# Chapter 43 - Restraining Unauthorized Disclosures of National Security Information

## 1st Amendment

### Right to speak

### Right to publish

### Does not preempt other laws such as espionage laws, so the question becomes can you be prosecuted for speaking.

#### How does this affect your speech rights?

## Only the government, not private employers or individuals

### Can NDA signed by Trump campaign workers be enforced for information they learn working for the government?

## Classification process

### All executive orders

### No statutory standards for reviewing classification decisions

### Will the courts look behind the classification of material?

## What is a security clearance?

### What is involved in getting one?

### Are the discretionary, i.e., how much due process to you get if you are denied one?

## Government employees or others with authorized access

### Whistle blowers

### Leakers

#### Is there a specific leaker’s exception in the law?

#### “authorized”? Trump talking to the Russians, from the supplement?

#### Is there implicit declassification?

#### Who would prosecute leakers?

##### DOJ

### Writers?

### Spies?

## Remedies

### Review Agreement – 1359

### Does this include talking about birdwatching done while a CIA employee?

### What if you get the classified information from an non-classified source?

#### Still applies

### Writers - Contract – Snepp/Marchetti/Odum (Navy Seal from supplement)

#### grab royalties

#### what about the publisher? (See pentagon papers next class)

### Criminal – Espionage Act/theft?

#### Review statutes

#### Did congress intend the Espionage Act to apply to the press? – top of page 1377

## Persons without legal access who are given classified information or who conspire to get it.

### Journalists

### Publishers

### Foreign agents

## Only Espionage Act or conspiracy to commit theft

## Why do administrations authorize “leaks” of classified information?

### What were examples from *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975)?

### What is the legal effect of leaking classified information?

## United States v. Marchetti, 466 F.2d 1309 (CTA4 1972)

### Who was Marchetti?

### What was his contractual agreement with the CIA?

### What did he do to trigger this case?

### What did the District Court order?

### What does it mean to say that the 1st Amendment prevents prior restraint?

#### Does that mean you cannot be punished post-publication?

### Why use a contract when you can just threat to prosecute them for leaking classified information?

### Can the contract abrogate the 1st Amendment?

#### What about a contract with a private employer?

### What must the CIA do to avoid the prior restraint problem, i.e., can they just sit on the request to clear a publication?

### If the CIA will not approve publication, is there judicial review?

### What will be reviewed?

### What could be grounds for reviewing whether a classification decision is proper?

### Who has the burden of requesting judicial review?

### Was the injunction upheld?

### Would the concurrence allow review of the classification decision?

### By what standard?

## Snepp v. United States, 444 U.S. 507 (1980)

### Who did Snepp work for?

### What did he do to trigger this case?

### What did Snepp promise the CIA in this employment contract?

### Did he comply with this?

### Did the district court find he violated his agreement?

### Did the court find that the publication had caused harm?

### What remedy did the court impose?

### Did the District Court find that the book contained classified information?

### Based on this, how did the Appeals Court modify the remedy?

### Why no punishment?

### What are the ways that publishing unclassified information might threaten the security of the United States?

#### Could it hurt morale?

#### What about trust by informants?

#### What is the mosaic theory?

### Why can’t the CIA just sue him for damages, rather than having the court impose a constructive trust?

### What are other advantages of the constructive trust?

### Did the United States Supreme Court restore the trust?

### Does the dissent accept the theory that publishing unclassified information can hurt the US, and thus could be banned by contract?

### Why do you think the dissent is comfortable with forcing the government to prosecute if it thinks the publication causes injury to the US?

### Notes

#### Could the constructive trust reach the publisher’s profits?

##### Would this be more effective?

##### Is there a 1st amendment right to be paid for publication?

#### What about movies and television?

#### What is the argument against allowing publication of public information that the agent had access to?

## Lifetime Prepublication review

### What does National Security Decision Directive 84 (NSDD 84) require?

### How many people have signed it?

### Review the provisions of the Classified Information Nondisclosure Agreement

### What is the statutory support for this contract?

#### Can you identify the source of the President’s authority to promulgate NSDD 84 to cover federal officials and employees other than CIA and NSA personnel?

#### What about civilian contract employees?

### Does any First Amendment right exist with respect to sensitive information that would not have been gained but for the employment?

### Do the agencies always comply with the 30 day review window?

### What if the information has time value, such as John Bolton’s testimony?

### What about telling stories at the bar or testifying to Congress – does that require pre-publication review?

### What happened when Congress attempted to prevent spending money (appropriations rider) to this these agreements when they applied to providing information to Congress?

## B. RESTRAINING LEAKS BY ESPIONAGE PROSECUTIONS

### What do the espionage laws criminalize?

### What does “deliver to a foreign government” mean in the Internet world?

### What is the significance of the Public Money, Property or Records law?

#### Why might physical property be involved?

#### What was the potential violation of this law in the Manning case?

### United States v. Morison, 604 F. Supp. 655 (D. Md.), aff’d, 844 F.2d 1057 (4th Cir. 1985).

#### Was he a government employee?

#### What was Morison prosecuted for selling?

#### Who did he sell it to?

#### Was he accused of being a spy?

### United States v. Rosen, 2006 445 F. Supp. 2d 602, as amended, 2006 WL 5049154 (EDV 2006)

#### Who did Rosen and Weissman work for?

#### What sort of organization is this?

#### Why might it want to spy on the US?

#### Who did Franklin work for?

#### Does he have a security clearance?

#### What happened to Franklin before this case?

#### What were they indicted for?

#### What were defendant’s constitutional arguments against the law?

#### Did Rosen and Weissman get access to classified information?

#### Were they authorized to have this classified information?

#### Did they pass information to a foreign official?

#### Is this illegal under the applicable espionage laws?

#### How did they get it?

##### Did they pay bribes or set honey pots?

##### Did they do anything different than journalists do?

#### What is there due process constitutional challenge?

#### Why do they say the statutes are vague?

#### What is the intent requirement?

#### Why does this eliminate the vagueness issue?

#### What is defendants’ novelty argument?

##### Is this a version of the one bite rule from dog law?

#### Why doesn’t the court buy the one bite rule?

#### What does the court think about argument that the law is not intended to punish leaks?

#### What does *United States v. Morison*, 604 F. Supp. 655, appeal dismissed, 774 F.2d 1156 (4th Cir. 1985) tell us about the theory that not using the law means that it does not apply.

#### What was the defendant’s 1st amendment argument in this case?

#### What is the government position on 1st Amendment issues and espionage laws?

#### What dos Mills v. Alabama, 384 U.S. 214, 218 (1966) tell us about 1st Amendment policy?

#### What does this court say about whether secrets can still get 1st Amendment protections?

#### So, we get a balancing test between the 1st Amendment and nation security. What goes on the defendants’ side of the scale from the *Pentagon Papers* case?

#### How does the government claim that these secrets are different from those in the *Pentagon Papers* case?

#### What is the “the appearance of confidentiality so essential to the effective operation of our foreign intelligence service”?

#### How does the court decide if §793 is a chainsaw or a scalpel?

#### When reporters publish information, is it willful?

#### Who decides if it is harmful?

#### Will the government admit that it is not harmful?

##### Does this really narrow 739?

#### Why is there no question that government employees entrusted with classified information have no 1st Amendment right to disclose it?

##### Is this really a 1st Amendment issue?

##### What is the difference between government as regulator and government as employer?

#### How are these defendants different from Morison, Marchetti or Snepp?

#### What is defendants “holder in due course” notion of the limits of espionage acts?

#### Why does the very wording of the court’s statement of this position tell you that defendants are about to lose?

#### What is the court’s traditional slam dunk you lose example?

#### Are defendants charged with this sort of violation?

#### What does the court tell us about the potential for prosecuting the New York Times for publishing the Pentagon Papers?

#### How does this undermine the defendants claim that espionage acts do not reach reporters?

#### What is the real scienter limitation?

#### So what will the government have to prove about defendants’ state of mind as an element of the prosecution?

#### Will this be what these defendants believed, or what a reasonable defendant would have believed?

#### What does this matter?

##### What do most whistle blowers believe?

##### What would you expect these defendants to believe if they are acting as Israeli spies?

#### Were defendants eventually prosecuted?

#### Think the result might have been different if they had been working for the Russian lobby

### Notes

#### How can the government bully reporters into giving up leakers?

##### Why do some people think the reporter was happy to go to jail in this case?

#### Do you think the defendants fairly claimed surprise because, with the single exception of Morison, the Espionage Act had never been applied except in ‘‘classic espionage cases’’?

##### What would you have told them if you were their lawyer?

#### National Defense Information was originally defined in times of traditional war, so it referred to things like troop movements. How does modern asymmetric warfare make this definition less useful?

##### Why is NDI a much broader notion today?

##### Does this undermine the argument that 739 deals with a narrow slice of information?

#### Does the espionage act punish just having unauthorized access to classified documents?

#### Is there evidence on whether congress historically meant to punish leaks published by reporters?

#### Do you think this applies to the 9/11 Congress?

#### Should motives matter?

#### How is leaking theft - what is the fiduciary duty law on employees leaking or selling employer confidential information?