



---

Spring 1-1-2018

## Revealing State Secrets: An Analysis of the Tension Between National Security and Government Transparency

Adam Marshall

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr-recent-developments>

---

### Recommended Citation

Adam Marshall, *Revealing State Secrets: An Analysis of the Tension Between National Security and Government Transparency*, 32 Emory Int'l L. Rev. Recent Dev. 1099 (2018).

Available at: <https://scholarlycommons.law.emory.edu/eilr-recent-developments/10>

This Essay is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review Recent Developments by an authorized administrator of Emory Law Scholarly Commons. For more information, please contact [law-scholarly-commons@emory.edu](mailto:law-scholarly-commons@emory.edu).

# REVEALING STATE SECRETS: AN ANALYSIS OF THE TENSION BETWEEN NATIONAL SECURITY AND GOVERNMENT TRANSPARENCY

*Adam Marshall\**

*For a nation that is afraid to let its people judge the truth and falsehood in an open market is a nation that is afraid of its people.*

—John F. Kennedy<sup>1</sup>

## INTRODUCTION

Espionage is no new topic in the study of international relations, but the intricacies that make it so intriguing also compel further study of the secrets it holds. Throughout history, states have relied upon the information attained through espionage to forge strategies and execute plans.<sup>2</sup> In recent times, espionage and spycraft have played pivotal roles in the balance of power among the players on the world stage, from the Cold War to the age of cyber espionage.<sup>3</sup> While conflict still exists in the traditional form of tanks and missiles, a second level of conflict lies underneath, full of ciphers and communiqués.<sup>4</sup>

This secondary conflict requires a singular resource: intelligence. The oft-quoted adage, “knowledge is power,” has seeped into the power politics of the international system, with states vying to gain superiority over their adversaries—and even their allies—while attempting to safeguard their own information from falling into the wrong hands.<sup>5</sup> Espionage has become so ingrained in the ways in which states interact, claiming to ignore its existence or denying to engage in it is not practical.<sup>6</sup> The general acceptance of the

---

\* Executive Managing Editor, *Emory International Law Review*; J.D. Candidate, Emory University School of Law (2018); Bachelor of Arts, University of Georgia (2014). The author would like to thank Professor Martha Grace Duncan for her advice in writing this Article. The author would also like to thank the Emory International Law Review Executive Board for their input throughout the editing and publication process. Finally, the author would like to thank his parents, Steve and Patti Marshall, for their continuous support.

<sup>1</sup> President John F. Kennedy, Remarks on the 20th Anniversary of the Voice of America (Feb. 26, 1962).

<sup>2</sup> See MICHAEL J. SULICK, *SPYING IN AMERICA: ESPIONAGE FROM THE REVOLUTIONARY WAR TO THE DAWN OF THE COLD WAR I* (2012).

<sup>3</sup> See *id.* at 272–74.

<sup>4</sup> See generally *id.* (detailing the role of espionage in various world conflicts).

<sup>5</sup> See A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 595, 606 (2007).

<sup>6</sup> See *id.* at 613.

nature of espionage in the international system presents an issue to the international community: How can a state deride the act while simultaneously participating in it? This contradiction provides a problem for which the only solution appears to be hypocrisy. States have begun to navigate this confusing issue through the various espionage statutes of the international system.<sup>7</sup>

The majority of states have adopted some form of an espionage statute that defines what espionage is and the various consequences for the act.<sup>8</sup> These statutes include provisions addressing acts of espionage aiding foreign actors and, more importantly, disclosures of information to the public made by government officials.<sup>9</sup> Although curtailing espionage is critical, restriction also presents a problem, especially in democratic societies espousing freedom of information.<sup>10</sup> In a government for the people, states must weigh their commitment to transparency and democratic ideals against their commitment to national security and protecting their secrets. In grappling with this conflict, some states have devised a solution—a public interest defense to espionage.<sup>11</sup> This defense is not without its critics, however, creating two camps: those who accept the defense and those who do not accept the defense.<sup>12</sup>

Both the United States and Canada have enacted legislation addressing espionage.<sup>13</sup> The United States codified its espionage statute in the Espionage Act of 1917.<sup>14</sup> The U.S. Act does not provide a public interest defense.<sup>15</sup> The Canadian Act, in contrast, does provide a public interest defense.<sup>16</sup> Adopted in 2001, Canada's espionage statute is known as the Security of Information Act.<sup>17</sup> Under Canadian law, a person may circumvent a charge of espionage if he or she can show that he or she acted in the public interest.<sup>18</sup> With Canada

---

<sup>7</sup> Espionage Act of 1917, 18 USC §§ 791–799 (2016); Security of Information Act, R.S.C. 1985, c. O-5; Official Secrets Act, 1989, c. 6 (U.K.); Didi Kirsten Tatlow, *China Approves Security Law Emphasizing Counterespionage*, N.Y. TIMES (Nov. 2, 2014), [http://www.nytimes.com/2014/11/03/world/asia/china-approves-security-law-emphasizing-counterespionage.html?\\_r=1](http://www.nytimes.com/2014/11/03/world/asia/china-approves-security-law-emphasizing-counterespionage.html?_r=1).

<sup>8</sup> 18 USC §§ 791–799 (2016); R.S.C. 1985, c. O-5; Official Secrets Act, 1989, c. 6 (U.K.); Tatlow, *supra* note 7.

<sup>9</sup> 18 USC §§ 791–799 (2016); R.S.C. 1985, c. O-5; Official Secrets Act, 1989, c. 6 (U.K.); Tatlow, *supra* note 7.

<sup>10</sup> Mark Norris, *Bad “Leaker” or Good “Whistleblower”? A Test*, 64 CASE W. RES. L. REV. 693, 704–05 (2013).

<sup>11</sup> R.S.C. 1985, c. O-5.

<sup>12</sup> 18 USC §§ 791–799 (2016); R.S.C. 1985, c. O-5.

<sup>13</sup> 18 USC §§ 791–799 (2016); R.S.C. 1985, c. O-5.

<sup>14</sup> 18 USC §§ 791–799 (2016).

<sup>15</sup> *See id.*

<sup>16</sup> R.S.C. 1985, c. O-5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

and the United States both purporting to be proponents of democracy and freedom of information, why is there such a discrepancy among these statutes? Is the United States' hardline approach more practical than its Canadian counterpart? Or is the nuanced Canadian approach more prescient? Answers to these questions require an investigation into the similarities and differences between U.S. and Canadian law.

This Essay will compare and contrast the United States Espionage Act of 1917 and the Canadian Security of Information Act to determine when a disclosure of state secrets should be deemed acceptable by a government. Part II lays out the background of each statute, including the circumstances behind its creation, the provisions contained within, and the act's applications. This discussion emphasizes the relation of each of these elements to a public interest defense. Part III analyzes the potential reasons for each stance using principles of criminal law as well as the democratic principle of government transparency. Ultimately, this analysis will conclude that the United States should adopt a public interest defense to bring itself into line with current democratic ideals without departing from established criminal law principles.

## I. BACKGROUND

An adequate comparison of the Espionage Act of 1917 and the Security of Information Act requires a number of aspects of the statutes to be highlighted: (1) the historical circumstances surrounding the creation of the statutes; (2) the actual provisions of the statutes; and (3) the practical application of the statutes. Using these aspects, we can see why these statutes were drafted, what they say, and how they have been interpreted. This inquiry will then illuminate the differences surrounding the statutes and offer a solution to bring them more closely in line with each other and reflect the current geopolitical climate. This Essay will begin with an examination of the Espionage Act of 1917 followed by the Canadian Security of Information Act. This will provide the factual background necessary to begin an informed analysis.

## A. *The United States Espionage Act of 1917*

### 1. *Background and Historical Context*

The Espionage Act of 1917 was passed in the midst of the First World War,<sup>19</sup> a time characterized by increased nationalism and distrust of foreign powers.<sup>20</sup> The U.S. government wanted to decrease the likelihood that any military defense information would fall into the hands of its enemies, opening the United States to a possible conflict that had yet to reach its shores.<sup>21</sup> Specifically, the government called for the ability to prohibit the disclosure of any information that the President deemed useful to the enemies of the United States—a seemingly broad category of items.<sup>22</sup>

While the ideas of treason and espionage were not new concepts to the homeland of Benedict Arnold, the Espionage Act of 1917 expanded the government's right to curb free speech in the pursuit of national security, thereby strengthening the government's police power in face of the rights seemingly guaranteed to citizens under the First Amendment.<sup>23</sup> Even at the time of its passage, this conflict did not go unnoticed, with criticism coming from politicians and the media alike.<sup>24</sup> Despite these concerns, the Act was passed by Congress in 1917.<sup>25</sup>

### 2. *Provisions of the Act*

The Espionage Act of 1917 itself contains provisions that address a variety of ways in which classified information could fall into the wrong hands.<sup>26</sup> The provisions that are most useful in analyzing the Espionage Act of 1917 in relation to a public interest defense are 18 USC § 793 and 18 USC § 798. Each of these provisions deals with information that a government employee would have ready access to and has been the subject of disclosures in the past.<sup>27</sup>

---

<sup>19</sup> CIVIL LIBERTIES IN WARTIME: LEGISLATIVE HISTORIES OF THE ESPIONAGE ACT OF 1917 AND THE SEDITION ACT OF 1918 v (William H. Manz, ed. 2007)[hereinafter CIVIL LIBERTIES IN WARTIME].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Laura Long, *An Analysis of Congressional Arguments Limiting Free Speech*, 5 COMM. L. REV. 52, 52 (2005).

<sup>24</sup> CIVIL LIBERTIES IN WARTIME, *supra* note 19, at v.

<sup>25</sup> *Id.*

<sup>26</sup> 18 U.S.C. §§ 792–99 (2016).

<sup>27</sup> Maria Glod, *Former FBI Employee Sentenced for Leaking Classified Papers*, WASH. POST (May 25, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/24/AR2010052403795.html>; Charlie

In Section 793, the Espionage Act of 1917 deals with the gathering, transmission, and loss of traditional defense information, such as information regarding military bases, weapons, and vehicles.<sup>28</sup> The subsections of 793 lay out which types of actions qualify as “gathering, transmitting, or losing” defense information, which include flying over military installments, copying classified documents, and accessing classified documents.<sup>29</sup> For example, the disclosure of information concerning U.S. military operations in Vietnam could fall under Section 793.<sup>30</sup>

Section 798 is more specific than Section 793 because it deals with the disclosure of classified materials *related to intelligence gathering*, such as ciphers, intelligence collection methods, and targets of communications intelligence.<sup>31</sup> Communications intelligence is defined as “all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients.”<sup>32</sup> This would include, for example, the disclosure of a U.S. government program that monitored the phone calls of the German Chancellor.<sup>33</sup>

Both sections address the disclosure of classified information to an unauthorized person. As it applies to both sections, classified information means “information which . . . is . . . specifically designated by a United States Government Agency for limited or restricted dissemination or distribution.”<sup>34</sup> An unauthorized person is essentially any person who has not been designated by the U.S. government as being allowed to receive such information.<sup>35</sup> While these definitions and provisions may seem clear in theory, it is helpful to put these provisions in context with examples of how the act has been used to prosecute disclosers in the past.

---

Savage, *Manning is Acquitted of Aiding the Enemy*, N.Y. TIMES (July 30, 2013), <http://www.nytimes.com/2013/07/31/us/bradley-manning-verdict.html>.

<sup>28</sup> 18 U.S.C. § 793.

<sup>29</sup> *Id.* § 793(a)–(f).

<sup>30</sup> *Id.* See generally *Russo v. Byrne*, 409 U.S. 1219 (1972).

<sup>31</sup> Compare 18 U.S.C. § 798 (prohibiting willful communicating, furnishing, transmitting, or otherwise making available of classified information to an unauthorized person that may be detrimental to the safety or interest of the United States and to the benefit of any foreign government), with 18 U.S.C. § 793 (prohibiting the obtaining of defense information that may be prejudicial to the United States’ national defense).

<sup>32</sup> *Id.* § 798(b).

<sup>33</sup> *Id.* § 798; Jake Tapper, *Obama Administration Spied on German Media as Well as Its Government*, CNN (July 4, 2015), <http://www.cnn.com/2015/07/03/politics/germany-media-spying-obama-administration/>.

<sup>34</sup> 18 U.S.C. § 798.

<sup>35</sup> *Id.*

### 3. Application of the Act

To further analyze these provisions, it is useful to discuss how the U.S. government has applied them in prosecuting offenders. In recent years, there have been a number of high profile espionage cases in the United States, including those of Chelsea Manning and Shamai Leibowitz.<sup>36</sup> Each of these cases highlights a provision of the Espionage Act of 1917, with Manning seeing an application of Section 793 and Leibowitz seeing an application of Section 798.<sup>37</sup>

#### a. Chelsea Manning

Chelsea Manning<sup>38</sup> was a military intelligence analyst stationed in Iraq between November 2009 and May 2010.<sup>39</sup> Through her access to classified networks and documents, Manning came across videos of military activities, military reports, and diplomatic cables that she believed to be of concern.<sup>40</sup> Manning transmitted this information to WikiLeaks, a non-profit organization that publishes secret materials and other leaks in the name of transparency.<sup>41</sup> After the government identified Manning as the leaker, she was charged and convicted<sup>42</sup> under Section 793 of the Espionage Act of 1917.<sup>43</sup> As previously discussed, Section 793 concerns the disclosure of (1) classified, (2) traditional defense information (3) to an unauthorized person.<sup>44</sup> Manning's case highlights the elements of a Section 793 violation while providing a practical context in which it can be applied. First, the information Manning transmitted to WikiLeaks was indeed classified, as it was restricted by the U.S. Army due

---

<sup>36</sup> Glod, *supra* note 27; Savage, *Manning is Acquitted of Aiding the Enemy*, *supra* note 27.

<sup>37</sup> Glod, *supra* note 27; Savage, *Manning is Acquitted of Aiding the Enemy*, *supra* note 27.

<sup>38</sup> Chelsea Manning is a transgender woman who, when convicted, was known as Bradley Manning. Therefore, many of the sources cited acknowledge her as Bradley Manning, although this Essay will refer to her as Chelsea Manning. Charlie Savage, *Chelsea Manning to be Released Early as Obama Commutes Sentence*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/us/politics/obama-commutes-bulk-of-chelsea-mannings-sentence.html>.

<sup>39</sup> Bradley E. Manning Additional Charge Sheet, U.S. Army 1 (Mar. 1, 2011) [hereinafter Additional Charge Sheet].

<sup>40</sup> Denver Nicks, *Private Manning and the Making of WikiLeaks*, THIS LAND (Sep. 23, 2010), <http://thislandpress.com/09/23/2010/private-manning-and-the-making-of-wikileaks-2/> [<https://web.archive.org/web/20110429142813/http://thislandpress.com/09/23/2010/private-manning-and-the-making-of-wikileaks-2/>].

<sup>41</sup> *Id.*

<sup>42</sup> In January 2017, President Barack Obama commuted Manning's sentence. The White House acknowledged that Manning was being granted the commutation partially due to her leaks being less serious and dangerous than those of other leakers, such as Edward Snowden. Savage, *Chelsea Manning to be Released Early as Obama Commutes Sentence*, *supra* note 38.

<sup>43</sup> Additional Charge Sheet, *supra* note 39.

<sup>44</sup> 18 U.S.C. § 793.

to national security concerns.<sup>45</sup> Second, the information was of a traditional defense nature as opposed to an intelligence gathering nature.<sup>46</sup> Finally, the information was leaked to an unauthorized source, as WikiLeaks is in no way endorsed by the United States to receive such information.<sup>47</sup>

*b. Shamai Leibowitz*

As Manning's case shows the application of Section 793 of the Espionage Act of 1917, the case of Shamai Leibowitz illustrates the application of Section 798 of the Espionage Act of 1917.<sup>48</sup> Leibowitz was a linguist with the Federal Bureau of Investigation (FBI) who leaked classified documents to a blogger.<sup>49</sup> The documents contained information regarding the practices of the FBI in recording conversations held in the Israeli Embassy in Washington, D.C.<sup>50</sup> This information pertained to U.S. intelligence gathering efforts, placing it under Section 798 of the Espionage Act of 1917.<sup>51</sup> Much like Section 793, Section 798 lays out a straightforward list of elements that must be met to charge someone under the provision.<sup>52</sup> The disclosed information must: (1) be classified, (2) concern communication intelligence of the United States, and (3) be disclosed to an unauthorized person.<sup>53</sup> Based on Leibowitz's conviction under the Act, it is clear that his disclosure of U.S. intelligence gathering in the Israeli Embassy to a blogger met each of the above elements and exposed Leibowitz to criminal liability.<sup>54</sup>

---

<sup>45</sup> Nicks, *supra* note 40.

<sup>46</sup> *Id.*

<sup>47</sup> Additional Charge Sheet, *supra* note 39.

<sup>48</sup> Norris, *supra* note 10.

<sup>49</sup> *Id.*

<sup>50</sup> Due to the classified nature of the information leaked, even the judge that presided over Leibowitz's trial was not privy to exactly what was contained in the documents. Scott Shane, *Leak Offers Look at Efforts by U.S. to Spy on Israel*, N.Y. TIMES (Sept. 5, 2011), <http://www.nytimes.com/2011/09/06/us/06leak.html>.

<sup>51</sup> 18 U.S.C. § 798 (1996).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> United States v. Leibowitz, No. AW-09-CR-0632 (D. Md. Dec. 4, 2009); see *Former FBI Contract Linguist Pleads Guilty to Leaking Classified Information to Blogger*, U.S. DEP'T JUST.: JUST. NEWS (Dec. 17, 2009), <https://www.justice.gov/opa/pr/former-fbi-contract-linguist-pleads-guilty-leaking-classified-information-blogger>.

## B. *The Security of Information Act of 2001*

### 1. *Background and Historical Context*

While the Espionage Act of 1917 does not recognize a public interest defense,<sup>55</sup> the Canadian Security of Information Act does.<sup>56</sup> The Canadian Security of Information Act is a relatively new statute<sup>57</sup> and was passed in 2001—replacing the older Official Secrets Act that had been in place since Canada was part of the British Empire.<sup>58</sup> The Canadian Parliament passed the new law due, in part, to the changing nature of technology and the threats posed to the country in an ever-globalizing world.<sup>59</sup> An important feature of the new Act was the creation of a public interest defense for selected crimes under that Act.<sup>60</sup> This provision was a unique addition to the traditional espionage statute, unseen in its allies' equivalents.<sup>61</sup>

### 2. *Provisions of the Act*

Much like its U.S. counterpart, the Canadian Security of Information Act provides a list of offenses that may be prosecuted under the Act.<sup>62</sup> The public interest defense, codified in Section 15, only applies to two of these offenses: Sections 13 and 14 of the Act.<sup>63</sup> Section 13 provides that “every person permanently bound to secrecy commits an offence who, intentionally and without authority, communicates or confirms information that, *if it were true*, would be special operational information.”<sup>64</sup> Section 14 provides that “every person permanently bound to secrecy commits an offence who, intentionally and without authority, communicates or confirms special operational information.”<sup>65</sup> The difference between the two provisions is subtle at first glance—simply a conditional qualification of the type of information covered

---

<sup>55</sup> Espionage Act of 1917, 18 USC §§ 791–99 (2016).

<sup>56</sup> Security of Information Act, R.S.C. 1985, c. O-5 1, § 15 (1985).

<sup>57</sup> Final Report of the Standing Committee on Public Safety and National Security, Rights, Limits, Security, and A Comprehensive Review of the Anti-Terrorism Act and Related Issues, 39th Parl., 1st Sess., Ch. 8 (Mar. 2008), <http://www.ourcommons.ca/DocumentViewer/en/39-1/SECU/report-7/>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Security of Information Act, R.S.C. 1985, c. O-5 1, § 15; 18 U.S.C. §§ 791–99 (2016); Official Secrets Act 1989, c. 6 (U.K.).

<sup>62</sup> Security of Information Act § 3.

<sup>63</sup> *Id.* § 15.

<sup>64</sup> *Id.* § 13 (emphasis added).

<sup>65</sup> *Id.* § 14.

under Section 13.<sup>66</sup> Section 13 allows an individual to be prosecuted for a disclosure of information that is not true, but if it were, it would have been special operations information.<sup>67</sup>

Another key difference between the two provisions is the potential punishment for wrongful disclosure.<sup>68</sup> For the purposes of these provisions, “special operational information” means “information that the Government of Canada is taking measures to safeguard” that relates to a host of topics, such as the identities of intelligence assets, military plans, or targets of intelligence collection. Sections 13 and 14 differ slightly from the pertinent U.S. sections as they are focused on both the type of information disclosed and the person who is making the disclosure, whereas the U.S. Act only addresses the type of information being disclosed.<sup>69</sup> The scope of both the U.S. and Canadian provisions, however, includes the same subjects—government employees who disclose classified information.<sup>70</sup>

While similar to their U.S. analogues, the Canadian sections differ from one another with respect to the type of information and severity of punishment.<sup>71</sup> This difference is explained by the variance in the type of information being disclosed, as disclosures of true special operational information garner more severe punishments. Regardless, the two provisions act in conjunction to provide a large umbrella of protection to safeguard what the Canadian government wishes to remain secret.

The provision of the Canadian Act most relevant to this Essay is Section 15, which provides a public interest defense to the offenses contained in Sections 13 and 14.<sup>72</sup> Essentially, the defense provides that one is acting in the public’s interest—and thus can invoke the defense—when he or she discloses some misconduct on the part of a person acting in an official capacity on behalf of the Canadian government and that disclosure benefits the public more than it hurts the public.<sup>73</sup> The information must pertain to an offense under

---

<sup>66</sup> *Id.* § 13.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* §§ 13, 14.

<sup>69</sup> *Id.* §§ 13, 14; 18 USC §§ 793, 98.

<sup>70</sup> R.S.C. 1985, c. O-5, §§ 13, 14; 18 USC §§ 793, 98.

<sup>71</sup> R.S.C. 1985, c. O-5, §§ 13, 14. The punishment under Section 13 is imprisonment for up to five years, whereas the punishment under Section 14 is imprisonment for up to fourteen years. *Id.*

<sup>72</sup> *Id.* § 15.

<sup>73</sup> This can be seen in the text of the statute: “No person is guilty of an offence under section 13 or 14 if the person establishes that he or she acted in the public interest.” *Id.*

Section 13 or 14 *and* the public interest in disclosing the information must outweigh the public interest in not disclosing the information.<sup>74</sup>

There is sometimes a tension in governments between being transparent and guarding national security. The Canadian Act addresses this tension by qualifying the defense on the grounds that the potential discloser must first meet a reporting requirement to have access to the defense.<sup>75</sup> For the sake of brevity, the reporting procedure can be summarized as requiring the discloser to report the potential disclosure to a higher authority and await a response.<sup>76</sup> If a response is not received, the potential discloser must then make a second report, only being able to disclose if he has not received a response from the appropriate authorities within a reasonable amount of time.<sup>77</sup> This gives the government enough time to deal with the issue in-house before having to deal with potential public exposure of the misconduct.

### 3. *Application of the Act*

Unfortunately—or rather fortunately—for Canadian national security, no person of record has yet to avail themselves of this defense; thus, there is no case law to illustrate the application of these provisions.<sup>78</sup> The Canadian Parliament had appropriate foresight, however, to include a list of seven factors that courts should weigh in determining whether the public interest in disclosure outweighs the public interest in non-disclosure.<sup>79</sup> The factors provide a framework for analysis of the defense and elucidate a hypothetical approach courts may take in determining if application of the defense would be appropriate. Courts must consider:

- (a) whether the extent of the disclosure is no more than is reasonably necessary to disclose the alleged offense or prevent the commission or continuation of the alleged offense, as the case may be;
- (b) the seriousness of the alleged offense;

---

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* The Canadian Act provides that these reporting requirements need not be followed if the disclosure is made to avoid “grievous bodily harm or death.” *Id.*

<sup>78</sup> There has only been one person charged under the Security of Information Act: a naval officer named Jeffery Delisle. Jane Taber & Colin Freeze, *Naval Spy to be First Canadian Punished Under Security of Information Act*, THE GLOBE AND MAIL (Jan. 29, 2013), <http://www.theglobeandmail.com/news/national/naval-spy-to-be-first-canadian-punished-under-security-of-information-act/article7986929/>. He did not avail himself of the defense. *Id.*

<sup>79</sup> R.S.C. 1985, c. O-5, § 15.

- (c) whether the person resorted to other reasonably accessible alternatives before making the disclosure and, in doing so, whether the person complied with any relevant guidelines, policies or laws that applied to the person;
- (d) whether the person had reasonable grounds to believe that the disclosure would be in the public interest;
- (e) the public interest intended to be served by the disclosure;
- (f) the extent of the harm or risk of harm created by the disclosure; and
- (g) the existence of exigent circumstances justifying the disclosure.<sup>80</sup>

The differences and similarities between the U.S. Act and the Canadian Act are clear. Each state is concerned with protecting its national secrets and punishing those that may threaten that endeavor. There is a clear departure between the acts, however, with Canada providing a public interest defense based on balancing the benefit of the disclosure and the harm and the United States foregoing such a defense for a far stricter regime. Because each state is a prominent democracy on the world stage, this delineation is troublesome. Therefore, it is prudent to analyze the potential reasons for the differing stances to see if there is a way to reconcile the two approaches or to simply select the better of the two.

## II. ANALYSIS

Most states and international bodies have taken a position on a public interest defense to espionage, but these positions vary. Despite aligning on most other issues concerning government transparency and freedom of information, some states have differing stances on this issue. Such difference of opinions is present in the United States and Canada. The United States does not allow for a public interest defense, while Canada does. How does such a difference exist? Through the use of the principles of criminal law and an analytic lens favoring government transparency, an answer to this question is clear and a reason for amendment of the Espionage Act of 1917 is presented.

---

<sup>80</sup> *Id.*

### A. *Purposes of Punishment*

Under criminal law, there are a variety of accepted theories as to why the state may choose to punish its citizens for certain acts.<sup>81</sup> These theories fall into one of two broad categories: retributivism or utilitarianism.<sup>82</sup> Retributivists believe that a person is punished simply because he or she deserves it.<sup>83</sup> Utilitarians believe that a person is punished because the punishment provides some benefit, whether to society in general or to the criminal in particular.<sup>84</sup> The three main utilitarian reasons for punishment are deterrence, restraint, and rehabilitation.<sup>85</sup> Each of these four reasons for punishment may provide some insight into why disclosers are punished and perhaps why the United States has yet to recognize a defense to such an offense.

#### 1. *Retributivism*

Retributivism, perhaps contrary to common belief, is not so much concerned with the actual harm done but with the moral culpability of the criminal.<sup>86</sup> The person must be punished because he or she committed a crime with the requisite *mens rea* and *actus reus*, breaking with social norms.<sup>87</sup> Under retributivist reasoning, a person who discloses classified information should be punished and held accountable because he or she broke the law. Retributivist reasoning does not take into account deterrence, rehabilitation, or restraint. There is no reason to delve into the benefits of the disclosure or the reasons behind it. He or she committed the crime; he or she must be punished. The retributivist theory of punishment is perhaps the most reflective of the United States' hardline approach to espionage. It ignores any noble intentions of an actor when determining the potential consequences of his or her act.<sup>88</sup>

---

<sup>81</sup> SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 90 (9th ed. 2012).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; Mario de Caro, *Utilitarianism and Retributivism in Cesare Beccaria*, 2 *ITALIAN L.J.* 1, 3 (2016); Michael S. Moore, *Justifying Retributivism*, 27 *ISR. L. REV.* 15, 15 (1993).

<sup>84</sup> KADISH ET AL., *supra* note 81.

<sup>85</sup> *Id.*

<sup>86</sup> See Michael S. Moore, *The Moral Worth of Retribution*, in *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 95 (Sanford Kadish et al. eds., 9th ed. 2012); Thomas H. Morawetz, *Retributivism and Justice*, 16 *CONN. L. REV.* 803, 820 (1984).

<sup>87</sup> See Moore, *supra* note 86, at 93.

<sup>88</sup> See *id.*

## 2. *Utilitarianism*

As applied to punishments, utilitarianism is concerned with the idea that the punishment will serve some future purpose rather than the backward-looking sanctioning of the criminal simply because he or she deserves it.<sup>89</sup> Punishing the individual provides some benefit that outweighs the cost of the punishment.<sup>90</sup> This theory could lend further support to why the United States may take the stance it does. As mentioned above, classic views of this school of thought look to three benefits that arise from punishment: deterrence, rehabilitation, and restraint.<sup>91</sup> Of these three rationales, deterrence is the most compelling reason for the high penalty for disclosers and the lack of a public interest defense in the Espionage Act of 1917<sup>92</sup>—the hope being that the severity of the punishment would dissuade others from committing similar crimes for fear of the punishment they know is coming.<sup>93</sup> The Espionage Act of 1917 is aimed at preventing the disclosure of information that the U.S. government has deemed to be vital to national security.<sup>94</sup> Strict punishments for espionage and the lack of an ameliorating defense are simply part of the safeguard that the United States employs.<sup>95</sup> Potential disclosers would see the consequences they faced and would be turned away from such acts.<sup>96</sup> Within the utilitarian framework, the cost of both a disclosure and providing a defense

---

<sup>89</sup> KADISH ET AL., *supra* note 81, at 90.

<sup>90</sup> *Id.* It should be noted that some retributivists believe that retributive punishment can also provide some greater benefit to society. See Emile Durkheim, *The Division of Labor in Society*, in CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 105 (Sanford Kadish et al. eds., 9th ed. 2012). Emile Durkheim argued that punishment only incidentally served the purpose of “correct[ing] the guilty person” and that its real purpose is to preserve the cohesion of society as a whole. *Id.*

<sup>91</sup> J. J. C. Smart, *Utilitarianism and Punishment*, 25 ISR. L. REV. 360, 375 (1991).

<sup>92</sup> Rehabilitation is concerned with improving the criminal’s behavior or outlook on life so that he can become a valuable member of society. See Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRIT. J. AM. LEGAL STUD. 263, 291 (1991). This is of less concern in this inquiry, as the discloser is presumably acting for the benefit of society, so the government cannot expect to rehabilitate a positive actor. Restraint is also less important because it is concerned with keeping the criminal confined as not to act in such a way again. In the case at hand, disclosers, regardless of whether they are acting for the public benefit or not would probably be stripped of any security clearances and access to classified information; therefore, the restraint would be achieved whether they could avail themselves of a public interest defense or not. Smart, *supra* note 91, at 374.

<sup>93</sup> KADISH ET AL., *supra* note 81, at 111. In describing the rationale behind deterrence, Jeremy Bentham, a leading utilitarian, stated, “If the apparent magnitude, or rather value of that pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it.” *Id.*

<sup>94</sup> 18 USC §§ 792–99 (1996).

<sup>95</sup> *Id.*

<sup>96</sup> Johannes Andenaes, *The Morality of Deterrence*, 37 U. CHI. L. REV. 649, 651 (1970).

is outweighed by the benefit the government enjoys from its strong bulwark against espionage.<sup>97</sup>

### *B. Justification*

Although the government may have a clear reason to prevent disclosures of classified information, it can also be argued that disclosers have a clear reason to provide the information to the public. This reason is clear in the very words of the Canadian public interest defense: “[T]he public interest in disclosure outweighs the public interest in non-disclosure.”<sup>98</sup> So if there is a reasonable rationale behind disclosure, surely criminal law can provide some guiding principles to allow for a public interest defense in the United States.

In criminal law, the principle of justification allows for the exculpation of crimes.<sup>99</sup> Justification accepts the fact that the individual committed the act yet provides a reason to “negate the culpability” of the offense.<sup>100</sup> Justification arguments reason that the individual committed the offense but the individual was right to do so.<sup>101</sup>

This argument could easily be transposed to the current analysis. The “noble” discloser would be making the disclosure not for personal profit but to provide a benefit to the public. By disclosing the information, the discloser has clearly committed an offense under both the U.S. Act and the Canadian Act.<sup>102</sup> The Canadian law has provided an avenue for exculpation by allowing the discloser to show that the public interest in disclosure outweighs the public interest in non-disclosure, thus justifying the action.<sup>103</sup> The United States should follow the Canadian example.

### *C. A Public Interest Defense in the United States and Government Transparency*

Government transparency is a hallmark of modern democracy.<sup>104</sup> As James Madison once said, “[a] popular Government, without popular information, or

---

<sup>97</sup> HEDIEH NASHERI, ECONOMIC ESPIONAGE AND INDUSTRIAL SPYING 5–6 (2004).

<sup>98</sup> Security of Information Act, R.S.C. 1985, c. O-5, 1, § 15 (1985).

<sup>99</sup> KADISH ET AL., *supra* note 81, at 817.

<sup>100</sup> *Id.*

<sup>101</sup> J.L. Austin, *A Plea for Excuses*, in CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 818 (Sanford Kadish et al. eds., 9th ed. 2012).

<sup>102</sup> 18 U.S.C §§ 792–99 (2016); Security of Information Act, R.S.C. 1985, c. O-5 1, § 15 (1985).

<sup>103</sup> Security of Information Act, R.S.C. 1985, c. O-5 1, § 15 (1985).

<sup>104</sup> See generally Frederick Schauer, *Transparency in Three Dimensions*, 4 U. ILL. L. REV. 1339, 1349 (2011).

the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”<sup>105</sup> Transparency in government helps allow for accountability of government officials and prevent abuses of power.<sup>106</sup> In order to further align national policy with the principles of democracy, U.S. government officials and legislators should offer a public interest defense to the Espionage Act of 1917.

The benefits of government transparency have been a focus of U.S. leaders since the country’s inception.<sup>107</sup> Transparency has been recognized as a potential cure to public distrust and suspicion of government and political leaders.<sup>108</sup> Allowing the public to see how its government works and how it conducts business produces a variety of effects that, in turn, should increase the effectiveness of the government itself.<sup>109</sup> These factors include increased accountability of government officials, reduced corruption, and decreased abuse of power.<sup>110</sup> These effects may also have ancillary benefits like an overall increase in the efficiency of governance.<sup>111</sup> Unfortunately, these beneficial effects are often overshadowed by what is commonly accepted to be a much graver concern: national security.<sup>112</sup> This concern is one of the large catalysts for the severe tension between government transparency and the safeguards of government information. Furthermore, this concern may explain why the United States continues to favor confidentiality over transparency with regard to the Espionage Act of 1917.

Under the current legal framework, the United States punishes any disclosure of classified information, even if that disclosure benefits the public. This hardline stance conceivably provides a chilling effect on the dissemination of information that may be relevant to the public. While some secrecy is necessary for a government to function effectively both domestically and internationally, there are cases in which classified information should be revealed to the public.

---

<sup>105</sup> Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *THE FOUNDERS CONSTITUTION* ch. 18, doc. 35 (Philip B. Kurland & Ralph Lerner eds., 2000).

<sup>106</sup> THE WHITE HOUSE, *TRANSPARENCY AND OPEN GOVERNMENT: MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES* (Jan. 21, 2009), <https://obamawhitehouse.archives.gov/the-press-office/transparency-and-open-government/>.

<sup>107</sup> WENDY GINSBERG ET AL., *CONG. RESEARCH SERV., R42817, GOVERNMENT TRANSPARENCY AND SECRECY: AN EXAMINATION OF MEANING AND ITS USE IN THE EXECUTIVE BRANCH 6* (2012).

<sup>108</sup> Amanda Frost, *Restoring Faith in Government: Transparency Reform in the United States and the European Union*, 9 *EUR. PUB. L.* 87, 88 (2003).

<sup>109</sup> *Id.* at 92.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> GINSBERG ET AL., *supra* note 107, at 8.

For example, the citizens of a democracy have a right to know what actions their government officials are taking on their behalf when it comes to foreign policy decisions, use of taxpayer resources, and other governmental conduct. This information would allow the public to make informed decisions concerning governance and the individuals they choose to entrust with governmental responsibility. Members of Congress have made such arguments in the past, with Representative Mark Meadows once stating that “[government] transparency gives our citizens the opportunity to make informed decisions, to hold accountable those in government that will abuse or perhaps mismanage the public resources.”<sup>113</sup> Although the United States has taken efforts to allow more access to government information, however, such as through the Freedom of Information Act,<sup>114</sup> the government must loosen its grips on the purse strings of intelligence once more.

While the normal citizen may be able to request information on things he or she believes may be hiding in government archives, he or she would not be likely to know to look for things he or she had no idea existed in the first place. Thus, government transparency does not rest on the likelihood of FOIA request responses alone but also entails proactive disclosure. Potential disclosures would be made by people who have more information than average citizens. This reality highlights the importance of benevolent disclosers. These “insiders” have a great responsibility to safeguard the secrets with which they are entrusted but also have an obligation to the country they represent and the society in which they live. While they certainly cannot expect to make public any information they so choose, they should be afforded the opportunity to prove that their disclosure is in the best interest of the public that they serve. This is the essence of the public interest defense.

It should be noted, however, that this call for a public interest defense is not the same as demanding that all government actions be revealed to the public. There are obviously some aspects of national defense that require secrecy. Any adopted public interest defense must reflect the realities of the global system and balance the public’s interests against those of an effective government. The Canadian Security of Information Act’s reporting requirements are examples of how this balancing could be implemented in any potential amended U.S. Act.<sup>115</sup> Any U.S. law could easily implement similar

---

<sup>113</sup> *Ensuring Government Transparency Through FOIA Reform: Hearing Before the Subcomm. on Gov’t Operations of the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. 1 (2015) (statement of Rep. Meadows, Chairman, H. Comm. on Oversight and Gov’t Reform).

<sup>114</sup> 5 U.S.C. § 552 (1970).

<sup>115</sup> R.S.C. 1985, c. O-5.

reporting requirements that would provide for the safeguarding of critical information while still providing the public with the benefits of transparency.

When U.S. neighbors have adopted provisions that seem more attuned with democratic ideals, U.S. policymakers should view these developments as a signal that it is time to update U.S. positions and become equally as attuned. The U.S. government should allow these disclosers an avenue to justify their actions; otherwise, current policies with regard to transparency only harm the citizens they are supposed to serve. National security is a phrase that is often thrown around to justify any number of actions, but the citizens of the United States should not allow these justifications to rob themselves of potential sources of information that would allow them to make decisions necessary to preserve democracy.

### CONCLUSION

The Espionage Act of 1917 was originally enacted in a time of uncertainty about national security and the emergence of threats to the nation's secrets.<sup>116</sup> Even though the Act has been amended over the years to account for changes in technology and the changing intelligence community,<sup>117</sup> it still reflects the fears and concerns of that era. Other states and international actors have recognized the need for freedom of information in a democratic and open society. For example, Canada provides its citizens with a potential defense to disclosures that allows one to avoid culpability if he or she can show that the public interest in the disclosure outweighs the public interest in non-disclosure.<sup>118</sup> It is now time for the United States to act in line with its reputation as a beacon of democracy and provide a similar defense to its citizens.

Espionage is certainly a threat, but it should not be combated by creating an even larger one: an unaccountable government. It is a well-accepted principle that a democratic government should be transparent in its actions and processes.<sup>119</sup> If a disclosure is truly in the best interest of the public, the government should not fear the disclosure. The state's laws should encourage

---

<sup>116</sup> CIVIL LIBERTIES IN WARTIME, *supra* note 19.

<sup>117</sup> Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1020 (1973).

<sup>118</sup> R.S.C. 1985, c. O-5.

<sup>119</sup> Alberto T. Muyot, *The Cornerstone of Democracy: Transparency, Accountability and the Constitutional Right to Information*, 73 PHIL. L.J. 202, 207–09 (1998).

the sharing of information that will allow its populace to make the most informed judgments about the government.

While some legislators and policymakers may be wary of providing a defense to the serious offense of espionage, their fears should be assuaged by the alignment of the public interest defense with accepted criminal law principles. Just as criminal law justifies the purpose of punishing disclosers under the retributivist and utilitarian views on punishment, it also provides a reason for why they should have the opportunity to absolve themselves under the principle of justification. These principles bolster the argument that the adoption of a public interest defense for espionage is not only in the best interests of the state but is also a logical step towards bringing a state's criminal code into compliance with modern principles of criminal law.

The Espionage Act of 1917 should be updated to allow principled individuals to disclose information that is in the public's best interest. A public interest defense would allow for the protection of such individuals and the promotion of a culture that accepts disclosures for the public good. To be sure, not every instance of revealing classified information is made for the purposes of the public interest, but it would be a mistake to prevent any beneficial disclosure based on the fear of the subset of potentially harmful ones. This hardline stance is counterproductive to government transparency and harmful to the United States' democratic image. National security is an important factor to consider in any government decision, but it should not be allowed to overshadow the equally important concern of government accountability. John F. Kennedy once remarked: "No President should fear public scrutiny of his program. For from that scrutiny comes understanding; and from that understanding comes support or opposition. And both are necessary."<sup>120</sup> It is paramount that the Espionage Act of 1917 be amended to include a public interest defense so as to provide the public the opportunity to understand the acts of its government and to prevent the censure of public discourse.

---

<sup>120</sup> President John. F. Kennedy, *The President and the Press*, Address Before the American Newspaper Publishers Association (Apr. 27, 1961), <https://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHA-025-001.aspx>.