump Administration is well on track to surpass its predecessor's record. Within a year and a half of President Trump's inauguration, his administration had already charged two media leakers under the Espionage Act, including Mr. Albury.[39] The Trump administration also charged a third alleged media leaker with lying to investigators, and announced that it "was pursuing about three times as many leak investigations as were open at the end of the Obama Administration."[40]

These prosecutions have proceeded under an expansive reading of certain provisions of the Espionage Act that would, taken together, make it a crime to disclose virtually any classified documents to anyone for any purpose. Mr. Albury was charged under one of these provisions, § 793(e), which authorizes criminal penalties for anyone who:

> having unauthorized . . . access to . . . any document . . . 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 [or] transmits . . . the same to any person not entitled to receive it, or willfully retains

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[36] *Rosen*, 445 F. Supp. 2d at 607-10.

[37] *See* Neil A. Lewis & David Johnston, *U.S. to Drop Spy Case Against Pro-Israel Lobbyists* (N.Y. TIMES, May 1, 2009), *available at* https://www.nytimes.com/2009/05/02/us/politics/02aipac.html.

[38] James Risen, *If Donald Trump Targets Journalists, Thank Obama* (N.Y. TIMES, Dec. 30, 2016), *available at* https://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html.

[39] *See* Stephen Montemayor, *Justice Department Charges Minnesota FBI Agent for Leaking Secret Document to News Outlet* (STAR TRIBUNE, Mar. 29, 2018).

[40] A. Goldman, N. Fandos & K. Benner, *Ex-Senate Aide Charged in Leak Case Where Times Reporter's Records Were Seized* (N.Y. TIMES, June 7, 2018), *available at* https://www.nytimes.com/2018/06/07/us/politics/times-reporter-phone-records-seized.html.

> the same and fails to deliver it to the officer or employee of the United States entitled to receive it.

The few courts that have interpreted § 793(e), and its similarly-worded counterpart in § 793(d),[41] have read the "not entitled to receive it" element to incorporate the troubling classification system reviewed above: persons administratively authorized to receive classified information are entitled to receive it under the Espionage Act, and those not authorized are not so entitled.[42] Given the broad and malleable terms in § 793(d) and (e),[43] virtually any unauthorized leak of classified information to the media could be prosecuted under the Act.[44]

B. The Espionage Act Poses An Evergreen Threat To Speech And Press Freedoms

The broad reach of the contemporary Espionage Act, combined with rampant overclassification, endangers the ability of the public to learn through the press information essential to self-government. Compelling anecdotal evidence shows that investigative reporters

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[41] The two provisions are nearly identical, with § 793(d) applying to persons with lawful access to the information, and § 793(e) applying to those with unauthorized access to the information. 18 U.S.C. § 793(d) & (e).

[42] *United States v. Morison*, 844 F.2d 1057, 1074-75 (4th Cir. 1988); *United States v. Kim*, 808 F. Supp. 2d 44, 54-55 (D.D.C. 2011).

[43] The few decisions interpreting these provisions have defined documents "relating to the national defense" to mean those that "'directly or may reasonably be connected with the defense of the United States,' the disclosure of which 'would be potentially damaging to the United States or might be useful to an enemy of the United States' and which had been 'closely held' by the government and was "not available to the general public." *Morison*, 844 F.2d at 1076; *Rosen*, 445 F.Supp.2d at 620-21. In cases where the defendants are accused of communicating information orally rather than transmitting documents, one court has held that the government also must prove that the "information was communicated 'with reason to believe it could be used to the injury of the United States or to the advantage of any foreign nation.'" *Rosen*, 445 F. Supp. 2d at 625-26 (quoting 18 U.S.C.§ 793(d) & (e)).

[44] Additional statutes criminalize more particularized leaks of national security information, further extending prosecutors' reach over media leaks. *See, e.g.*, Papandrea, *Leaker Traitor Whistleblower Spy*, 94 B.U. L. REV. at 509-12. In short, "virtually any deliberate leak of classified information to an unauthorized recipient is likely to fall within the reach of one or more criminal statutes." Pozen, *The Leaky Leviathon*, 127 HARV. L. REV. at 524-25.

lost sources of classified and unclassified information after the Obama administration launched its unprecedented volley of media-leak prosecutions. Scott Shane, a Pulitzer-winning journalist at *The New York Times*, observed in 2013 that "[m]ost people are deterred by those leak prosecutions. They're scared to death. There's a gray zone between classified and unclassified information, and most sources were in that gray zone. Sources are now afraid to enter that gray zone. It's having a deterrent effect."[45] Washington Post reporter Rajiv Chandrasekaran remarked that same year that "one of the most pernicious effects [of the leak crackdown] is the chilling effect created across government on matters that are less sensitive but certainly in the public interest as a check on government and elected officials."[46]

Worse, this unconstrained breadth invites political retaliation, disproportionately deterring sources whose information might politically embarrass or anger an incumbent administration. While many leaks come from high-level officials, including the President and political appointees,[47] those powerful figures have relatively little to fear from an uptick in leak prosecutions.[48] Aggressive prosecutions of less politically protected public servants, by contrast, send a pointed message to career insiders who contemplate exposing abuses or illegality, or sharing information that casts an administration in a bad light. The recent rise in rank-and-file leak prosecutions affirms a perverse incentive on the part of administrations: to combat "public

[45] Leonard Downie Jr., *The Obama Administration and the Press* at 2 (COMMITTEE TO PROTECT JOURNALISTS, Oct. 10, 2013), *available at* https://cpj.org/reports/us2013-english.pdf.

[46] *Id.* at 3.

[47] *See, e.g.*, Pozen, *The Leaky Leviathon*, 127 HARV. L. REV. at 529-530; Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 250-54 (2008).

[48] *See, e.g.*, Uri Friedman, *Good Leak, Bad Leak* (FOREIGN POLICY, June 8, 2012), *available at* https://foreignpolicy.com/2012/06/08/good-leak-bad-leak/.

accountability leaks" that "expose systemic illegality, incompetence, error, or malfeasance."[49]

The threat of political retaliation has reached its apogee in the current administration, where it is not just demonstrable, but declared. As is well known, the President rails repeatedly against the press, calling them "fake news" and "the enemy of the American people."[50] When embarrassing information about himself or his administration is revealed, President Trump routinely exhorts that "[t]he real story is all of the illegal leaks of classified and other information," and that the "low life leakers will be caught!"[51] And the President matches rhetoric with action: breaching longstanding norms by personally directing criminal leak investigations "into his perceived opponents."[52]

C. Longstanding Barriers To Media-Leak Prosecutions Are Eroding

Perhaps even more important than the skyrocketing number of leak investigations and prosecutions are the reasons for the increase. Those reasons portend that the trend will continue to accelerate, further threatening journalists' capacity to gather information and the public's ability to learn about important government activities.

As in so many domains, the revolution in digital technology has helped to precipitate this

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[49] *See, e.g.* Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281, 283-84, 303-04 (2014).

[50] *See, e.g.*, Philip Bump, *Half of Republicans Say the News Media Should Be Described as the Enemy of the American People* (WASH. POST, Apr. 26, 2018), *available at* https://www.washingtonpost.com/news/politics/wp/2018/04/26/half-of-republicans-say-the-news-media-should-be-described-as-the-enemy-of-the-american-people/?noredirect=on&utm_term=.d829344aa6bf.

[51] Heidi Kitrosser, *Leaks, Leakers, and a Free Press*, HARVARD L. & POL'Y REVIEW BLOG, Mar. 9, 2017 (quoting tweets by Donald J. Trump).

[52] Charlie Savage & Eric Lichtblau, *Trump Directs Justice Department to Investigate 'Criminal Leaks,'* (N.Y. TIMES, Feb. 16, 2017), *available at* https://www.nytimes.com/2017/02/16/us/politics/justice-department-leak-investigation-trump.html.

threat. *First*, because of these technologies' ever-growing ubiquity, journalists and sources are increasingly likely to leave digital footprints behind when they communicate with one another. Matthew Miller, the spokesperson for President Obama's first attorney general, Eric Holder, attributed the increase in leak prosecutions to this fact: "'a number of cases popped up that were easier to prosecute' with 'electronic evidence,' including telephone and e-mail records of government officials and journalists. 'Before, you needed to have the leaker admit it, which doesn't happen' . . . 'or the reporter to testify about it, which doesn't happen.'"[53] Even the most Luddite journalist-source meet-ups are vulnerable to technology: "meetings in dark parking garages a la Bob Woodward in *All the President's Men* are not safe if a camera captures footage of every person that comes in and out."[54]

Second, investigators increasingly exploit third parties to obtain electronic records that identify alleged leakers, rather than subpoenaing news organizations directly and affording them an opportunity to resist disclosure in advance. Very recently, the Trump administration notified a reporter for *The New York Times* that it had obtained several years of her telephone and e-mail records to investigate alleged leaks from a Senate Intelligence Committee staffer.[55] This development echoes a revelation from 2013 when the Obama administration "secretly subpoenaed and seized all records for 20 AP telephone lines and switchboards for April and May of 2012" to investigate a 2012 Associated Press story. The seized records covered "'thousands upon thousands of newsgathering calls' by more than 100 AP journalists using newsroom, home, and mobile

[53] Downie, Jr., *The Obama Administration and the Press*, *supra* n. 46 at 9.

[54] Papandrea, *Leaker Traitor Whistleblower Spy*, 94 B.U. L. REV. at 460 & n. 50 (citing Adam Liptak, *A High-Tech War on Leaks* (N.Y. TIMES, Feb. 11, 2012)).

[55] Goldman, et al., *Ex-Senate Aide Charged in Leak Case*, *supra* n. 49.

phones."[56] The AP was not notified that its journalists' records had been seized until many months after the fact.[57]

While in those cases the targeted journalists and the public eventually learned of the third-party subpoenas, even less is known about the current and previous administrations' uses of a yet more secretive tool known as a national security letter ("NSL"). Like third-party subpoenas, NSLs can be used to demand that entities, including bank, credit card, or communications companies, turn over information about their customers. Unlike subpoenas, however, NSLs "can be issued by executive officials without a judicial warrant or a hearing," and they "normally come with a gag order. The recipient may not reveal the contents of the NSL or the fact that it exists, and recipients are subject to the gag order until the government releases them, which it may never do."[58] But "[t]ens of thousands of NSLs are issued secretly every year, and those who know the most about the practice and its consequences are forbidden to speak about it."[59]

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[56] Downie, Jr., *The Obama Administration and the Press*, *supra* n. 46 at 17.

[57] *Id.*

[58] Jack M. Balkin, *Old-School / New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2330-32 (2014).

[59] *Id.* at 2333. One of the leaked documents attributed to Mr. Albury itself generated a news story that sheds light on the FBI's rules for using NSLs to target journalists. According to a report in the Columbia Journalism Review on the document and resulting story, the "document is critical to understanding how the Trump administration could go after journalists in its broader crackdown on leaks." The same report concludes:

> These rules for targeting journalists should never have been secret in the first place. The idea that knowing the bureaucratic sign-offs required to issue an NSL could damage national security is absurd. Keeping them secret *does*, however, avoid the embarrassment and public debate that would ensue if they were officially public.

Trevor Timm, *Forget Comey and McCabe: Support FBI Whistleblower Terry Albury* (COLUMBIA JOURNALISM REV., April 17, 2018), *available at* https://www.cjr.org/watchdog/terry-albury.php.

These powerful new digital and legal surveillance tools shed retrospective light on a 2011 exchange between a prominent press freedom advocate and an intelligence official. The official told Lucy Dalglish, then the executive director of the Reporters Committee for Freedom of the Press, that a subpoena for reporter James Risen "is one of the last you'll see. . . . We don't need to ask who you're talking to. We know."[60]

In other words, the floodgates against media leak prosecutions have cracked open. The practical and legal restraints that used to permit only the tiniest drip of cases to reach the courts are no longer effective. Instead, it now falls to courts like this one, at sentencing, to address the First Amendment threat posed by the government's transformation of the Espionage Act into an Official Secrets Act.

III. THIS COURT'S SENTENCE SHOULD REFLECT THE IMPORTANT FIRST AMENDMENT INTERESTS AT STAKE.

In determining the appropriate sentence to impose on Mr. Albury, the Court should take into consideration the broad scope of First Amendment protection for speech on matters of public concern—including speech by a government employee disclosing classified documents to the press. Several branches of First Amendment doctrine show that media-leak prosecutions implicate the First Amendment, and past First Amendment challenges to leak prosecutions confirm that free-speech ramifications must be weighed in this domain, and are properly considered when penalties are set.

It is particularly appropriate for this Court to consider the First Amendment in determining an appropriate sentence because the technological developments discussed above have effectively eliminated the opportunity for judges to weigh the free speech implications of a media leak

[60] Liptak, *A High Tech War on Leaks*, *supra* n. 55.

prosecution at earlier stages in the process. For example, courts traditionally considered free speech concerns at the investigatory or pre-trial stage of leak cases, when asked to determine whether a reporter who published the leaked information should be compelled to disclose her confidential, anonymous source. In that context, courts have applied a First Amendment or common law privilege that sets a high bar against compelled disclosure specifically to protect "the important social interests in the free flow of information" to the public.[61] In such cases, courts weighed the "First Amendment privilege and the opposing need for disclosure . . . in light of the surrounding facts" so that "a balance [is] struck to determine where lies the paramount interest."[62] In the specific context of a criminal investigation of a leak involving national security information, one judge articulated the inquiry as follows: "[T]he court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value."[63]

Because the government no longer has any need to compel testimony from reporters to prosecute leaks, *see supra* § II.C, courts no longer have an opportunity to calibrate the public's First Amendment interests in a leak of classified information at that stage of a prosecution. Given this reality, courts can and should weigh these free speech interests in deciding an appropriate

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[61] *United States v. Burke*, 700 F.2d 70, 73 (2d Cir. 1983); *see also Schoen v. Schoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (recognizing that the "journalist's privilege recognized in *Branzburg* was a 'partial First Amendment shield' that protects journalists against compelled disclosure in all judicial proceedings, civil and criminal alike") (quoting *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975)); *United States v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000) (applying privilege in criminal case); *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988) (applying privilege in pre-trial criminal proceeding); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (applying privilege in civil proceeding); *United States v. Hubbard*, 493 F. Supp. 202 (D.D.C. 1979) (applying privilege in criminal case); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1163-83 (D.C. Cir. 2006) (Tatel, J., concurring).

[62] *Farr*, 522 F.2d at 467.

[63] *In re Miller*, 438 F.3d at 1175 (Tatel, J., concurring).

punishment at sentencing. In particular, this Court should weigh the harm actually caused by the leak against the value of the information to the public. This inquiry would serve to protect the First Amendment interests that are clearly engaged by this prosecution.

A. Government Prosecutions of Leaks to the Media Present First Amendment Concerns

Several branches of First Amendment jurisprudence affirm that leaks to the media present First Amendment concerns that are relevant at sentencing.[64] They include requirements (1) that speech about the actions of our government receives the highest level of constitutional protection, and (2) that heightened scrutiny is necessary when the government seeks to shield particular information about itself from public view.

On the first point, the Supreme Court has made clear that speech on matters of public importance is at the heart of the First Amendment.[65] Such speech not only benefits speakers, but the citizen-audiences who have a right to receive it, and their press surrogates who play a "structural role" in bringing it to them.[66]

These rights are fundamental to maintaining our constitutional republic. If elections and inter-branch checks and balances are to be meaningful, the People must have opportunities to learn and convey information and debate ideas. As the Supreme Court put it:

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[64] This section draws substantially from Heidi Kitrosser, RECLAIMING ACCOUNTABILITY 140-41 (U. CHICAGO P. 2015).

[65] *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 269-71, 273-76 (1964).

[66] *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555, 575-76 (1980) (plurality op. of Burger, J.) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." (*quoting First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)); *Richmond Newspapers*, *supra* at 587 (Brennan, J., concurring) ("the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government").

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. [67]

The First Amendment vigorously protects speech about government and public affairs in part because of concerns that the government will abuse its censorial powers to target speech that it dislikes or that threatens its interests or credibility. Prosecutions that target leaks to the media engage precisely these concerns. The Supreme Court has repeatedly recognized the very real risk—and long history—of such abuse as important factors underlying its free speech jurisprudence.[68] Indeed, the First Amendment takes this threat so seriously that it categorically forbids the government from punishing or prohibiting speech based on its content or viewpoint unless the restriction satisfies the most stringent constitutional scrutiny.[69]

Long experience also demonstrates the special risks posed where government seeks to punish speech that ostensibly threatens national security. From World War I through the early Cold War years, the Court regularly upheld prosecutions for antiwar, communist, and socialist speech. But the consensus judgment of history has deemed those prosecutions poorly justified and the Court's deference to the government undue.[70] The Supreme Court internalized these lessons by 1969, when it announced in *Brandenburg v. Ohio* that a person cannot constitutionally be punished

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[67] *Thornhill v. Alabama*, 310 U.S. 88, 95, 101-02 (1940); *see also Grosjean v. Am. Press. Co.*, 297 U.S. 233, 243, 249-50 (1936).

[68] *See, e.g., Sullivan*, 376 U.S. at 276 ("although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.").

[69] *See, e.g., Texas v. Johnson*, 491 U.S. 397, 410-20 (1989).

[70] *See, e.g.*, Geoffrey Stone, PERILOUS TIMES: FREE SPEECH IN WARTIME 179-207, 403-11 (W.W. NORTON, 2011).

for speech linked to terrorism or to other dangerous activity unless the speech is intended to incite, and likely to incite, imminent, lawless action.[71] The *Brandenburg* Court thus erected a high—nearly insurmountable—bar to prosecutions of speech deemed subversive or threatening. In so holding, the Supreme Court also emphasized the separation-of-powers concerns that lurks in these issues, holding that it is for the courts ultimately to protect the freedom of speech even in the face of security threats.[72]

The Supreme Court has further demonstrated its concern to protect unfettered public discussion and deliberation in cases that emphasize the "chilling effect" of restrictions that are poorly tailored, unpredictable, or overbroad.[73] The Court has repeatedly observed that free speech is harmed not only by unwarranted punishments, but by the self-censorship of those who must decide whether to risk punishment in the face of uncertainty.[74] Speakers may play it safe in the face of vague or far-reaching laws, saying nothing that risks angering powerful members of society. Such concerns are central, for example, to the Supreme Court's decisions conforming state libel laws to constitutional principles. The Court explained that it would rather craft speech

[71] *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969).

[72] *Id*.

[73] *See, e.g., United States v. Alvarez*, 567 U.S. 709, 723 (2012) (explaining that a governmental power to regulate all false speech is so broad that its "mere potential . . . casts a chill"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010) (noting that prolix laws, like vague laws, chill speech due to uncertainty about their meanings and applications); *United States v. Stevens*, 559 U.S. 560, 483-84 (2010) ("Because an overly broad law may deter constitutionally protected speech, the overbreadth doctrine allows a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others.").

[74] *See supra* nn. 46-49 (citing sources).

protections so strong that some defamatory speech will go unpunished, than so weak that "would-be critics of official conduct may be deterred from voicing their criticism."[75]

These concerns are particularly salient here. Rank-and-file government employees such as Mr. Albury can play a crucial role in informing public discussion about the actual activities of government. But they lack the political power of an authorized, high-level official, or the resources of corporate publishers. They are thus vulnerable to the threat of retaliatory disclosures whose content runs counter to an administration's desire to contain embarrassing or otherwise inconvenient truths.

The precedents that best illuminate the public's interest in leaks from government insiders are those addressing the free speech protections due to government employees against termination, discipline, or retaliation. In *Garcetti v. Ceballos*, the Supreme Court explained that "the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion."[76] Indeed, the Court recently affirmed that "speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment."[77]

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[75] *Sullivan*, 376 U.S. at 279.

[76] *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

[77] *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014). To be sure, the Court in the public employee speech cases grants public employers considerable leeway to make disciplinary decisions, and full discretion to do so in response to employee speech that constitutes work product. *Id.* at 2377-78. In Mr. Albury's case, of course, there is no question that the leaks did not constitute work product. More so, the important constitutional values that the Court identified in public employee speech are very much at issue. Finally, it bears observing that the Court in the public-employee speech cases granted public employees some protection even from employment-based discipline. The instant case, of course, involves the far more severe context of prosecution, in which the government acts not as an employer or bureaucratic manager but as a sovereign. *See* Kitrosser,

B. Leaks of Classified Information To The Press Raise These Same First Amendment Concerns

The unique value of public employee speech does not simply disappear when that speech concerns classified matters. To the contrary, the very secrecy imposed on law enforcement and national security activities can heighten the importance of such information to the public, even as the State's interests on the other side of the balance may rise as well. Because Espionage Act prosecutions for leaks to the media have historically been so rare, there is little case law elaborating the extent of the First Amendment's protection in this context. But the cases that have been decided make clear the First Amendment interests presented.[78]

Only one federal appellate court has ruled directly on the constitutionality of prosecuting media leakers under the Espionage Act. In *United States v. Morison*, the U.S. Court of Appeals for the Fourth Circuit upheld such a conviction.[79] While the court found that the conviction should not be reversed on First Amendment grounds, two of the three judges on the panel wrote separately to emphasize that "the first amendment issues raised by [the defendant] are real and substantial and require … serious attention."[80] Indeed, Judge Wilkinson's concurrence elaborated at some length on the First Amendment interests at stake in media leak prosecutions, observing that "The First Amendment interest in informed popular debate does not simply vanish at the invocation of the words 'national security.' National security is public security, not government security from

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Calibrating First Amendment Protections, 6 NAT'L. SEC. J. L. & POL'Y at 440-45 (arguing that the government should have a higher burden to justify leak prosecutions as opposed to employment-based punishment for leaks).

[78] *Cf. McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (holding, in the context of pre-publication review of a former employee's book, that the employee "has a strong first amendment interest in ensuring that CIA censorship of his article results from a *proper* classification of the censored portions.") (emphasis in original).

[79] 844 F.2d at 1068.

[80] *Id.* at 1085 (Philips, J., concurring); *id.* at 1080-81 (Wilkinson, J., concurring);

informed criticism."[81]

Ultimately, the panel agreed that, on the facts of Morison's case where the harm to national security was demonstrable, the First Amendment did not compel reversal of the conviction. But that decision reflected a judgment at the guilt phrase of the trial and, especially, the proper interpretation of the elements of the crime in the Espionage Act. The two concurring opinions strongly suggest that First Amendment considerations may be particularly appropriate at sentencing.

Judge Wilkinson, in particular, accepted the idea that, in determining the permissible scope of the criminal prohibition on leaks, it was appropriate for the courts to provide some amount of deference to the classification judgments of the executive branch. But he reached that conclusion only because he was optimistic that, as in the civil context of public employee speech cases, sources who revealed important information, such as that involving "corruption, scandal, and incompetence in the defense establishment," were unlikely to be prosecuted or convicted, and that if they were, the situation could be "cured through case-by-case [judicial] analysis of the fact situations."[82] Judge Phillips endorsed the view that such leak prosecutions engage serious First Amendment concerns and accepted Judge Wilkinson's "general estimate" that leaks exposing important news would not be punished, "the critical judicial determination forced by the first amendment arguments advanced in this case."[83]

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[81] *Id.* at 1081 (Wilkinson, J., concurring).

[82] *Id.* at 1083-84 (Wilkinson, J., concurring); *cf. Lane*, 134 S. Ct. at 2380 ("The importance of public employee speech is especially evident in the context of this case: a public corruption scandal"); *Hunter v. Mocksville*, 789 F.3d 389, 401 (4th Cir. 2015) (holding that in public employment cases, "an employee's speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency, is protected") (internal citation omitted).

[83] *Id.* at 1085-86 (Phillips, J., concurring). A subsequent district court confirmed that *Morison* does not preclude First Amendment defenses in Espionage Act prosecutions for leaking

Morison thus not only leaves the door open for case-by-case constitutional challenges to Espionage Act prosecutions, it flags important First Amendment considerations that belong in the mix at sentencing. Indeed, the recent spate of leak prosecutions—including this one—that target disclosures of important, newsworthy information suggest that Judge Wilkinson's optimism about the substantive reach of the Espionage Act may have been misplaced. Leaks of important news *are* being prosecuted. But this only serves to emphasize that the First Amendment interests that he and Judge Phillips recognized should be factored into the decision about what punishment to impose at sentencing.

IV. THIS COURT'S SENTENCE SHOULD REFLECT THE PUBLIC VALUE OF MR. ALBURY'S DISCLOSURES AND THE FUTURE IMPLICATIONS OF THE PENALTY IMPOSED

"Both Congress and the Sentencing Commission [] expressly preserved the traditional discretion of sentencing courts to 'conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.'"[84] Even within the Guidelines rubric, this Court considers whether any circumstances warrant departures from the guidelines range appropriate for a "heartland" offense,[85] and, ultimately, whether the "circumstances of the offense" create a "need" for Guidelines sentencing at all, requiring consideration of whether Guidelines punishment is "just" or "necessary to protect the public from further crimes of the defendant."[86]

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classified information. *Rosen*, 445 F. Supp. 2d at 630. That court cited Judge Wilkinson's concurrence to support the broader point that the mere invocation of "national security" or "government secrecy" does not foreclose a First Amendment inquiry. *Id.* at 630 (citing *Morison*, 844 F.2d at 1081 (Wilkinson, J., concurring)).

[84] *Pepper*, 562 U.S. at 489 (quoting *Tucker*, 404 U.S. at 446).

[85] *United States v. Washington*, 515 F.3d 861, 866 (8th Cir. 2008); *United States v. Chase*, 451 F.3d 474, 482 (8th Cir. 2006).

[86] 18 U.S.C. § 3553(a)(1) & (2).

Mr. Albury pleaded to conduct well outside the "heartland" of the Espionage Act, which is targeted at disclosures by spies, defectors, and enemies. Moreover, the circumstances of his offense reveal no "need" to "protect the public" from future offenses by him. Indeed, Mr. Albury has already lost his access to any classified information along with his job and security clearance.

To be sure, Mr. Albury has admitted that he is guilty of violating the Espionage Act. But that reflects more on the indiscriminate breadth of the statute—as construed by the government and a tiny handful of cases—than it does than the gravity of Mr. Albury's crime. Indeed, the statute, as construed by the government, does not distinguish between disclosures that actually inflict grave national security harm and disclosures where classification is marginal or arguably improper, or disclosures that offend no valid government purpose, or that affirmatively protect the public by exposing government misconduct or illegality.

As such, in fixing Mr. Albury's sentence this Court can and should be attentive to the particulars of his disclosure and the potential impact of his punishment on First Amendment interests. Among other factors, the Court should properly consider (1) the strength of the decision to classify the information in question and any actual sensitivity of that information the government may present; (2) how and to whom the information was disclosed – *i.e.* selectively to the responsible press, not indiscriminately to the public; (3) whether and to what extent reasonable arguments could be made that the information Mr. Albury disclosed reveals illegal government activity; (4) whether alternative means of disclosure were available, were exhausted, or would have been effective; and (5) the extent to which the disclosure in fact prompted public deliberation, debate, or action.[87]

[87] *See generally* Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 WM. & MARY L. REV. 1221, 1264-75 (2015).

These factors warrant consideration here. First, there are serious concerns that Mr. Albury's disclosures should not have been classified and present no compelling reasons for secrecy.[88] The FBI's rules for using NSLs to target journalists, for example, which implicate the press's own First Amendment interests, contravene the Department of Justice's public guidelines about media-related investigations and "should never have been secret in the first place."[89] As a former FBI agent said of Albury's disclosures:

> Most of them were FBI policy documents, and if we live in a democracy, we can't have secret government policies . . . Clearly, having released them hasn't put our national survival at peril. All it has done is provide the public with more information about how the FBI conducts its business, and clearly there was evidence of abuse, particularly in a lot of the documents about targeting immigrants, targeting journalists.[90]

Second, Mr. Albury did not disclose information to an enemy power, or indiscriminately to the public, but to a highly-regarded news organization that "redacted the sections that could be used to identify individuals or systems for the purpose of causing harm," and presented the remaining information to serve the public's interest: "because we believe the public has a right to know how the U.S. government's leading domestic law enforcement agency understands and wields its enormous power."[91]

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[88] Because much (if not all) of the disclosed information apparently remains classified, the only public indicia of their content are somewhat vague references in the felony information, search warrant, and plea agreement in this case, and more specific discussions in news outlets. In describing Mr. Albury's disclosures, therefore, we rely on news reports. *See, e.g.*, *infra* nn. 93-95 and accompanying text.

[89] Timm, *Forget Comey and McCabe*, *supra* n. 60.

[90] Alice Speri, *The FBI's Race Problems Are Getting Worse. The Prosecution of Terry Albury is Proof* (THE INTERCEPT, April 21, 2018), https://theintercept.com/2018/04/21/terry-albury-fbi-race-whistleblowing/ (quoting former FBI agent Michael German).

[91] Glenn Greenwald & Betsy Reed, *The FBI's Secret Rules* (THE INTERCEPT, Jan. 31, 2017), *available at* https://theintercept.com/series/the-fbis-secret-rules/about/.

Third, reasonable arguments could amply be made that Mr. Albury's disclosures shed light on unlawful government conduct. Indeed, they already have been made, including about unlawful FBI profiling, "controversial tactics the agency uses when investigating political groups and religious and ethnic minorities,"[92] and dissonance with the FBI's public commitment to avoiding racial and religious profiling.[93] This dissonance and these troubling concerns never would have been, and were not, made public without Mr. Albury's disclosures.

Fifth, the ensuing public conversation did real and immediate good in the community Mr. Albury's former field office served:

> Members of Minneapolis' large Somali community – a major target of FBI's efforts there – told The Intercept that the documents Albury was accused of leaking helped shed light on the profiling and harassment many in that community regularly experience at the hands of the FBI, and said they were grateful for the former agent's courage in making them public.[94]

This Court should also craft a sentence that reflects the grave First Amendment concerns that are raised when individuals are prosecuted for speaking to the press on matters of serious public importance, and the potential future impact of the sentence imposed here. As recounted already, these First Amendment concerns include the public's constitutionally-protected interest in receiving and debating information about the government's activities,[95] as well as the threat to

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[92] Timm, *Forget Comey and McCabe*, *supra* n. 60.

[93] Cora Currier, *Despite Anti-Profiling Rules, the FBI Uses Race and Religion When Deciding Who to Target* (The Intercept, Jan. 31, 2017), https://theintercept.com/2017/01/31/despite-anti-profiling-rules-the-fbi-uses-race-and-religion-when-deciding-who-to-target/; *see also* Speri, *The FBI's Race Problems Are Getting Worse*, *supra* n. 91 (noting public concern about instances of FBI profiling and the Brennan Center Report's conclusion that FBI community-outreach initiatives "had morphed into intelligence-gathering efforts").

[94] Speri, *The FBI's Race Problems, supra* n. 91.

[95] *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (citing "numerous" Supreme Court decisions acknowledging the right to receive speech); *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 386–87 (1998)

the press's "important role in the discussion of public affairs"[96] that would result from unbridled prosecutorial latitude to selectively target leaks of any classified information. This Court should impose punishment that is calibrated to the free speech interests at stake.

Indeed, the Supreme Court itself has repeatedly considered the First Amendment interests of the press and public to limit collateral damage from punishing particular speakers. In the classification context, the Court in *Snepp v. United States* considered the appropriate civil penalty to impose on a former CIA employee who published a book without first submitting it to the CIA for pre-publication review and potential censorship. The Court decided in the government's favor but emphasized the relative narrowness of the sanction imposed—a constructive trust on profits from the book—observing that the remedy "deals fairly with both parties by conforming relief to the dimensions of the wrong."[97] Even in the civil-defamation context, the Supreme Court refused to permit punitive damages for defamation claims without heightened constitutional showings, because remedies should "reach no farther than is necessary to protect the legitimate interest involved" – there, the "competing interest grounded in the constitutional command of the First Amendment."[98]

(Rehnquist, J., concurring) ("Our decisions have concluded that First Amendment protection extends equally to the right to receive information").

[96] *Mills v. State of Ala.*, 384 U.S. 214, 219 (1966).

[97] *Snepp v. United States*, 444 U.S. 507, 515-16 (1980) ("[T]he remedy . . . is tailored to deter those who would place sensitive information at risk. And since the remedy reaches only funds attributable to the breach, it cannot saddle the former agent with exemplary damages out of all proportion to his gain.")

[98] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (holding that states may not permit recovery of punitive damages without heightened constitutional showings: "We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment."). *See also* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 1002-16 (2012) (describing examples of "penalty-sensitive . . . analysis" in several areas of free speech doctrine).

This lesson speaks even more powerfully outside the civil-damages context. Criminal punishments obviously threaten free speech interests to a greater degree than civil damages. Indeed, the Supreme Court has cautioned that "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful" speech,[99] and that the mere threat of criminal prosecution can exercise a forbidden prior restraint on protected speech.[100]

The Supreme Court has "long eschewed any 'narrow, literal' conception of the [First] Amendment's terms,"[101] and courts accommodate the public's interest in the free flow of information in a wide range of doctrinal contexts. They relax constitutional and third-party limitations on standing.[102] They alter pleading requirements.[103] They limit punitive damages.[104] And, recognizing that receiving information is "necessary to the enjoyment of other First Amendment rights," they constrain judges' authority to bar the press from their courtrooms "to

[99] *Reno v. ACLU*, 521 U.S. 844, 872 (1997); *see also Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 896 (2010) ("Laws enacted to control or suppress speech may operate at different points in the speech process," including "subjecting the speaker to criminal penalties" (citing *Brandenburg*, 395 U.S. at 445)).

[100] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (threat of prosecution was unconstitutional prior restraint); *see also ACLU v. City of Pittsburgh*, 586 F. Supp. 417, 423 (W.D. Pa. 1984) (same); *Pilchesky v. Miller*, 2006 WL 2884445 (M.D. Pa. Oct. 10, 2006) (same).

[101] *Globe Newspaper Co. v. Superior Court for Norfolk Cnty*., 457 U.S. 596, 604 (1982) ("[W]e have long eschewed any 'narrow, literal conception' of the Amendment's terms").

[102] *City of Lakewood v. Plain Dealer Pub. Co*., 486 U.S. 750, 759 (1988) (because requiring advance authorization for expression "constitutes a prior restraint and may result in censorship," plaintiffs may bring facial challenges to statutes granting such discretion "even if the discretion and power are never actually abused."); *Epona v. Cnty. of Ventura*, 876 F.3d 1214, 1220 (9th Cir. 2017) (reversing dismissal of facial challenge to prior restraint because parties with interests affected by unconstitutional restrictions on third parties have standing to challenge them).

[103] *Biro v. Conde Nast*, 807 F.3d 541, 545 (2d Cir. 2015), *cert. denied* 136 S. Ct. 2015 (2016) (recognizing heightened defamation-pleading requirements in light of "the First Amendment interests at stake").

[104] *Gertz*, 418 U.S. at 349.

ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one."[105]

These principles have no less relevance here, where the Court has largely untrammeled discretion to determine what sentence is just. Accordingly, *amici* respectfully urge the court to closely consider the benefits to the public and to democratic deliberation that resulted from Mr. Albury's disclosure to the press, as well as the damage that a severe sentence would inflict on the constitutionally-protected interest in the flow of information to the citizenry on matters of public importance.

Dated: October 4, 2018

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[105] *Globe*, 457 U.S. at 604 (the First Amendment is "broad enough to encompass those rights" that are "necessary to the enjoyment of other First Amendment rights.").