RECENT CASES

CONSTITUTIONAL LAW — DUE PROCESS AND FREE SPEECH — DISTRICT COURT HOLDS THAT RECIPIENTS OF GOVERNMENT LEAKS WHO DISCLOSE INFORMATION "RELATED TO THE NATIONAL DEFENSE" MAY BE PROSECUTED UNDER THE ESPIONAGE ACT. — *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006).

Although there is little dispute that "the societal value of speech must, on occasion, be subordinated to other values and considerations,"[1] much uncertainty surrounds the government's right to criminally prosecute lobbyists, members of the press, and others who traffic in information deemed harmful to national security.[2] This uncertainty stems largely from the "incomprehensible"[3] nature of the espionage statutes,[4] in particular 18 U.S.C. § 793(e).[5] While no member of the press has yet been prosecuted under these statutes, recently, in *United States v. Rosen*,[6] the United States District Court for the Eastern District of Virginia held that recipients of government leaks who disclose information "related to the national defense" to those "not entitled to receive it" may be prosecuted under the Espionage Act. By misconstruing precedent, the *Rosen* court reached the wrong result. Section 793(e), as applied to situations in which First Amendment rights are at stake, is unconstitutionally vague. Although the government undoubtedly has an interest in ensuring national security — an interest that might sometimes entail prosecuting transmitters and recipients of information whose behavior implicates the First Amendment — the Espionage Act, as written, is an unconstitutional vehicle through which to pursue such an interest.

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[1] Dennis v. United States, 341 U.S. 494, 503 (1951).

[2] *See, e.g.*, Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311, 327–28 (1974) ("Underlying the Pentagon Papers case was a largely unexplored issue of constitutional law: To what extent does the governmental interest in national security justify the suppression of speech relating to national security matters?").

[3] Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 934 (1973).

[4] 18 U.S.C. §§ 793–798 (2000).

[5] Section 793(e) contains sweeping language; in brief, it imposes criminal penalties for possessing "information relating to the national defense" and "communicat[ing]" or "retain[ing]" that information. 18 U.S.C. § 793(e); *see also* Edgar & Schmidt, *supra* note 3, at 937 (discussing the provision's "apparent reach").

[6] 445 F. Supp. 2d 602 (E.D. Va. 2006).

Steven Rosen and Keith Weissman were employed by the American Israel Public Affairs Committee (AIPAC),[7] a lobbying group that focuses on foreign policy issues of interest to Israel.[8] Between 1999 and 2004, Rosen and Weissman obtained information from various government officials[9] and transmitted this information to members of the media, officials of foreign governments, and constituents of AIPAC.[10] The government charged Rosen and Weissman with conspiring to transmit information relating to the national defense to those not entitled to receive it, in violation of 18 U.S.C. §§ 793(d) and (e).[11] Rosen and Weissman filed a pretrial motion to dismiss the charges.[12]

The United States District Court for the Eastern District of Virginia, in a memorandum opinion written by Judge Ellis, denied the defendants' motion to dismiss. After conducting a brief review of the history of the espionage statutes and their application,[13] and rejecting the defendants' statutory argument,[14] Judge Ellis examined the defendants' constitutional arguments. The defendants first argued that the government's application of §§ 793(d) and (e) was unconstitutionally vague, in violation of the Fifth Amendment's Due Process Clause, in two respects: in failing to define adequately both what kind of information is encompassed by the phrase "information relating to the national defense," and which individuals are "not entitled to receive" that information.[15] Responding to the first objection, Judge Ellis concluded that while the phrase "information relating to the national defense" seems overbroad, judicial precedent has limited the phrase by requiring the government to prove both that the information is "closely held by the government" and that the information is the type "that could

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[7] Rosen was AIPAC's Director of Foreign Policy Issues, and Weissman was AIPAC's Senior Middle East Analyst. *Id.* at 608.

[8] *Id.* at 607–08.

[9] Lawrence Franklin was one of these government officials and was a codefendant before pleading guilty. *Id.* at 608 & n.3.

[10] *Id.* at 608–10. These facts were taken to be true for the purpose of the Rule 12(b) motion to dismiss. *Id.* at 607 n.2.

[11] The indictment charged Rosen and Weissman under § 793(g), which is the conspiracy charge for two or more persons violating provisions of §§ 793(a)–(e). *Id.* at 607. Rosen was also charged with "aiding and abetting the transmission of information relating to the national defense to one not entitled to receive it, in violation of 18 U.S.C. § 793(d)." *Id.*

[12] *See id.*

[13] *Id.* at 611–14.

[14] Defendants argued that the word "information," as used in the phrase "information relating to the national defense" in § 793, should be construed to include only tangible information, not intangible, oral information, as was allegedly conveyed in *Rosen*. *Id.* at 614. Judge Ellis concluded that any absurdity resulting from construing "information" to include oral information was the result of "inadvertence and careless drafting, and not an indication that the drafters intended to restrict the prohibition of the first clause to tangible items." *Id.* at 615–16.

[15] *Id.* at 617.

harm the United States" if disclosed.[16] So limited, the phrase passes constitutional muster.[17] As for the second objection, the court reasoned that the phrase "entitled to receive" incorporates the Executive Order establishing a uniform classification system,[18] thus providing the necessary constitutional clarity.[19]

Judge Ellis also rejected the defendants' argument that the oral nature of the information allegedly exchanged rendered the statute, as applied to the defendants, unconstitutionally vague.[20] The court held that any vagueness resulting from the oral nature of the information was cured by the statute's rigorous scienter requirements.[21] Any deficiencies in the defendants' knowledge due to the information's oral nature — such as not knowing that the information was classified — would serve as a scienter defense to a violation of the statute.[22]

The court next turned to the defendants' First Amendment arguments. Judge Ellis first noted that just as an invocation of "national security" does not foreclose a First Amendment analysis, an invocation of the First Amendment does not provide limitless protection to speech.[23] Central to the analysis is the "relationship to the government of the person whose First Amendment rights are implicated."[24] If a person has access to information by virtue of his governmental position, Judge Ellis reasoned, there is little controversy that his speech can be constitutionally limited.[25] However, Rosen and Weissman were not government employees and were prosecuted for their own acts of disclosing information.[26] Judge Ellis, while admitting that the "authority addressing this issue is sparse," concluded that "both common sense and the relevant precedent point persuasively to the conclusion that the government can punish those outside of the government for

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16 *Id.* at 618; *see also id.* at 620–22 (discussing these two requirements).

17 *Id.* at 622.

18 This system, as set forth in Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003), *amending* Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995), includes three categories: top secret, secret, and classified. *Id.* §§ 1.2(a)(1)–(3), 68 Fed. Reg. at 15,315–16; *see also Rosen*, 445 F. Supp. 2d at 622.

19 *See Rosen*, 445 F. Supp. 2d at 622–23.

20 *See id.* at 623–25.

21 *See id.* at 624–27. The government must prove that the defendants willfully committed the prohibited conduct. *See id.* at 625. Further, when the information exchanged involves intangible information, the government must prove that the defendants had reason to believe the information "could be used to the injury of the United States or to the advantage of any foreign nation." *Id.* at 625–26 (quoting 18 U.S.C. §§ 793(d), (e) (2000)) (internal quotation mark omitted).

22 *See id.* at 627. Judge Ellis also rejected an argument that application of the statute in situations like this "is so novel and unprecedented that it violates the fair warning prong of the vagueness doctrine." *Id.* at 627–29.

23 *See id.* at 629–34.

24 *Id.* at 635.

25 *Id.* at 635–36.

26 *Id.* at 636.

the unauthorized receipt and deliberate retransmission of information relating to the national defense."[27] Looking to dicta from *New York Times Co. v. United States*,[28] the court found precedential support for the notion that applying § 793(e) to those outside the government does not offend the Constitution.[29] Judge Ellis emphasized, however, that this conclusion applies only when national security is at risk; the Espionage Act may not be used to limit criticism of incompetence or corruption.[30]

Judge Ellis's opinion stands in the wake of more than half a century of judicial efforts to impose constitutionally acceptable limitations on various incarnations of the espionage statutes. The *Rosen* court, however, both misconstrued and overgeneralized this precedent with respect to § 793(e). While it is true that courts have held that the phrase "related to the national defense," in combination with some kind of scienter requirement, is not unconstitutionally vague, they have always done so in contexts that do not implicate the First Amendment. In a case such as *Rosen* — in which the alleged criminal activity involved not just traditional espionage, but also behavior that implicates the very core of the rights the First Amendment was designed to protect — § 793(e) fails to achieve the higher level of clarity mandated by the vagueness doctrine in a First Amendment context.[31]

The *Rosen* court extrapolated broad generalizations from several cases, ignoring the specific contexts in which those cases were decided. First, Judge Ellis relied heavily on *Gorin v. United States*[32] to conclude that "related to the national defense" is not unconstitutionally vague.[33] Indeed, in that case, the Supreme Court did reject a vagueness challenge, accepting the government's argument that "[n]ational defense" is "a generic concept of broad connotations, referring to the

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[27] *Id.* at 637.

[28] 403 U.S. 713 (1971) (per curiam) (holding that the government failed to meet its heavy burden to justify injunctive relief against publication).

[29] *Rosen*, 445 F. Supp. 2d at 638–39.

[30] *Id.* at 639. Judge Ellis rejected the defendants' First Amendment right to petition and overbreadth arguments for essentially the same reasons he rejected their other First Amendment arguments. *See id.* at 641–43. Judge Ellis also dismissed Rosen's separate motion to dismiss the aiding and abetting charge against him on grounds that the facts alleged are legally insufficient to support the indictment. *See id.* at 643–45.

[31] The due process vagueness analysis is stricter when influenced by First Amendment concerns. *See, e.g.*, Grayned v. Rockford, 408 U.S. 104, 109 (1972) ("[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'" (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 287 (1961))); GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 122 (2d ed. 2003) ("The vagueness doctrine has special bite in the first amendment context . . . .").

[32] 312 U.S. 19 (1941). Gorin, a citizen of the former USSR, was prosecuted for giving information to his government. *Id.* at 22–23.

[33] *See Rosen*, 445 F. Supp. 2d at 618–20.

military and naval establishments and the related activities of national preparedness."[34] Yet this holding did not address the statutory provision in question in *Rosen*. Rather, it addressed the predecessor of what is currently 18 U.S.C. § 794(a), a provision that criminalizes what is usually considered "traditional espionage": delivering national defense information to a foreign government.[35] Thus, while the Court rejected the notion that the phrase "related to the national defense" was unconstitutionally vague, it did so in a context — a foreign citizen transferring information to his government — in which the defendant's First Amendment rights were not implicated.[36]

Judge Ellis also relied on *United States v. Morison*[37] in holding that the phrase "relating to the national defense" is not unconstitutionally vague.[38] In that case, however, the court made special note that its holding was only "as applied to the defendant," an analyst for the Navy.[39] Thus, again, the *Rosen* court ignored the specific context of the case being cited: the defendant in *Morison* was a government employee transferring confidential information to a foreign newspaper.[40] As most recently reiterated by the Supreme Court in *Garcetti v. Ceballos*,[41] the First Amendment offers limited protection to government employees,[42] protecting only their right "to speak as a citizen addressing matters of public concern."[43] Accordingly, the *Morison* court explicitly found that the defendant's conduct in that case did not implicate the First Amendment.[44]

The *Rosen* court thus reached the conclusion that the phrase "related to the national defense" is constitutionally acceptable based on precedent that addressed its constitutionality only in contexts that did

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[34] *Gorin*, 312 U.S. at 28 (internal quotation mark omitted).

[35] Section 794(a) prohibits transmission of such information "to any foreign government, or to any faction or party or military or naval force within a foreign country." 18 U.S.C. § 794(a) (2000).

[36] *See, e.g.*, Thomas I. Emerson, *National Security and Civil Liberties*, 9 YALE J. WORLD PUB. ORD. 78, 87 (1982) ("Espionage, although it involves conduct that resembles speech, has never been thought to be covered by the First Amendment or to have any degree of First Amendment protection.").

[37] 844 F.2d 1057 (4th Cir. 1988).

[38] *See Rosen*, 445 F. Supp. 2d at 613.

[39] *Morison*, 844 F.2d at 1073.

[40] *See id.* at 1060–61.

[41] 126 S. Ct. 1951 (2006).

[42] *See id.* at 1958 ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.").

[43] *Id.* at 1957.

[44] *See Morison*, 844 F.2d at 1070. The only other case that Judge Ellis relied on to a significant extent was *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), which did not address the constitutionality of the phrase "related to the national defense." *Truong* simply held that the phrase was not limited to military matters. *Id.* at 917–18.

not implicate First Amendment rights. Missing this crucial distinction, Judge Ellis failed to conduct a proper analysis.

As Judge Ellis noted, the basic standard for vagueness is provided by the Fifth Amendment's Due Process Clause.[45] However, the court disregarded the higher level of scrutiny for vagueness that is required when the First Amendment is implicated;[46] as the Supreme Court has stated, "[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts."[47]

Specifically, in vagueness cases that implicate the First Amendment, the "Court's method is often to set up examples of patently privileged activity which could be read to fall within the challenged law. . . . [L]ack of certainty arises *when the man of ordinary intelligence tries to guess not the literal scope but the permissible scope*."[48] This heightened standard is appropriate because First Amendment rights are highly context-dependent,[49] making it exceptionally difficult to ascertain whether particular speech is constitutionally protected. As a result, overbreadth concerns[50] necessarily inform the vagueness analysis in First Amendment contexts;[51] particularly, the concern is that when the First Amendment is implicated, the effect of a vague statute is to severely chill protected speech,[52] an outcome that is inconsistent with constitutional guarantees.[53] Therefore, the proper analysis

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[45] *See Rosen*, 445 F. Supp. 2d at 617.

[46] *See, e.g.*, Grayned v. Rockford, 408 U.S. 104, 109 & n.5 (1972) (explaining the special import of the vagueness doctrine in a First Amendment context); *see also* Jonathan Bloom, *A Funny Thing Happened to the (Non)Public Forum*, 62 BROOK. L. REV. 693, 715 (1996) ("The Supreme Court repeatedly has emphasized that the vagueness doctrine applies with particular force in relation to regulations of constitutionally protected speech.").

[47] Smith v. Goguen, 415 U.S. 566, 573 (1974).

[48] Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 874 (1970) (emphasis added).

[49] *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968) (noting that "[b]ecause of the enormous variety of fact situations" that may involve public employees criticizing their superiors, it is not "appropriate or feasible to attempt to lay down a general standard" to gauge First Amendment protection).

[50] "[T]he [overbreadth] doctrine emphasizes the need to eliminate an overbroad law's deterrent impact — or 'chilling effect' — on protected primary activity." Note, *supra* note 48, at 853.

[51] *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 359 n.8 (1983) ("[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines."); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 857 (1991) ("[V]agueness, in the First Amendment context, is best analyzed as a subcategory of overbreadth, and . . . overbreadth principles should govern vagueness issues.").

[52] *See, e.g.*, STONE ET AL., *supra* note 31, at 122 ("[V]ague laws, like overbroad laws, may have a significant chilling effect and may invite selective enforcement.").

[53] *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere.").

is one that is mindful of both the difficulty of knowing the permissible scope of a statute and the chilling effect that any such uncertainty might have on protected speech.[54]

Because the defendant's actions in *Rosen* — the dissemination of information to the media[55] about the conduct of government by persons not associated with the government — cut to the very heart of the First Amendment's guarantees,[56] the court should have applied this more rigorous test for vagueness.[57] And under this test, the Espionage Act fails to pass constitutional muster. Leaving aside the vagueness added by the word "related," the phrase "national defense" is, by itself, insufficient to serve as the basis of an espionage statute's applicability in First Amendment contexts, for the concept of "national defense" necessarily implicates the rights protected by the First Amendment:

> [O]ur military establishment exists for the purpose of defending the United States, and "the United States" means not just a certain territory and the physical well-being of its inhabitants, but a political system whose core is the freedom guaranteed by the First Amendment. . . . The Constitution contemplates that the people will oversee, criticize and finally control the operations of our government, of which national defense is of course a part. The people obviously cannot do this without access to the facts. . . . This basic democratic control is as important to the national security as the preservation of the most highly valued military secrets.[58]

The term "national defense" is thus a deeply complex concept that implicates the same rights it is invoked to repress. Even combined with the statute's various scienter requirements,[59] a man of ordinary intelligence could not reasonably know the permissible scope of this statute,

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[54] Indeed, the more stringent nature of the vagueness test in First Amendment contexts is demonstrated by the fact that a vague statute, like an overbroad one, can be declared facially invalid and not merely unconstitutional as applied. *See* Fallon, *supra* note 51, at 904.

[55] If transmitting information to foreign officials were the only charge, precedent would support the notion that § 793(e) is constitutionally clear. *See, e.g.*, Gorin v. United States, 312 U.S. 19 (1941) (rejecting a vagueness challenge involving the transmission of information to a foreign official). But the allegations also included transmitting information to the media, *see Rosen*, 445 F. Supp. 2d at 609, behavior implicating the First Amendment and thus not addressed by precedent.

[56] *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

[57] The *Rosen* court itself admitted that "the defendants' First Amendment interests at stake in this prosecution . . . are significant and implicate the core values the First Amendment was designed to protect." *Rosen*, 445 F. Supp. 2d at 633.

[58] Special Comm. on Commc'ns Law, *The Espionage and Secrecy Provisions of the Proposed New Federal Criminal Code*, 31 REC. ASS'N B. CITY N.Y. 572, 573–74 (1976).

[59] This vagueness cannot be cured through scienter requirements, as Judge Ellis contends, for the scienter requirements encompass the same definitional problems: to prove scienter, the government must prove that one "willfully" transmitted information "related to the national defense," and, when dealing with intangible information, that one "intended harm to the United States or benefit to a foreign nation." 18 U.S.C. § 793(e). As is evident, in both cases, the concept of "national defense" (and the accompanying vagueness problems) is central to the analysis.

as one could only guess how national security will be defined, and how the First Amendment rights at stake will weigh in that definition. For instance, can the *New York Times* be prosecuted under this statute for revealing the NSA electronic surveillance program? It is impossible to tell, since § 793(e) is so vaguely written that the answer would ultimately turn on an ad hoc weighing by the prosecutor (in bringing the suit) or the jury (in deciding the merits of the suit) of the right to free speech against the importance of national security — national security by definition encompassing the right to free speech.[60] The constitutional proscription on vagueness exists specifically to prevent such ad hoc balancing and the accompanying chilling effect on protected speech.[61] Indeed, the uncertainty and fear in the media world that has resulted from the *Rosen* decision[62] is indicative of a chilling effect and is therefore evidence of the unconstitutional vagueness of § 793(e).

The contention is not that the United States lacks the right to ensure its national security; however, Judge Ellis was wrong in reasoning from this fact to the "common sense"[63] conclusion that the current Espionage Act, when applied to recipients of government leaks who transmit information to the media, passes constitutional muster. If the United States government wishes to prosecute recipients and transmitters of information who are not engaged in classic espionage and not associated with the government, a new statute — one that recognizes the special First Amendment interests at stake in any such prosecution — must be drafted. A failure to do so would be perilous. Given the current political and world climate,[64] the United States, now more than ever, requires an espionage statute that allows the government to ensure the country's national security without violating the very rights that any such statute, by definition, purports to protect.

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[60] This vagueness is especially significant given that globalization, the war on terror, and the threat of terrorist attacks are rapidly altering the concept of "national defense," possibly beyond any clear meaning.

[61] *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

[62] *See* Jonathan H. Adler & Michael Berry, *A Troubling Prosecution*, NAT'L REV. ONLINE, Aug. 21, 2006, http://article.nationalreview.com/?q=NjkyM2E5ZGE0ODdmNGViZjhhMDBiNWRlMWJmZTUxYTQ= ("[T]he editorial pages of the *Washington Post* and *Wall Street Journal* proclaimed that Judge Ellis transformed the Espionage Act into an American version of Britain's Official Secrets Act.").

[63] *Rosen*, 445 F. Supp. 2d at 637.

[64] "It is only in times of popular panic and indignation that freedom of speech becomes important as an institution . . . ." ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 70 (Athenium 1969) (1941).