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The Espionage Act revisited (2 parts)

Thu, 11/14-21/2013 - 10:28am Field Notes From A Battleground [1] Opinion/Viewpoint [2]
By Charles R. Church

Part 1

Back in June, the indispensable Dick Ahles called for repeal of the Espionage Act of 1917. Because of various developments since then, I want to take another look at the act.

Ahles pointed to the case of Fox News reporter James Rosen as an important basis for his demand for repeal. A request by the U.S. government was supported by an FBI agent's May 2010 affidavit for a warrant seeking access to Rosen's email account, claiming that the contents of the account probably "are evidence, fruits and instrumentalities of criminal violations" of Section 793 of the Espionage Act, and that Rosen probably was an "aider and abettor and/or co-conspirator" of a violation of its sub-section (d), forbidding the willful communication of information related to the national defense to someone "not entitled to receive it" by one with lawful access to the information. Such an offense is punishable by imprisonment for up to 10 years. Stern accusations, surely, and especially worrisome when aimed at a journalist.

After the story broke, U.S. Attorney General Eric Holder wrote to the chair of the House Judiciary Committee on June 19, 2013, stating that "it remains my understanding that the Department [of Justice, or DoJ] has never prosecuted a journalist for publishing classified information." In the course of investigating the unauthorized disclosure of classified information that appeared in Rosen's news article in June 2009, the DoJ, with Holder's approval, sought a search warrant for the reporter's emails. "In order to proceed under the Privacy Protection Act, the government was required to establish that there was probable cause to believe that the reporter had committed ... a criminal offense to which the needed materials related." This was only an investigative step, "and at no time ... have prosecutors sought approval from me to bring criminal charges against the reporter."

As reported by David Carr in "More Tools to Protect News Sources" in the New York Times on Sept. 30, 2013, on account of the outcry over the Rosen affidavit, the DoJ revisited its "ancient guidelines," codified when email didn't exist, and made significant reforms. The new guidelines favor providing advance notice to news organizations before seeking news-gathering materials, and investigators no longer are allowed to "portray reporters as engaged in a criminal act to by-pass restrictions in the Privacy Protection Act." Further, Carr reported, the administration has supported enacting a federal shield law to provide some protection for reporters' sources.

Nonetheless, Carr added, “a clear and persistent danger” still exists for reporters. In July, a federal appeals court held that James Risen of the New York Times had no right to resist giving evidence against a former CIA officer thought to be a source for Risen’s book.

Next week, I will describe how the danger to journalists under our espionage laws may be greater than what Carr describes.

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The Espionage Act revisited

Thu, 11/21/2013 - 10:09am Field Notes From A Battleground [1] Opinion/Viewpoint [2]
By Charles R. Church

Part 2

Last week, I described how the apparent threat against a reporter under the Espionage Act was revealed as less ominous than thought. Today, I will describe other, more actual perils.

A weeklong debate at www.justsecurity.org [3], beginning on Sept. 24, shows the danger may be greater than that. Gabriel Schoenfeld, once an advisor to Mitt Romney, claimed that "[a] good deal of national-security journalism as it is practiced today ... skirts the edge of the law." He pointed specifically to Rosen, who "received highly classified information concerning North Korean nuclear testing" from a State Department source, whom he cultivated with flattery, while suggesting that the two used aliases and a system of coded signals to set up meetings. Schoenfeld then asked: "Does the First Amendment truly provide members of the press a license to behave in a manner that is functionally identical to the behavior of spies?"

The next day, Washington College of Law Professor Steve Vladeck replied: "Of course it doesn't." But Schoenfeld seems to believe that because a particular activity is prohibited by "the notoriously sloppy" Espionage Act, that makes it espionage. The flaw in that reasoning is found in the Act itself, which "draws no distinction between three different activities by three different classes of actors: classic espionage; leaking and the retention or redistribution of national defense information by non-government actors." The act could theoretically be used not just to prosecute reporters who publish national security secrets, but members of the public who retain such information on their hard drives as well. Does Schoenfeld really think that all of us who read the New York Times are spies too?

A day later, Marty Lederman of Georgetown Law, formerly of the Office of Legal Counsel in Obama's administration, joined the fray. "[T]he Rosen case does not presage a new age in which the federal government treats journalists as spies." He supposed a case in which the journalist willfully publishes leaked information "concerning the communication activities of the" U.S., something that Sec. 798(a)(3) — another provision of the "Espionage" chapter of the U.S. criminal code, enacted in 1950 — makes a felony. Newspapers regularly violate Sec. 798, including with the numerous Snowden-based accounts. Yet he'd be surprised if a 798 prosecution has even been contemplated seriously. That's because we have "as a legal and political culture settled upon a rough consensus that criminal prosecution of the press is not an

ideal response to such cases."

Schoenfeld responded on Oct.2, pointedly remarking that such "a consensus could change."

That's my point too, at least in part. The Department of Justice may have reformed its ancient guidelines so there can be no repetition of the Rosen excess, but the next administration could take away some or all of the reforms, or change the guidelines in other ways many would find objectionable. It could decide to enforce the Espionage Act or its cousins to prosecute journalists and others for behavior that many think wholly benign. Danger exists any time criminal statutes clearly apply to conduct, but simply are not being enforced against it. Who can say the day will not come when new powers-that-be decide enforcement is the better course? Hence, the Espionage Act requires full review and reform — along with other statutes in the Espionage Chapter of the federal criminal Code. Our government classifies far too much information, yet no one can doubt that some secrets should be kept. Even though the picture becomes more complex as we recall the valuable leaks — about Abu Ghraib, waterboarding, CIA black sites, extraordinary rendition, and on and on — the effort nonetheless is required.

While members of Congress are at it, by the way, they should also enact the shield law the administration supports. But that's fodder for another column.

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