IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee	BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANT
v.	Docket No. ARMY 20130739
Private First Class (E-3) **CHELSEA E. MANNING** United States Army, Appellant	Tried at Fort Meade, Maryland, on 23 February, 15-16 March, 24-26 April, 6-8, 25 June, 16-19 July, 28-30 August, 2, 12, and 17-18 October, 7-8, and 27 November-2, 5-7, and 10-11 December 2012, 8-9 and 16 January, 26 February-1, 8 March, 10 April, 7-8 and 21 May, 3-5, 10-12, 17-18 and 25-28 June, 1-2, 8-10, 15, 18-19, 25-26, and 28 July-2, 5-9, 12-14, 16, and 19-21 August 2013, before a general court-martial appointed by Commander, United States Army Military District of Washington, Colonel Denise Lind, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended the First Amendment for nearly a century in state and federal courts across the country. It has also been at the forefront of efforts to ensure robust protections for whistleblowers and the public's right of access to information. The ACLU has served as direct counsel and amicus curiae in numerous First Amendment cases. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Elonis v. United States*, 135 S. Ct. 2001 (2015). Accordingly, the proper resolution of this case is a matter of substantial interest to the ACLU and its members.

INTRODUCTION

It is a pervasive feature of our democracy that government and military officials at all levels regularly disclose what may broadly be considered "information relating to the national defense." They do so in pursuit of various agendas. Some disclose information to further the government's preferred messages, some to pursue private agendas, and some to inform the

public of information critical to democratic accountability. Until Private First Class ("PFC") Manning was convicted before a general court-martial of six counts of violating the Espionage Act, 18 U.S.C. § 793(e), however, no person in the history of this nation had been sentenced to decades in prison for the crime of disclosing truthful information to the public and press.

The conviction and sentence of PFC Manning under the Espionage Act must be overturned for two reasons. First, the Espionage Act is unconstitutionally vague, because it provides the government a tool that the First Amendment forbids: a criminal statute that allows the government to subject speakers and messages it dislikes to discriminatory prosecution. Second, even if the Act were not unconstitutional in all its applications, the military judge's application of the Act to PFC Manning violated the First Amendment because the military judge did not permit PFC Manning to assert any defense that would allow the court to evaluate the value to public discourse of any of the information she disclosed. The military judge therefore failed to weigh the public interest in the disclosures against the government interest in preventing them, as required by the

First Amendment.[1] For these reasons, PFC Manning's conviction for violating the Espionage Act should be vacated.

ARGUMENT

The Espionage Act, 18 U.S.C. §§ 792 *et seq.*, (the "Act"), as applied by the military judge in PFC Manning's case, violates the First Amendment and the Fifth Amendment to the U.S. Constitution.

It is well established that "speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991). The Supreme Court has long recognized "the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Laws restricting the ability to disclose "truthful information of public concern" "implicate[] the core purposes of the First Amendment." *Bartnicki v. Vopper*, 532 U.S.

[1] Specifically, the military judge ruled that evidence of PFC Manning's motive (including, necessarily, any motive based on the value to public discourse of the information disclosed) was not relevant to the applicable *mens rea* standard, *see* App. Ex. 470, and that evidence of actual damage or harm caused by the disclosure of information was irrelevant to the merits of the case, *see* App. Ex. 470; App. Ex. 221. Evidence of the latter, in particular, would have allowed the military judge to assess whether the government interest in preventing disclosure was carefully constrained to comport with constitutional limits on government regulation of speech. *See infra*.

514, 533–34 (2001). Accordingly, laws regulating speech on the basis of its content are presumptively invalid, and the government must narrowly tailor any restrictions it imposes in the service of a compelling interest. *See Ashcroft v. ACLU*, 542 U.S. 656, 660, 670 (2004).

This general speech-protective framework applies even when the interest invoked is that of national security. *See New York Times Co. v. United States*, 403 U.S. 713 (1971). Especially when speech is restricted by the threat of criminal sanction, the government must narrowly draw its prohibitions to avoid the chill on lawful speech that may result from overbroad or vague laws. *See Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. . . . As a practical matter, this increased deterrent effect, coupled with the 'risk of discriminatory enforcement' of vague regulations, poses greater First Amendment concerns than those implicated by [a] civil regulation . . . .").

The Espionage Act is unconstitutionally vague when applied to government whistleblowers and leakers because it allows for discriminatory enforcement against only disfavored speakers and provides no fair notice of which disclosures of information will be punished or not. But even if the Act were not vague in all

its applications, its application in PFC Manning's case was unconstitutional, because the military judge did not consider the public interest in the disclosures against the government's interest in concealment, as required in cases implicating core First Amendment rights. *See Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978).

Without judicial consideration of whether the disclosure of information is of critical public concern, the government is free to use the Espionage Act, aided by a regime of secrecy and over-classification, to restrict the flow of information that is embarrassing to it or that exposes unlawful government acts. Such an outcome would subvert the principles of robust and open debate and government accountability that are protected by the First Amendment, and would leave the American people with only one source of information in the arenas of national security and foreign affairs: what the government wants the public to know.

I. The Espionage Act, when applied to government whistleblowers and leakers, is unconstitutionally vague and allows for the discriminatory punishment of disfavored speakers.

The Constitution forbids the government from using vague criminal laws to punish speakers it dislikes or suppress disfavored messages. Yet applying the Espionage Act to government whistleblowers or leakers creates precisely this forbidden result by including within its sweep a prohibition on

a pervasive activity: the sharing of information broadly defined as "relating to the national defense" ("national defense information" or "NDI") with the public or press. *See* 18 U.S.C. § 793(e).[2] Against a backdrop of routine leaking for a variety of motives, this application of the Act furnishes the government with a tool for the selective prosecution that the Constitution forbids. When applied to government leakers, the Espionage Act's vague prohibitions permit unfettered prosecutorial discretion and provide no fair notice as to which leaks of information will be punished. The unprecedented sentence imposed on PFC Manning, particularly when compared with the government's treatment of favored speakers, demonstrates the danger and unfairness of providing the government with a vague tool for punishing speakers and messages that are "critical of those who enforce the law." *Gentile*, 501 U.S. at 1051.[3]

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[2] The Espionage Act is therefore a content-based regulation of speech. *See infra* Part II.

[3] Until a decade ago, Samuel Loring Morison was the only American to have been convicted and sentenced under the Espionage Act for providing information to the press. "What is remarkable is not the crime," wrote Sen. Daniel Patrick Moynihan in a 1998 letter to the President about the Morison case, "but that he is the only one convicted of an activity which has become a routine aspect of government life: leaking information to the press in order to bring pressure to bear on a policy question." Letter from Sen. Daniel Patrick Moynihan to the President (Sept. 29, 1998), https://fas.org/sgp/news/2001/04/moynihan.html. President Bill Clinton pardoned Morison in 2001. *See* Executive Grant of Clemency (Jan. 20, 2001), https://fas.org/sgp/news/2001/01/pardon.pdf.

The First Amendment stands as a bulwark against laws that "give[] a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759 (1988). This concern, coupled with the possibility of chilling lawful speech, means that vagueness review of statutes is particularly searching in the First Amendment context. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." (internal quotation marks and alterations omitted)); *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982)(noting "the clarity that the Constitution demands of a law" is heightened when a law "threatens to inhibit the exercise of constitutionally protected rights" including "free speech").

The prohibition against vague regulations of speech is "based in part on the need to eliminate the impermissible risk of discriminatory enforcement." *Gentile*, 501 U.S. at 1051. The Supreme Court has instructed that courts must be vigilant in evaluating whether a law "is so imprecise that discriminatory enforcement is a real possibility," because "history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." *Id.* The danger of

discriminatory enforcement is particularly acute when a criminal law sweeps routine activity within its prohibitions. Statutory language that extends to a broad range of everyday conduct impermissibly "delegate[s] to prosecutors and juries the inherently legislative task" of determining the contours of a crime and the boundaries between favored and disfavored activities. *United States v. Kozminski*, 487 U.S. 931, 949 (1988). As applied to government leakers to the public or press, the Espionage Act produces this result.

The provision of the Espionage Act under which PFC Manning was prosecuted, Section 793(e), forbids any person with "unauthorized possession of, access to, or control over . . . information relating to the national defense" to "willfully communicate[], deliver[], transmit[] . . . the same to any person not entitled to receive it." 18 U.S.C. § 793(e).[4] While classification is not dispositive of whether information is NDI within the meaning of the Act, it has been considered relevant. *See, e.g.*, *United States v. Morison*, 844 F.2d 1057, 1073–75 (4th Cir. 1988).

[4] The Act further requires the government to prove that the defendant "ha[d] reason to believe [the information] could be used to the injury of the United States or to the advantage of any foreign nation." 18 U.S.C. § 793(e). Section 793(d) of the Act applies similar dissemination prohibitions to any person "lawfully having possession of, access to, control over . . . information relating to the national defense." 18 U.S.C. § 793(d).

Government and military officials at all levels routinely disclose what may broadly be considered "national defense information" in pursuit of various agendas. According to a Senate Intelligence Committee study, there were "147 disclosures of classified information that made their way into the Nation's eight leading newspapers in one 6-month period alone"—none of which "resulted in legal proceedings." *See* Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary, 111th Cong. 48 (2010) (testimony of Gabriel Schoenfeld). Empirical evidence confirms that government leaking is pervasive: "[I]n a survey of current and former senior government officials conducted by the Harvard Kennedy School's Institute of Politics in the mid-1980s, forty-two percent of respondents indicated that they had, at least once, 'fe[lt] it appropriate to leak information to the press.'" David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 Harv. L. Rev. 512, 528 (2013) (quoting Martin Linsky, Impact: How The Press Affects Federal Policymaking 238 (1986)). As one former Director of Central Intelligence has explained:

> [T]he White House staff tends to leak when doing so may help the President politically. The Pentagon leaks, primarily to sell its programs to the Congress and the public. The State Department leaks when it is being forced into a policy move that its people dislike. The CIA leaks when some of its people want to influence policy but know that's a role they're not allowed to play openly.

Stansfield Turner, Secrecy and Democracy: The CIA in Transition 149 (1985).

The Espionage Act did nothing to modify this aspect of American democracy. Routine disclosures of information to the press predate its enactment, and leaking has continued to be utilized by every administration since the Act's passage. *See generally* Tom Wicker, *Leak On, O Ship of State*, N.Y. Times, Jan. 26, 1982, http://www.nytimes.com/1982/01/26/opinion/in-the-nation-leak-on-o-ship-of-state.html (summarizing tradition and taxonomy of government leaks). The passage of classified information from government and military officials to the press is such a critical and accepted part of our democratic system that President Bill Clinton vetoed a 2000 bill that would have criminalized the practice, reasoning that "[a]lthough well intentioned, that provision is overbroad and may unnecessarily chill legitimate activities that are at the heart of a democracy." 146 Cong. Rec. H11852 (Nov. 2000) (statement of Pres. Clinton); *see also* Raymond Bonner, *News Organizations Ask White House to Veto Secrecy Measure*, N.Y. Times, Nov. 1, 2000, http://www.nytimes.com/2000/11/01/us/news-organizations-ask-white-house-to-veto-secrecy-measure.html (reporting on letter from news organization chief executives that observed that "the 'leak' is an important instrument of communication that is

employed on a routine basis by officials at every level of government").

Meanwhile, the problem of over-classification ensures that documents are regularly classified without justification. Executive officials have estimated that the public release of somewhere between fifty percent and ninety percent of classified documents would not pose a legitimate danger.[5] Former CIA Director Porter Goss told the 9/11 Commission, "[W]e overclassify very badly. There's a lot of gratuitous classification going on, and there are a variety of reasons for them." National Commission on Terrorist Attacks Upon the United States, Public Hearing (May 22, 2003) (testimony of Porter Goss), http://fas.org/irp/congress/2003_hr/911Com20030522.html#dys. President Obama acknowledged this reality in his recent defense of former Secretary of State Hillary Clinton's handling of NDI, noting that "there's classified, and then there's classified." David E. Sanger & Mark Landler, *Obama's Latest View on Secrecy*

[5] *See* Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform, 108th Cong. 82 (2004) (testimony of Carol A. Haave, Deputy Under Sec'y of Def., Counterintelligence and Sec.) (estimating fifty percent); Comm'n on Protecting and Reducing Gov't Secrecy, Report of the Commission on Protecting and Reducing Government Secrecy, S. Doc. No. 105-2, at 36 (1997) (quoting Rodney B. McDaniel, Executive Secretary of the National Security Council under President Reagan) (estimating ninety percent).

Overlooks Past Prosecution of Leaks, N.Y. Times, Apr. 12, 2016, at A14.

Not only is the classification stamp frequently misapplied, it is actively used to hide misconduct and waste. Former Solicitor General Erwin Griswold, who led the government's fight for secrecy in the Pentagon Papers case, admitted decades after the Papers were released that "[i]t quickly becomes apparent to any person who has considerable experience with classified material" that "the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another." Erwin N. Griswold, Op-Ed, *Secrets Not Worth Keeping: The Courts and Classified Information*, Wash. Post, Feb. 15, 1989, at A25. In the 1950s, after the government had been allocated funds for military cargo planes, it classified pictures showing that the aircraft had in fact been "converted to plush passenger planes." Special Subcomm. on Gov't Info., Report of the Special Subcommittee on Government Information, H.R. Rep. No. 85-1884, at 4 (1958). In describing his review of documents classified during the Vietnam War, then-Senator John Kerry stated that "more often than not" documents were classified "to hide negative political information, not secrets." *See* Radley Balko, *Government Secrecy Undermines Government's Ability to Keep Secrets*, Huffington Post, June 27, 2013,

http://www.huffingtonpost.com/2013/06/27/government-secrecy-secrets_n_3512665.html.[6]

The combination of routine leaking and the lack of connection between the classification stamp and legitimate danger to national security renders the application of the Espionage Act to government leakers to the public or press impermissibly vague. Prosecution of government leakers under the Act turns neither on the public importance of the information disclosed nor on any danger to national security, but rather on whether the government favors a particular speaker or message. Under this scheme, favored speakers and speech hewing to the government's preferred messages are exempt from the Espionage Act, while disfavored leakers are barred even from exposing illegality. *See infra* Part II (discussing the lack of any available defense for the public interest in any disclosures). A few examples illustrate this perverse and constitutionally impermissible outcome:

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[6] Against this backdrop of harmful over-classification, routine leaking serves an essential role in our democracy. Justice Stewart observed, in his concurrence in the Pentagon Papers case, that "[i]n the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government." *New York Times Co. v. United States*, 403 U.S. at 728 (Stewart, J., concurring).

General David Petraeus disclosed NDI that was far more sensitive than anything PFC Manning disclosed, including "classified information regarding the identities of covert officers, war strategy, intelligence capabilities and mechanisms, diplomatic discussions, quotes and deliberative discussions from high-level National Security Council meetings, and [General Petraeus's] discussions with the President of the United States of America." General Petraeus disclosed this "highly classified" and "code word" information purely for self-interested reasons, without any public-serving motivation. He also lied about these actions to the FBI. Yet General Petraeus, a favored speaker, was permitted to plead guilty to a misdemeanor and will serve no jail time. *See* Factual Basis, *United States v. Petraeus*, No. 3:15-CR-47, at ¶¶ 17, 22-24 (W.D.N.C. filed Mar. 3, 2015).

Former CIA Director and Secretary of Defense Leon Panetta disclosed NDI that was far more sensitive than anything PFC Manning disclosed. A draft report prepared by the Defense Department Inspector General's office found that Panetta revealed Department of Defense information classified at the Top Secret level, as well as Secret information protected by Alternative Compensatory Control Measures, to "a Hollywood executive" working on a film glorifying the CIA's role in locating Osama bin Laden. *See* U.S. Department of Defense

Inspector General, Release of Department of Defense Information to the Media (Draft), at 12-13 (2013), http://pogoarchives.org/m/ns/pogo_document_2013_ig.pdf. Panetta faces no Espionage Act charges.

The Senate Select Committee on Intelligence Study of the CIA's Detention and Interrogation Program ("SSCI Report") found that "[t]he CIA's Office of Public Affairs and senior CIA officials coordinated to share classified information on the CIA's Detention and Interrogation Program to select members of the media to counter public criticism, shape public opinion, and avoid potential congressional action to restrict the CIA's detention and interrogation authorities and budget. These disclosures occurred when the program was a classified covert action program." SSCI Report, Findings and Conclusions, at 8 (2014). A CIA official who urged the leaking of "examples of CIA 'detainee exploitation success'" during this period even noted that these favored leaks might be "'undercutting our complaint against those leakers'" that the government disfavored. *Id.* at 405–06. Ultimately, no one was ever prosecuted for transmitting highly-classified NDI to the media to promote the government's favored message on CIA torture.

The discriminatory prosecution and severe sentencing of PFC Manning for speech critical of the government stands as a stark

illustration of the danger produced by the application of the Espionage Act to government whistleblowers or leakers.

But even if this court disagrees that the Act is impermissibly vague when applied to government leakers, the application of the Act in PFC Manning's case was unconstitutional. The military judge had a duty to ensure that the Act as applied was narrowly tailored, specifically by balancing the government's interest in preventing disclosure against any public interest in the information or speech, as other courts have done to avoid constitutional problems created by criminal prohibitions on speech. *See Landmark Commc'ns*, 435 U.S. at 838-39 (holding that a statute criminalizing the disclosure of confidential judicial proceedings could not be applied against a newspaper for publishing an article containing "accurate factual information" that "clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect"); *Ostergren v. Cuccinelli*, 615 F.3d 263, 276-87 (4th Cir. 2010) (determining that a law prohibiting the publication of social security numbers was not "narrowly tailored" as applied in a particular case after considering whether the information was "a matter of public significance" and whether the state's interest was "of the highest order"). As discussed further in Part II, *infra*, a consideration of the value of the speech to public discourse is a critical limitation

to ensure any application of the Espionage Act to a government leaker is narrowly tailored to protect First Amendment rights.

Without such tailoring in individual cases, government leakers, including those who disclose information of overriding public interest that caused no harm to national security, must guess at their peril as to whether they will be punished under the Espionage Act. The combination of over-classification and the threat of severe punishment threaten to chill the informed discussion of foreign and military affairs that is essential to our democracy. Only favored speakers and those who promote the government's preferred messages can assume they are free to speak, while whistleblowers face severe punishment regardless of the value of their speech to public discourse.

II. The Espionage Act as applied by the military judge violates the First Amendment.

The First Amendment requires narrowly delineating the categories of speech or communication that the government may restrict. While the government undoubtedly has a compelling interest in preventing disclosure of certain narrowly-drawn categories of defense and national security information, the Espionage Act is impermissibly overbroad if read to prohibit the disclosure of all information "relating to the national defense" without *any* regard to the public interest in the information. In particular, certain categories of truthful information are

presumptively of such strong public concern that their disclosure can almost never be constitutionally prohibited, including information revealing government illegality or misconduct.

On its face, the Espionage Act is a content-based restriction on the communication of "information relating to the national defense" that triggers First Amendment scrutiny. *See United States v. Stevens*, 559 U.S. 460, 468 (2010). The Act's prohibition on the communication or dissemination of information constitutes a regulation of speech within the meaning of the First Amendment. *See Bartnicki*, 532 U.S. at 527 (noting that a prohibition on the disclosure of information is a speech restriction, because "if the acts of disclosing and publishing information do not constitute speech, it is hard to imagine what does fall within that category" (internal quotation marks and alteration omitted)).[7]

[7] Even in *United States v. Morison*, where the court upheld a conviction under Section 793(e) against a First Amendment challenge, two of the panel judges wrote concurring opinions recognizing that the Espionage Act regulates protected speech. *See* 844 F.2d at 1081 (Wilkinson, J., concurring) ("I do not think the First Amendment interests here are insignificant. Criminal restraints on the disclosure of information threaten the ability of the press to scrutinize and report on government activity."); *id.* at 1085 (Phillips, J., concurring) (agreeing with Judge Wilkinson's "differing view" from the majority opinion that "the first amendment issues raised . . . are real and substantial"). The court in *United States v. Rosen*, which permitted an Espionage Act prosecution to go forward with limiting constructions of various terms against two lobbyists

Moreover, the information which the government seeks to restrict, namely, that "relating to the national defense," encompasses not only protected speech, but high-value speech about the government that is at the core of the First Amendment's concerns. *See supra* Part I. On its face, "information relating to the national defense" potentially covers a wide variety of subjects including not only military affairs but general defense policies, economic capacity, civilian defense readiness, and other matters of critical public concern.[8] *See* Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 974 (1973) (noting "no limits on the range of the term 'relating to the national defense'" and that the legislative history demonstrates it is "without principled limitations"); *see also New York Times v. United States*, 403 U.S. at 728 (Stewart, J., concurring) (recognizing that even in the realm of

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who received classified information, nonetheless acknowledged that the defendants' information-sharing activities "implicate the core values the First Amendment was designed to protect" because "collection and discussion of information about the conduct of government by defendants and others in the body politic is indispensable to the healthy functioning of a representative government"). *See* 445 F.Supp.2d 602, 633 (E.D. Va. 2006). Amicus does not suggest that the limiting constructions imposed in *Morison* and *Rosen* are sufficient to resolve the First Amendment and vagueness problems with the Act.

[8] It is clear that "information relating to the national defense" is not limited to those narrow categories of speech that are outside the ambit of First Amendment protection. *See Stevens*, 559 U.S. at 468-72.

national defense, a critical and informed public is essential for democratic accountability).

Faced with constitutional concerns raised by the Act's scope, courts have imposed various limiting constructions, including heightened *mens rea* requirements for certain sections of the Act, *Gorin v. United States*, 312 U.S. 19, 28-29 (1941); *United States v. Rosen*, 445 F.Supp.2d 602, 639-42 (E.D. Va. 2006), the requirement that the information be closely held by the government, *United States v. Heine*, 151 F.2d 813, 815-16 (2d Cir. 1945), and that disclosure "be potentially damaging to the United States or . . . useful to an enemy of the United States," *Morison*, 844 F.2d at 1076. But these court-imposed limitations are not sufficient to restrict the Act's reach in cases where the government interest in secrecy is low, especially as compared with the public value of the disclosure.[9] Even Judge Phillips' concurring opinion in *Morison* expressed skepticism about whether the requirement of "potential" damage or usefulness to an enemy adopted in that case was constitutionally sufficient, given that the scope of "national defense" information "still sweeps extremely broadly." *See* 844 F.2d at 1086 (Phillips, J., concurring) ("One may wonder whether any

[9] *See, e.g.*, Edgar & Schmidt, *supra*, at 986 (noting that even "judicial gloss" has not cabined the term's "tendency to encompass nearly all facets of policy-making related to potential use of armed forces").

information shown to be related somehow to national defense could fail to have at least some such 'potential.'").

In fact, the Act cannot satisfy the strictures of the First Amendment without consideration of the public interest in disclosure of particular information, which must then be weighed against the government's interest to determine if the restriction on speech is narrowly tailored. *See Landmark Commc'ns*, 435 U.S. at 838-39; *Ostergren*, 615 F.3d at 276-77, 285-87 (assessing a speech restriction's narrow tailoring by considering if the information at issue was "a matter of public significance" and whether the state's interest was "of the highest order" before concluding that criminal sanctions were not justified). While the government undoubtedly has an interest in restricting the disclosure of certain information pertaining to national security, the Act's prohibitions are not narrowly tailored. As discussed above, the scope of "information relating to the national defense" which the government can restrict is extraordinarily broad. Not only does it cover matters of public concern, it is not even limited to those instances where the government interest in secrecy is high. For example, there is no requirement that information that has been disclosed have caused *actual* harm to the United States, *see* 18 U.S.C. § 793(e), thus countenancing punishment even where the disclosure of information was of critical public concern and where no harm

actually resulted.[10] And to the extent classification is considered relevant to determining what is information "relating to the national defense" within the meaning of the Act, the problem of over-classification additionally demonstrates the Act's lack of tailoring. *See supra* Part I.

Even under the more deferential standard for restrictions on government employees' speech stated in *Pickering v. Board of Education*, an employee would be entitled to a consideration of the public interest in the information disclosed. As the Supreme Court stated, a balancing test evaluating the reasonableness of the speech restriction must weigh "the interests of the [individual], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. 563, 568 (1968).[11] Thus, even a

[10] The military judge in fact ruled that evidence of actual harm or damage, or lack thereof, from PFC Manning's disclosures was not relevant. *See* App. Ex. 470; App. Ex. 221. Both the *Morison* construction of "national defense" information, which requires that it be "potentially" damaging, *see* 844 F.2d at 1076, and the requisite *mens rea* for Section 793(e), which requires that the leaker had "reason to believe" the information "could be used to the injury of the United States or to the advantage of any foreign nation," *see* 18 U.S.C. § 793(e), do not specifically require showing actual harm.

[11] The balancing test applies when an employee speaks "as a citizen upon matters of public concern," *Connick v. Myers*, 461 U.S. 138, 147 (1983), and not pursuant to official duties. *See Garcetti v. Ceballos*, 547 U.S. 410, 420-24 (2006). In *Lane v. Franks*, the Supreme Court reiterated that the scope of

law imposing only civil sanctions on a public employee would still entitle the employee to a determination of whether her speech was on a matter of public concern. And when a law imposes the threat of criminal penalties on speech, it must be held to even more stringent standards of narrow tailoring, to ensure it does not unduly chill lawful speech. *See Reno*, 521 U.S. at 872 (recognizing that the "severity of criminal sanctions" creates an "increased deterrent effect" that "poses greater First Amendment concerns than those implicated by [a] civil regulation"). The Espionage Act, which carries with it the risk of severe criminal penalties, must therefore be applied with at least the minimum requirement of some consideration of the public interest in the information disclosed.[12]

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permissible regulation does not turn on whether the employee is speaking based on information acquired through her government position, as would be the case with many government leakers, and that *Pickering* protections still apply. *See* 134 S. Ct. 2369, 2379-81 (2014).

[12] Amicus does not address here to what extent a government employee must show a motive to speak on a matter of public concern or whether an objective test of the value of the information to public discourse applies; what is critical is that the Espionage Act, when applied with *no* consideration of the public interest in the speech, does not satisfy First Amendment requirements. *See, e.g.*, Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. Ill. L. Rev. 881, 928 (2008) (proposing that "the government must show that the [leaking] employee lacked a substantial basis to believe that the public interest in disclosure outweighed any national security harms"); Geoffrey R. Stone, *Free Speech and National Security*, 84 Ind. L.J. 939, 961 (2009) (proposing that "the First Amendment would protect a public employee who reveals

Furthermore, there are certain categories of information that are of such great public concern that will almost always trump the government interest in preventing disclosure: these include disclosures about government illegality or misconduct. *See* Geoffrey R. Stone, *Free Speech and National Security*, 84 Ind. L.J. 939, 957 (2009) (arguing that "the disclosure of unwise or even unlawful government programs or activities" "is extremely important to public debate"). As the Supreme Court recognized in *Lane v. Franks*, a government employee's testimony about "corruption in a public program and misuse of state funds . . . obviously involves a matter of significant public concern." 134 S. Ct. 2369, 2380 (2014); *see also Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) ("Exposing governmental inefficiency and misconduct is a matter of considerable significance."). Yet as the Act was applied in PFC Manning's case, the military judge had no opportunity even to assess whether any of the disclosures fit into these categories or were otherwise of public concern, thereby failing to satisfy the requirements of the First Amendment.

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classified information if the value to public discourse outweighs the harm to national security"). Although *United States v. Diaz*, 69 M.J. 127 (C.A.A.F. 2010), determined that motive evidence could be excluded in consideration of charges under Section 793(e), that court did not consider First Amendment concerns, nor did the court in *United States v. McGuinness*, 35 M.J. 149 (C.M.A. 1992).

CONCLUSION

For the foregoing reasons, PFC Manning's conviction for violating the Espionage Act should be vacated.

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Respectfully submitted,

/s/

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Certificate of Service

I certify that a copy of the foregoing was sent via electronic mail to J. David Hammond, CPT, JA, counsel for Appellant, on 18 May 2016, who will serve a copy of the foregoing on counsel for Appellee the United States on the same date via hand delivery.

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